Lawyers Who Made Headlines
Timed Outline
R. Young
October 15, 2016

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- **C. Disclaimer**

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- **A. Mac Truong and Zealous Representation**

Supreme Court of Florida

No. SC96767

THE FLORIDA BAR,
Complainant,

vs.

F. LEE BAILEY,
Respondent.

[November 21, 2001]

PER CURIAM.

F. Lee Bailey seeks review of a referee's report finding numerous, serious violations of the Rules Regulating the Florida Bar and recommending permanent disbarment. We have jurisdiction. See art. V, § 15, Fla. Const. For the reasons that follow, we approve the referee's findings of guilt and order that F. Lee Bailey be disbarred.

FACTS

The Florida Bar filed a complaint against Bailey alleging seven

counts of misconduct in violation of various Rules Regulating the Florida Bar in the course of Bailey's representation of his client, Claude Duboc.[1] After a final hearing was held over a number of days in which witnesses testified and exhibits were introduced into evidence, the referee issued a detailed twenty-four page report containing her findings of fact and conclusions of law. The referee began the report with an overview of the factual setting that provided the framework for further findings as to all counts of charged misconduct:

In 1994, Bailey represented Duboc in a criminal case filed against Duboc by the United States alleging violations of Title 21 of the United States Code, which prohibits drug smuggling. The indictment also included forfeiture claims under Title 18 of the United States Code. Bailey worked out a deal with the United States Attorneys ("U.S. Attorneys") covering Duboc's plea, repatriation of assets, and payment of attorneys' fees. Under the agreement, Duboc would plead guilty and forfeit all of his assets to the United States Government. All of Duboc's cash accounts from around the world would be

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1. Count number six of the Bar's complaint was dismissed and is therefore not discussed further.

transferred to an account identified by the U.S. Attorney's Office. To deal with the forfeiture of Duboc's real and personal property, 602,000 shares of Biochem Pharma ("Biochem") stock, valued at $5,891,352.00, would be transferred into Bailey's Swiss account. Bailey would use these funds to market, maintain and liquidate Duboc's French properties and all other assets. In order to put this unusual arrangement in context, we set forth the specific factual findings surrounding this plea agreement and Bailey's role in it:

> The ultimate strategy employed by Respondent [Bailey] was that Duboc would plead guilty and forfeit all assets to the United States Government in the hopes of a reduction of sentence based on what [Bailey] described as "extraordinary cooperation." First, Duboc would identify and transfer all cash accounts from around the world into an account identified by the United States Attorney's Office.
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> The forfeiture of the real and personal properties held in foreign countries presented some nettlesome problems. Duboc owned two large estates in France and valuable car collections, boats, furnishings and art works. Most of these properties were physically located in France. The two estates required substantial infusions of cash for maintenance.
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> The idea proposed by [Bailey] was to segregate an asset, a particular asset, one that would appreciate in value over time, so that when it came time for Duboc to be sentenced following entry of a plea of guilty, the United States Government would not argue in opposition to a defense claim that part of the appreciation in value was not forfeitable to the United States. Ultimately, the object was to sequester a fund which would not be entirely subject to forfeiture.
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> The identified asset was 602,000 shares of Biochem Pharma Stock. This would serve as a fund from which [Bailey] could serve as

> trustee and guardian of Duboc's French properties. Duboc's primary interest was to maximize the amount of forfeitures that would be turned over to the United States. This stock would provide a sufficient fund from which to market, maintain and liquidate the French properties and all other assets. [Bailey] explained that it would be prudent to hold the Biochem stock because the company was conducting promising research on a cure for AIDS, and the loss the government would suffer if large blocks of stock were dumped on the market.
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> Money was transferred immediately into a covert account identified by the United States Attorney's Office. Duboc provided written instructions to the various financial institutions and the orders were then faxed. On April 26, 1994, the Biochem stock certificates were transferred to [Bailey's] Swiss account at his direction. The Respondent provided the account number.

On May 17, 1994, United States District Court Judge Maurice Paul held a pre-plea conference in his chambers. At the conference, the following arrangement as to attorneys' fees, including those for Bailey, was reached: "[T]he remainder value of the stock which was being segregated out would be returned to the court at the end of the day, and from that asset the Judge would be – a motion would be filed for a reasonable attorney's fee for Mr. Bailey." Later in the day on May 17, Duboc pled guilty to two counts in open court and professed his complete cooperation with the U.S. Attorney's Office.

Having outlined these predicate findings of fact, the referee then made the following factual findings and recommendations as to guilt

in the context of each count of misconduct as alleged by the Bar in its complaint.

Count I of the Bar's complaint charged Bailey with commingling. Bailey was entrusted with liquidating stock that belonged to Duboc, referred to as "the Japanese Stock." Upon liquidation, Bailey was then to transmit the proceeds to the United States. Bailey sold the Japanese stock and deposited approximately $730,000 into his Credit Suisse account on or about July 6, 1994. Bailey then transferred the money into his Barnett Bank Money Market Account. The money was paid to the United States Marshal on or about August 15, 1994. The referee found that Bailey admitted that his money market account was not a lawyer's trust account, nor did Bailey create or maintain it as a separate account for the sole purpose of maintaining the stock proceeds. In concluding that Bailey had engaged in commingling, the referee rejected Bailey's claims that there were no personal funds in the Barnett Bank account at the time Bailey transferred the funds from the Japanese Stock into this account, and that Bailey's deposit of the proceeds into a non-trust account was "inadvertent error." The referee concluded that Bailey

violated Rule Regulating the Florida Bar 4-1.15(a) by failing to set up a separate account for these funds and also by commingling client funds with his personal funds.

Count II of the Bar's complaint charged Bailey with misappropriating trust funds and commingling. On or about May 9, 1994, the 602,000 shares of Biochem stock were transferred into Bailey's Credit Suisse Investment Account. Bailey sold shares of stock and borrowed against the stock, deriving over $4 million from these activities. Bailey then transferred $3,514,945 of Biochem proceeds from the Credit Suisse account into his Barnett Bank Money Market Account. Bailey had transferred all but $350,000 of these proceeds into his personal checking account by December 1995. From this account, Bailey wrote checks to his private business enterprises totaling $2,297,696 and another $1,277,433 for other personal expenses or purchases. Bailey further paid $138,946 out of his money market account toward the purchase of a residence.

The referee rejected Bailey's two defenses to the Bar's charge of misappropriation: (1) he never held the stock in trust for Duboc or the United States; rather, it was transferred to him in fee simple absolute;

and (2) this stock was not subject to forfeiture. The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3-4.3 (lawyer shall not commit any act that is contrary to honesty and justice), 4-1.15(a) (commingling funds), 4-8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 4-8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and 5-1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a specific purpose).

Count III charged Bailey with continuing to expend Biochem funds in contravention of two federal court orders. In January 1996, Judge Paul issued two orders regarding the Duboc criminal case; one on the 12th and the other on the 25th. The January 12 order relieved Bailey as Duboc's counsel, substituting the Coudert Brothers law firm. The order further required Bailey to give within 10 days "a full accounting of the monies and properties held in trust by him for the United States of America." The order froze all of the assets received by Bailey from Duboc and further prohibited their disbursement. The

January 25 order directed Bailey to bring to a February 1, 1996, hearing all of the shares of Biochem stock that Duboc had turned over to Bailey. The referee found that Bailey continued to use the Biochem proceeds that he held in trust after service and knowledge of the January 12 and January 25, 1996, orders. The referee rejected Bailey's argument that the January 25 order did not restrain him from utilizing the funds to meet his prior financial obligations, finding that "the order

. . . require[d] Respondent to bring with him the Biochem Pharma stock or any replacement asset . . . . Clearly there were judicial restraints in place when the money was disbursed."

The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3-4.3 (lawyer shall not commit an act that is contrary to honesty and justice), rule 4-8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), rule 4-8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and rule 5-1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a

specific purpose). The referee further found that by knowingly expending trust account funds from the money market account after entry of the January 12 order, Bailey violated Rules Regulating the Florida Bar 3-4.3, 4-3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal), 4-8.4(a) (lawyer shall not violate the Rules of Professional Conduct), and 4-8.4(d) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Count IV of the Bar's complaint charged Bailey with giving false testimony. The referee found that Bailey testified falsely before Judge Paul and the U.S. Attorneys that he did not see the January 12 or January 25 orders until the morning of a civil contempt hearing held on February 2, 1996. The referee further found that Bailey was not being truthful when: (1) in his answer to the Bar's complaint, Bailey denied that he had received the orders and that he had testified falsely before Judge Paul; and (2) Bailey testified before the referee at the final hearing.

Specifically, the referee found numerous reasons why this testimony was false. First, Bailey had a conversation with the

Assistant U.S. Attorney about the terms of the January 12 order following its entry. Indeed, on January 19, when Bailey met with the Assistant U.S. Attorneys, he accused them of obtaining the order from the judge ex parte. In addition, when Bailey returned to his Palm Beach office on January 18, he marshaled documents in support of the accounting that the January 12 order required him to provide. In the letter to Judge Paul dated January 21, 1996, Bailey "plainly concedes that he knew of the terms of the order as early as January 16, 1996." In that letter, he referred to the manner, mode and method by which Judge Paul entered the order. He complained in the letter that "Your Honor was persuaded to act on representations which are at a minimum subject to sharp challenge." As the referee notes, "these assertions could not have been made unless [Bailey] had seen the January 12 order." Further, as to the January 25, 1996, order, it was served upon Bailey by "fax transmission, United States mail, and personally by the U.S. Marshal's Service pursuant to the very terms of the order." Based on these factual findings, the referee found Bailey guilty of violating Rules Regulating the Florida Bar 3-4.3, 4-8.4(b), 4-8.4(c), and 4-3.3(a)(1) (lawyer shall not knowingly make a

false statement of material fact or law to a tribunal).

Count V of the Bar's complaint charged Bailey with self-dealing in the course of his representation of Duboc. The referee found that Bailey's claim that he owned the stock in fee simple created a financial conflict of interest between Bailey and Duboc. "The more [Bailey] received, the less his client would produce in his column at the time of sentencing." This finding refers to the fact that under the plea agreement, it was in Duboc's interest to maximize the amount of assets he forfeited to the United States Government in hopes of receiving a reduced sentence, and that for Bailey to claim entitlement to the appreciation of the stock would be directly contrary to the interests of his client. The referee concluded that Bailey's claim of entitlement to the stock was in no way consistent with the premise that ultimate approval and payment of fees rested with Judge Paul.

The referee further found that Bailey used information relating to his representation of Duboc to the disadvantage of his client. The referee found that Bailey managed one of the French properties to his own personal benefit by procrastinating in his efforts to sell the property. The referee ultimately concluded that Bailey had engaged

in self-dealing, and therefore violated Rules Regulating the Florida Bar 4-1.7(b) (lawyer shall not represent a client if lawyer's exercise of independent professional judgment may be materially limited by the lawyer's own interest), 4-1.8(a) (lawyer shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client), and 4-1.8(b) (lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation).

Count VII of the Bar's complaint charged Bailey with ex parte communications, self-dealing, and disclosure of confidential information. In connection with this count, the referee found that on May 17, 1994, Duboc appeared before Judge Paul and entered a plea and cooperation agreement. Duboc pled guilty to counts II and III of the indictment. The referee found that the only way Duboc would get a reduced sentence was if Judge Paul was convinced that Duboc had completely and totally cooperated and had forfeited all of his assets to the United States. On January 4, 1996, Bailey wrote a letter to Judge Paul stating, "I have sent no copies of this letter to anyone, since I believe its distribution is within Your Honor's sound

discretion." (Emphasis added.) This letter contains an express admission that it was ex parte. In this ex parte letter to Judge Paul, Bailey stated that: (1) Duboc pled guilty because he had no defense due to the strength of the case, (2) Duboc chose this course because it was his only option, not in a spirit of remorse or cooperation, (3) Duboc was a "multimillionaire druggie," (4) by consulting with other counsel, Duboc was no longer acting in the spirit of cooperation, and (5) Duboc's new defense team had interests contrary to those of his client and the court. Bailey sent a second letter to Judge Paul on January 21, 1996, a copy of which was sent to the U.S. Attorney's Office, threatening to seek an order to invade the attorney-client privilege in an attempt to defeat Duboc's position that the stock was held in trust.

The referee found that both of Bailey's letters were sent to compromise Duboc before the sentencing judge and to protect Bailey's interest and control of Duboc's and the U.S. Government's money. The referee recommended that Bailey be found guilty of violating Rules Regulating the Florida Bar 4-1.6(a) (lawyer shall not reveal information relating to representation of a client), 4-1.8(a), 4-

1.8(b), 4-3.5(a) (lawyer shall not seek to influence a judge), 4-3.5(b) (in an adversary proceeding, lawyer shall not communicate as to the merits of the cause with a judge).

Having made the above findings of fact and recommendations as to guilt, the referee considered the appropriate discipline for Bailey's misconduct:

Preliminarily, the referee noted that Bailey was 67 years old at the time of the report. He has been a member of The Florida Bar since 1989, and was admitted to the Massachusetts Bar in 1960. The referee further states "[a]ccording to the Respondent, he is a member of The Supreme Court of the United States, every circuit in the United States, the Tax Court, the Federal Court of Claims, and as of the time of the hearing was admitted in North Carolina and California pro hac vice on two cases."

Prior to considering any aggravating or mitigating factors, the referee stated that "any of the violations of the rules regulating the Florida Bar which have been proven by the Bar as set forth above, would singularly warrant the recommended discipline [of disbarment]. Collectively, the numerous violations, all of which are serious and egregious, plainly warrant permanent disbarment." The

referee then listed the following aggravating factors: dishonest or selfish motive, a pattern of misconduct, multiple offenses, submission of false statements, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law. Further, the referee considered that a federal judge recently found Bailey to be in civil contempt in another case. The referee noted that Bailey has two prior disciplinary actions; a censure in Massachusetts in 1970 and a suspension for one year of the privilege of applying for permission to appear pro hac vice in New Jersey in 1971; however, these incidents were too remote in time to be considered in aggravation. The referee did not find any mitigation. Finally, the referee recommended that the Bar be awarded all reasonable costs. Bailey petitioned this Court for review, challenging multiple aspects of the referee's report.

ANALYSIS

In our system of discipline regulating the conduct of lawyers, our referees, who are circuit court judges, serve as the finders of fact. They hear the testimony of witnesses, judge their credibility, and receive evidence, as would be done in any trial in a court of law. As with any other fact finder, this Court will uphold a

referee's findings of fact when they are supported by competent substantial evidence in the record below. See Florida Bar v. Jordan, 705 So. 2d 1387, 1390 (Fla.1998). As we have explained, where the findings of fact are supported by competent substantial evidence, this Court will not reweigh the evidence and substitute our judgment as to the findings of fact of the referee. See Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996). Nevertheless, in any Bar disciplinary case, and in particular a case where the recommendation is disbarment, the most severe penalty we can administer to an attorney, we engage in a careful and thorough review of the record. Having reviewed the extensive record before us, we conclude that there is competent substantial evidence to support the referee's findings of fact and conclusions of guilt as to each count of misconduct. Although each of the rule violations is extremely serious, ranging from trust account violations to misappropriation of funds, lying to a federal judge, self-dealing and compromising the position of a client, we focus on Bailey's actions regarding the Biochem stock (count II) because the gist of his defense in this case was that the Bar never established the stock was to be held by Bailey in trust. In connection with this, we also review whether, regardless of Bailey's claim that the stock had been transferred to him in "fee simple," this claimed right to the stock would permit him to act in disregard of the judge's orders (count III).

The Biochem Pharma Stock (Count II)--The most contested issue in this case is whether a trust was created with the transfer of the Biochem stock from Duboc to Bailey. The Bar argued that the plea agreement with the U.S. Government provided that Bailey was to hold the stock in trust for the benefit of the U.S. Government. Bailey would use the stock to maintain and liquidate Duboc's properties. After this was accomplished, the stock or its replacement assets would be forfeited to the United States in order to maximize any benefit to Bailey's client for his cooperation. However, Bailey argued that the stock was transferred to him in fee simple. He agreed that he was required to utilize the Biochem stock to derive the funds necessary to maintain and liquidate the French properties. However, Bailey asserted that after the properties were sold, he was only accountable to the United States for the value of the stock on the date that Duboc transferred it to Bailey's Swiss account (which was approximately $6 million), and not for any appreciation--which, as of January 1996, amounted to over $10 million. In other words, Bailey claims that he was entitled to all of the Biochem stock and proceeds from the sale of the stock, minus the approximate $6 million for which he was accountable to the U.S. Government. As he wrote Judge Paul in his letter of January 21, 1996:

I viewed [the value of the stock of $5,891,352.00 on May 9, 1994] as

> an account in which the United States had an interest to this extent: after the payment of costs associated with the case and fees approved by Your Honor, any balance of the $5,891,352.00 remaining would revert to the United States. Because of this view, I did not declare the funds to be income to myself.

(Emphasis omitted.)

We conclude that regardless of the manner in which he was to hold the stock, Bailey is guilty of the most serious and basic trust account violations. The stock, by his own admission, was given to Bailey by his client neither as a gift, nor as an earned fee. Rather, the stock was given to Bailey to be used for the benefit of Duboc, and ultimately the U.S. Government. Bailey was required to use the stock to maximize Duboc's forfeitures to the U.S. Government in the hope that Duboc would receive a reduction of sentence for his cooperation. In his January 21, 1996, letter to Judge Paul, even Bailey recognized that the U.S. Government had an interest in the transfer value of the Biochem stock. Nevertheless, from the day it was transferred to him, Bailey treated the money as his own.

Rule Regulating the Florida Bar 3-4.1[2] charges every member of the Bar with knowledge of the standard of ethical and professional conduct prescribed by this

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2. Rule 3-4.1 provides, "Every member of the Florida Bar . . . is within the jurisdiction of this court . . . and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court."

Court, and with notice of rule 3-4.1. Rule 4-1.15 provides:

> A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the lawyer receives written permission from the client to do so and provided that such written permission is received prior to maintaining the funds other than in a separate bank account. In no event may the lawyer commingle the client's funds with those of the lawyer or those of the lawyer's law firm. Other property shall be identified as such and appropriately safeguarded.

(Emphasis added.) Bailey admits that he was accountable to the United States for the approximate $6 million value of the Biochem stock on the day of transfer. Nevertheless, when the stock was transferred, Bailey made absolutely no effort to segregate or safeguard this money. Rather, he commingled the money with the funds in his Credit Suisse account, sold shares of the stock, and obtained a line of credit on the stock, deriving over $4,000,000 from these activities. As noted by the Bar at oral argument, if on January 1, 1996, the value of Biochem stock fell to zero, Bailey would have already taken $3.5 million out of the Biochem stock fund and transferred it to his personal money market account. Bailey transferred all but $350,000 of these proceeds into his personal checking account and used some or all of this money to pay for various business and

personal expenses.

Further and importantly, Bailey admits that Judge Paul would approve the amount of Bailey's fee for representing Duboc, and that his fee would be taken from the approximate $6 million value of the Biochem proceeds. Therefore, even if some of the initial $6 million corpus was to be used for payment of an attorneys' fee, Bailey was not entitled to the fee until it was approved by Judge Paul--a fact that Bailey admits in his January 21 letter to Judge Paul, and that he admits in this case. Indeed, in a letter written to his own client, Duboc, before a falling out occurred, Bailey explained that:

> You do not face the dilemma since I will be paid with Chief Judge Paul's approval - only that amount which is commensurate with the result achieved in your case, and the amount of work that went into it. Our interests are therefore in perfect alignment.

Rule 5-1.1(a) provides: "Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose." When the approximate $6 million transfer value of the Biochem stock was given to Bailey, it was given to him for specific purposes: to maintain the property of his client and then to return the remainder to the U.S. Government. Therefore, under Rule Regulating the Florida Bar 5-1.1, Bailey had a duty to safekeep this property and use it only for the

aforementioned purposes. The transfer value of this stock or its proceeds could neither be commingled nor could it be withdrawn. The fact that a portion of this fund was to be used for payment of any attorneys' fees only serves to highlight this fact--that the monies were to be held in trust for a specific purpose.

If Bailey's fee had been earned, then it could have and should have been withdrawn from a trust account; the failure to do so would have been a violation of trust account rules. See Florida Bar v. Tillman, 682 So. 2d 542 (1996) (holding that rule 4-1.15(c) requires fees to be withdrawn when they become due and the failure to do so constitutes a trust account violation). However, if money is given to a client to be applied to fees when they become earned, much like a retainer, these monies cannot be withdrawn from a trust account and spent until they are earned. See In re Sather, 3 P.3d 403, 410 (Colo. 2000) ("[U]nearned portion[s] of . . . advance fees must be kept in trust and cannot be treated as the attorney's property until earned."). In this case, by express agreement, Bailey was not entitled to any fees until determined and approved by Judge Paul. Thus, he was expressly prohibited from withdrawing and spending any portion of the stock for his own personal benefit until approved by Judge Paul. See generally Spann, 682 So. 2d at 1070-71.

In light of the foregoing, we conclude that regardless of the manner in which

the stock was transferred to Bailey and the exact words used, Bailey violated rule 4-1.15 and rule 5-1.1(a) as to approximately $6 million (i.e., the value of the stock at the time it was transferred to Bailey).[3]

We further note that even if there was no precise agreement with the U.S. Government regarding the necessity to segregate and safeguard the stock and its proceeds, Bailey's obligations as to his client's property or the property of a third party flow from the Rules Regulating the Florida Bar, rules that are imposed as a condition of all attorneys' membership in The Florida Bar. Indeed, one of the most solemn obligations that separate lawyers from any other professionals relates to the safeguarding and segregation of a client's property.

The January 12 and January 25 orders (Count III)--Judge Paul's January 12, 1996, order provides that "[a]ll monies, real and personal property and other assets received by Bailey from or on behalf of Duboc, including the aforementioned Biochem Pharma stock shall be frozen as of the date of this order and no further disbursement of any of these funds shall be made unless authorized by this Court." The January 25 order required Bailey to "bring with him all shares of stock of Biochem Pharma, Inc. held by him, or by others, which represent the stock turned

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3. We approve the referee's other findings regarding rule violations under this count without further discussion.

over to him by the Defendant, Claude Duboc, or Duboc's representatives. If the Biochem Pharma, Inc. stock has been replaced by any other form of asset while in the possession of Mr. Bailey, then the replacement stock will be brought to this Court at the time of the above hearing."

As mentioned earlier, Bailey took no action to segregate or safeguard the value of the Biochem proceeds for which he admits he was accountable to the United States. Because Bailey held approximately $6 million in trust for the Government, and Bailey commingled money from the Biochem proceeds with his personal assets, we conclude that Judge Paul's orders covered that portion of the Biochem proceeds that Bailey was holding in his money market account or his personal checking account.

Even if Bailey felt that he was entitled to the stock proceeds in his personal account, this does not permit him to act in contravention of two federal court orders. In Florida Bar v. Gersten, 707 So. 2d 711, 713 (Fla. 1998), this Court found that an attorney who failed to comply with a court order violated rule 4-3.4(c). The Court stated that "[a]n attorney is not permitted to ignore and refuse to follow a court order based upon his personal belief in the invalidity of that order. To countenance that course is to court pandemonium and a breakdown of the judicial system." Id. (quoting Florida Bar v. Rubin, 549 So. 2d 1000, 1003 (Fla.

1989)). Similarly, in Florida Bar v. Canto, 668 So. 2d 583 (Fla. 1996), this Court found that an attorney who continued to litigate a case despite being disqualified from the case had violated rules 3-4.3, 4-3.4(c), 4-8.4(a), and 4-8.4(d), in addition to other rules. We found that "Canto's repeated refusal to accept the directives of the court are of a most serious order. The record contains unrefuted evidence of the injury he has caused his former clients, third parties, and the courts. Such disdain for the legal system simply can not be tolerated." Id. at 585. Bailey's disregard of the January 12 and January 25 orders requiring him not to utilize or expend Biochem proceeds similarly demonstrates disdain for the federal court that issued those orders. Therefore, we conclude that Bailey violated rules 3-4.3, 4-3.4(c), 4-8.4(a) and 4-8.4(d) by acting in contravention of Judge Paul's orders.

DISCIPLINE

Bailey has committed multiple counts of egregious misconduct, including offering false testimony, engaging in ex parte communications, violating a client's confidences, violating two federal court orders, and trust account violations, including commingling and misappropriation. Disbarment is the presumed discipline for many of these acts of misconduct. For example, as to Bailey's mishandling of the Biochem stock, Standard 4.11 of the Florida Standards for Imposing Lawyer Sanctions provides: "Disbarment is appropriate when a lawyer

intentionally or knowingly converts client property regardless of injury or potential injury." As to Bailey's violation of the January 12 and 25 orders, Standard 6.21 provides that "[d]isbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes . . . potentially serious interference with a legal proceeding." Regarding Bailey's ex parte communication with Judge Paul, Standard 6.31 provides that "[d]isbarment is appropriate when a lawyer: . . . (b) makes an unauthorized ex parte communication with a judge or juror with intent to affect the outcome of the proceeding."

Case law also supports disbarment for the types of misconduct committed by Bailey. See Florida Bar v. Rightmyer, 616 So. 2d 953, 955 (Fla. 1993) (holding that "[n]o breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process"); Florida Bar v. Leon, 510 So. 2d 873 (Fla. 1987) (attorney disbarred for engaging in ex parte communication with judge to achieve alteration of sentences and then lying under oath to Judicial Qualifications Commission). Further,"[t]his Court deals more severely with cumulative misconduct than with isolated misconduct." Florida Bar v. Greenspahn, 386 So. 2d 523, 525 (Fla. 1980); see also Spann, 682 So. 2d at 1074.

Bailey has committed some of the most egregious rules violations possible, evidencing a complete disregard for the rules governing attorneys. "[M]isuse of client funds is one of the most serious offenses a lawyer can commit. Upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment." Tillman, 682 So. 2d at 543. Bailey's false testimony and disregard of Judge Paul's orders demonstrate a disturbing lack of respect for the justice system and how it operates. Bailey's self-dealing and willingness to compromise client confidences are especially disturbing. Not only did Bailey use assets that his client intended to forfeit to the U.S. Government for Bailey's own purposes, but Bailey also attempted to further his own interests by disparaging his client in an ex parte letter to the judge who would sentence his client. Bailey's self-dealing constitutes a complete abdication of his duty of loyalty to his client. His willingness to compromise his client for personal gain shows an open disregard for the relationship that must be maintained between attorney and client: one of trust, and one where both individuals work in the client's best interest. Such misconduct strikes at the very center of the professional ethic of an attorney and cannot be tolerated. As we have repeatedly stated, discipline must serve three purposes:

> First, 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 penalty. Second, 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. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Florida Bar v. Brake, 767 So. 2d 1163, 1169 (Fla. 2000) (quoting Florida Bar v. Cibula, 725 So. 2d 360, 363 (Fla. 1998)).

In light of Bailey's egregious and cumulative misconduct, and the absence of any mitigating factors, we conclude that disbarment is not only appropriate in this case, but necessary to fulfill the threefold purpose of attorney discipline. By this disbarment, Bailey's status as a member of The Florida Bar shall be terminated and he may not reapply for readmission for a period of five years, and then he may "only be admitted again upon full compliance with the rules and regulations governing admission to the bar." R. Regulating Fla. Bar 3-5.1(f). This includes retaking the Florida bar examination, complying with the rigorous background and character examination, and demonstrating knowledge of the rules of professional conduct required of all new admittees.[4]

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4. Although we regard these rule violations as extremely serious and warranting disbarment, we do not accept the referee's recommendation of permanent disbarment. Under the rules, the minimum period of disbarment is for five years (and thereafter until the attorney is readmitted to the practice of law). See R. Regulating Fla. Bar 3-5.1(f). In 1998, the Court amended the Rules Regulating the Florida Bar to specifically provide for permanent disbarment. See In re

CONCLUSION

Accordingly, F. Lee Bailey is hereby disbarred from the practice of law in the State of Florida. The disbarment will be effective thirty days from the filing of this opinion so that Bailey can close out his practice and protect the interests of existing clients. If Bailey notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the disbarment effective immediately. Bailey shall accept no new business from the date this opinion is filed until he is readmitted to the practice of law in Florida. Judgment is entered for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for recovery of costs from F. Lee Bailey in the amount of $24,418.60, for which sum let execution issue.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS, and QUINCE, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARMENT.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Staff

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Amendments to Rules Regulating The Florida Bar, 718 So. 2d 1179, 1181 (Fla. 1998) (amending rule 3-5.1(f) "to authorize permanent disbarment as a disciplinary sanction").

Counsel, Tallahassee, Florida; David Robert Ristoff, Branch Staff Counsel, and Debra Joyce Davis, Assistant Staff Counsel, Tampa, Florida; and Terrance E. Schmidt, Jacksonville, Florida,

for Complainant

Bruce Rogow and Beverly A. Pohl of Bruce S. Rogow, P.A., Fort Lauderdale, Floida; Don Beverly, West Palm Beach, Florida; and Russell S. Bohn of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach, Florida,

for Respondent

P. Michael Patterson, United States Attorney, Tallahassee, Florida,

for the Northern District of Florida, Amicus Curiae

90 A.3d 1137
Supreme Judicial Court of Maine.

F. Lee BAILEY
v.
BOARD OF BAR EXAMINERS.

Docket No. Cum–13–291.
|
Argued: Jan. 14, 2014.
|
Decided: April 10, 2014.

Synopsis

Background: Attorney disbarred in other state and federal jurisdictions petitioned for admission to practice of law in state. On reconsideration, a single justice of the Supreme Judicial Court, Alexander, J., recommended admission. Board of Bar Examiners appealed.

Holdings: The Supreme Judicial Court, Levy, J., held that:

[1] fact that attorney was not fully repentant and did not unambiguously admit to all misconduct for which he was disbarred in other jurisdiction, without more, did not preclude finding that he satisfied requirement that he recognize wrongfulness and seriousness of prior misconduct, and

[2] attorney failed to establish by clear and convincing evidence that he recognized wrongfulness and seriousness of his conduct.

Vacated and remanded.

Saufley, C.J., and Clifford, J., dissented with opinion.

Attorneys and Law Firms

***1140** Thomas A. Knowlton, Asst. Atty. Gen. (orally), Office of the Attorney General, Augusta, on the briefs, for appellant Board Of Bar Examiners.

Peter J. DeTroy, Esq. (orally), and Devin W. Deane, Esq., Norman, Hanson & DeTroy, LLC, Portland, on the briefs, for appellee F. Lee Bailey.

Panel: SAUFLEY, C.J., and LEVY, MEAD, GORMAN, JABAR and CLIFFORD, JJ.
Majority: LEVY, MEAD, GORMAN, and JABAR, JJ.
Dissent: SAUFLEY, C.J., and CLIFFORD, J.

Opinion

***1141** LEVY, J.

[¶ 1] The Board of Bar Examiners appeals from the judgment of a single justice of the Supreme Judicial Court (*Alexander, J.*) concluding that applicant F. Lee Bailey presently possesses the requisite good character and fitness required by M. Bar R. 7.3(j)(5) to be admitted to practice law in Maine.

[¶ 2] The Board advances several reasons in support of its position that the single justice erred in authorizing Bailey's admission to the Maine bar. [1] Because we conclude that the single justice erred with respect to the Board's principal assertion—that Bailey failed to prove by clear and convincing evidence that he recognizes the wrongfulness and seriousness of the misconduct that resulted in his disbarment—we vacate the judgment on that basis and do not reach the Board's other contentions.

I. BACKGROUND

A. Bailey's Representation of Claude Duboc

[¶ 3] In 1994, Bailey, who had practiced primarily as a criminal-defense attorney for many years, began defending Claude Duboc against charges of drug smuggling and money laundering and related claims for asset forfeiture in the United States District Court for the Northern District of Florida. Bailey was disbarred in Florida in 2001 due to misconduct in connection with his representation of Duboc, and was reciprocally disbarred in the state and federal courts of Massachusetts in 2003 and 2006, respectively. The Florida Supreme Court, in its decision ordering Bailey's disbarment, set out the following factual background based upon the findings of Circuit Judge Cynthia Ellis, who acted as the referee in the disbarment proceedings:

> In 1994, Bailey represented Duboc in a criminal case filed against Duboc by the United States alleging violations of Title 21 of the United States Code, which prohibits drug smuggling. The indictment also included

forfeiture claims under Title 18 of the United States Code. Bailey worked out a deal with the United States Attorneys ("U.S. Attorneys") covering Duboc's plea, repatriation of assets, and payment of attorneys' fees. Under the agreement, Duboc would plead guilty and forfeit all of his assets to the United States Government. All of Duboc's cash accounts from around the world would be transferred to an account identified by the U.S. Attorney's Office. To deal with the forfeiture of Duboc's real and personal property, 602,000 shares of Biochem Pharma ("Biochem") stock, valued at $5,891,352.00, would be transferred into Bailey's Swiss account. Bailey would use these funds to market, maintain and liquidate Duboc's French properties and all other assets....

The ultimate strategy employed by [Bailey] was that Duboc would plead ***1142** guilty and forfeit all assets to the United States Government in the hopes of a reduction of sentence based on what Bailey described as "extraordinary cooperation." First, Duboc would identify and transfer all cash accounts from around the world into an account identified by the United States Attorney's Office.

The forfeiture of the real and personal properties held in foreign countries presented some nettlesome problems. Duboc owned two large estates in France and valuable car collections, boats, furnishings and art works. Most of these properties were physically located in France. The two estates required substantial infusions of cash for maintenance.

The idea proposed by Bailey was to segregate an asset, a particular asset, one that would appreciate in value over time, so that when it came time for Duboc to be sentenced following entry of a plea of guilty, the United States Government would not argue in opposition to a defense claim that part of the appreciation in value was not forfeitable to the United States. Ultimately, the object was to sequester a fund which would not be entirely subject to forfeiture.

The identified asset was 602,000 shares of Biochem Pharma Stock. This would serve as a fund from which Bailey could serve as trustee and guardian of Duboc's French properties. Duboc's primary interest was to maximize the amount of forfeitures that would be turned over to the United States. This stock would provide a sufficient fund from which to market, maintain and liquidate the French properties and all other assets. Bailey explained that it would be prudent to hold the Biochem stock because the company was conducting promising research on a cure for AIDS, and the loss the government would suffer if large blocks of stock were dumped on the market.

Money was transferred immediately into a covert account identified by the United States Attorney's Office. Duboc provided written instructions to the various financial institutions and the orders were then faxed. On April 26, 1994, the Biochem stock certificates were transferred to Bailey's Swiss account at his direction. [Bailey] provided the account number.

On May 17, 1994, United States District Court Judge Maurice Paul held a pre-plea conference in his chambers. At the conference, the following arrangement as to attorneys' fees, including those for Bailey, was reached: "The remainder value of the stock which was being segregated out would be returned to the court at the end of the day, and from that asset ... a motion would be filed for a reasonable attorney's fee for Mr. Bailey." Later in the day on May 17, Duboc pled guilty to two counts in open court and professed his complete cooperation with the U.S. Attorney's Office.

Florida Bar v. Bailey, 803 So.2d 683, 685–86 (Fla.2001) (per curiam) (quotation marks omitted) (alterations omitted).

[¶ 4] During the course of Bailey's management of Duboc's assets, the market value of the Biochem stock [2] increased significantly. After the stock was transferred to Bailey's Credit Suisse account in Switzerland, Bailey sold some shares and borrowed against the remaining shares, deriving over $4 million in proceeds. He then ***1143** transferred over $3.5 million of the Biochem proceeds from the Credit Suisse account to his personal money market account, and by December 1995 he had transferred all but $350,000 of that amount to his personal checking account. From this personal account, Bailey wrote checks totaling over $2 million to his private businesses and nearly $1.3 million for personal expenses and purchases. Bailey also paid $138,946 from his money market account towards the purchase of a personal residence. Bailey used a substantial portion of the remaining funds to pay the expenses of maintaining and liquidating Duboc's French holdings.

[¶ 5] By late 1995, Duboc had become dissatisfied with Bailey's representation and filed a motion to substitute new counsel for Bailey. Five days before the scheduled hearing, Bailey sent a letter to Judge Paul without copying the prosecutors, Duboc, or Duboc's new attorneys. Bailey's letter referred to Duboc, in quotes, as a "multimillionaire druggie" and alleged, among other things, that Duboc's new attorneys had a conflict of interest and were giving Duboc harmful advice. At the end of the letter, Bailey acknowledged its ex parte nature: "I have sent no copies of this letter to anyone, since I believe its distribution is within Your Honor's sound discretion."

[¶ 6] Following a hearing, Judge Paul entered an order on January 12, 1996, removing Bailey as Duboc's counsel. The order also froze all of Duboc's assets held by Bailey and required Bailey to submit a complete accounting of Duboc's money and property that he held in trust. Despite his knowledge of the January 12 order, Bailey thereafter spent over $300,000 of the Biochem proceeds for his own purposes. Judge Paul issued a second order on January 25, 1996, mandating that Bailey surrender all of the shares of the Biochem stock or any replacement assets, and prepare a full accounting of the assets he received from Duboc, including any disbursements he made from those assets. Bailey then notified the Swiss government that the Biochem shares and proceeds in his Swiss bank account were the fruits of drug trafficking, which resulted in the Swiss authorities freezing the account. As a result, Bailey did not surrender the stock or proceeds as he was required to do. Judge Paul subsequently scheduled a hearing to determine if Bailey should be held in contempt.

[¶ 7] At the contempt hearing held on February 2, 1996, Bailey testified under oath that he did not physically see the January 12 and January 25 orders until that very morning. Judge Paul held Bailey in contempt for violation of the orders, and ordered his incarceration until he could purge himself of contempt by producing the requested accountings and the stock, and repaying to the court the amount he had withdrawn. When Judge Paul determined that he had substantially complied with the court's contempt order, Bailey was released from incarceration after forty-four days.

[¶ 8] Ultimately, Judge Paul approved $1.2 million of the approximately $1.6 million in expenditures Bailey claimed to have made to manage Duboc's assets. Because Bailey had already spent more than the approved expenses, he was ordered to pay an additional $423,737 to the court. The court also ordered Bailey to return the sum that he had withdrawn from the Swiss account and spent for personal purposes. On appeal, the United States Court of Appeals for the Eleventh Circuit rejected Bailey's contention that Judge Paul was biased against him and should have been recused, and affirmed the court's allowance of expenses with one minor exception. ***1144** *United States v. Bailey,* 175 F.3d 966, 968–70 (11th Cir.1999) (per curiam).

B. Bailey's Disbarment

[¶ 9] In July 2000, after a five-day hearing on the Florida Bar's petition for Bailey's disbarment, Judge Ellis found that Bailey had committed various ethical violations, including misappropriation of client assets and commingling them with personal assets, ex parte communication, self-dealing, conflict of interest, and false testimony under oath. Judge Ellis rejected Bailey's argument that because the Biochem stock was transferred to him in "fee simple absolute," he was entitled to treat the stock and its appreciation as his own. In arriving at a proposed sanction, Judge Ellis noted that Bailey was sixty-seven years old at the time of the misconduct and had been practicing law for many years. She applied the aggravating factors of substantial experience in the practice of law, selfish motive, pattern of misconduct, multiple offenses, and refusal to acknowledge the wrongful nature of his misconduct. Emphasizing the egregiousness of Bailey's ethical violations and the aggravating factors, Judge Ellis recommended that Bailey be permanently disbarred.

[¶ 10] On appeal, the Florida Supreme Court upheld all of Judge Ellis's findings and conclusions regarding the six counts of ethical violations, noting that Bailey had "committed some of the most egregious rules violations possible." *Florida Bar,* 803 So.2d at 690, 694. The court ordered Bailey disbarred with eligibility to apply for readmission after a period of five years. *Id.* at 695. Bailey appealed to the United States Supreme Court, which denied certiorari. *Bailey v. Florida Bar,* 535 U.S. 1056, 122 S.Ct. 1916, 152 L.Ed.2d 825 (2002). Subsequently, Bailey was reciprocally disbarred in both the state and federal courts of Massachusetts. [3]

[¶ 11] After Bailey's disbarment in Florida, the Biochem stock continued to be a subject of dispute. In 2002, the United States Court of Federal Claims rejected a claim

Bailey brought against the United States in which he contended that the government had breached an implied-in-fact contract to transfer the stock to him in fee simple absolute. *Bailey v. United States,* 54 Fed.Cl. 459, 485–87 (2002), *aff'd, Bailey v. United States,* 94 Fed.Appx. 828 (Fed.Cir.2004). In January 2013, the United States Tax Court determined that Bailey owed taxes and penalties in the amount of $1.9 million, not including statutory interest, resulting in part from his failure to report as income a portion of the Biochem proceeds that he had treated as his own. *Bailey v. Comm'r,* No. 3080–08 (T.C. Jan. 11, 2013); *Bailey v. Comm'r,* No. 3081–08 (T.C. Jan. 11, 2013); *Bailey v. Comm'r,* 103 T.C.M. (CCH) 1499, 2012 WL 1082928, at *22 (T.C. Apr. 2, 2012). In July 2013, the Internal Revenue Service (IRS) filed tax liens against Bailey in the approximate sum of $4.5 million, which included statutory ***1145** interest on Bailey's tax liability.[4] Bailey appealed the Tax Court's decision, and the United States Court of Appeals for the First Circuit affirmed. *Bailey v. Internal Revenue Serv.,* No. 13–1455, 2014 WL 1422580 (1st Cir. Mar. 14, 2014).

C. Bailey's Application to the Maine Bar

[¶ 12] In February 2012, ten years after his disbarment in Florida, Bailey applied for admission to practice law in Maine and passed the Maine bar exam. In November 2012, following a testimonial hearing, the Board of Bar Examiners concluded in a five-to-four decision that Bailey had failed to meet his burden of proving, by clear and convincing evidence, that he presently possesses the requisite good character and fitness for admission to the Maine bar. *See* M. Bar R. 7.3(j)(5). The Board found, among other things, that Bailey did not recognize the wrongfulness and seriousness of his prior misconduct that led to his disbarment, that he continued to dispute the Florida Supreme Court's findings regarding his misconduct, and that he continued to challenge the legitimacy of the judicial process that resulted in his disbarment.

[¶ 13] Bailey appealed the Board's decision pursuant to M. Bar Admission R. 9(d)(6), and the single justice held a de novo hearing on March 6 and 7, 2013. In April 2013, the single justice entered a judgment concluding that Bailey had met his burden of proving the requisite good character and fitness in all but one respect—his large outstanding tax obligation. The single justice specifically found that Bailey recognizes the wrongfulness and seriousness of the misconduct that led to his disbarment but denied Bailey's petition for a certificate of good character and fitness based on the tax liability alone. The single justice invited the parties to submit motions for reconsideration to address this issue, explaining:

> [T]he existence of large debts can compromise professional judgment and client relations in ways that must be recognized in considering admission applications. The issue of an outstanding, though not final, judgment ordering payment of nearly $2 million must be addressed in consideration of a bar admission. This issue remaining unaddressed is the only bar to this Court's granting Bailey a certificate of good character and fitness to be admitted to the practice of law.
>
> Bailey has the burden to prove, by clear and convincing evidence, good character and fitness to practice law. With the tax debt issue unresolved, and not seriously addressed at hearing or in the written closing arguments, the Court cannot find present fitness to practice proven by clear and convincing evidence. Accordingly, the Court must deny the petition to grant an unconditional admission and issue a certificate of good character and fitness to practice law. For the present, this denial will be without prejudice to a timely request for reconsideration addressing how, if at all, the Court should treat the obligations indicated in the January 11, 2013, Tax Court orders in reaching its decision on good character and fitness.

[¶ 14] Bailey subsequently filed a motion for reconsideration. In June 2013, after a hearing, the single justice issued a judgment finding that Bailey, by actively litigating and seeking to resolve the tax debt, "is making a genuine effort to meet ***1146** his responsibilities" and had therefore met his burden of proof on this last issue bearing on his character and fitness. The single justice remanded the case to the Board with instructions to issue Bailey a certificate of qualification.

[¶ 15] The Board filed a motion for further findings and for reconsideration, arguing that the single justice failed to consider evidence bearing negatively on Bailey's character and fitness. The single justice denied the Board's motion, and this appeal followed.

II. DISCUSSION

[1] [¶ 16] Maine Bar Rule 7.3(j) governs the admission of attorneys who have been disbarred. Pursuant to Maine Bar Rule 7.3(j)(5), Bailey bore the burden of presenting "clear and convincing evidence demonstrating the moral qualifications, competency, and learning in law required for admission to practice law" in Maine, as well as evidence establishing that "it is likely that [his admission] will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest." *See also In re Williams,* 2010 ME 121, ¶ 6, 8 A.3d 666 (citing M. Bar R. 7.3(j)(5)); *In re Hughes,* 594 A.2d 1098, 1100–01 (Me.1991). [5] To determine whether Bailey met this burden, the single justice was required to evaluate whether Bailey demonstrated, among other requirements, that he "recognizes the wrongfulness and seriousness of the misconduct" leading to his disbarment. M. Bar R. 7.3(j)(5)(C). [6] This requirement presents a mixed question of law and fact. *See Bd. of Overseers of the Bar v. Warren,* 2011 ME 124, ¶ 25, 34 A.3d 1103 ("We interpret the meaning of the [bar] rules de novo as a matter of law, and review for clear error the findings of fact that determine the applicability of the rule." (citations omitted)).

[2] **[3]** [¶ 17] The Board asserts that the evidentiary record shows that the single justice's finding that Bailey recognizes the wrongfulness and seriousness of his misconduct is clearly erroneous, and that, as a matter of law, Bailey failed to prove this factor because he only admitted to some, but not all, of the misconduct found by the Florida Supreme Court. We interpret the meaning of Rule 7.3(j)(5) de novo as a matter of law and review for clear error the single justice's findings of fact. *Warren,* 2011 ME 124, ¶ 25, 34 A.3d 1103. When reviewing on appeal findings of fact that must be proved by clear and convincing evidence, we determine "whether the factfinder could reasonably have been persuaded that the required factual finding ***1147** was or was not proved to be highly probable." *Taylor v. Comm'r of Mental Health & Mental Retardation,* 481 A.2d 139, 153 (Me.1984).

A. Maine Bar Rule 7.3(j)(5)(C)'s Standard for Recognition of the Wrongfulness and Seriousness of Prior Misconduct

[¶ 18] We begin by examining the meaning of the phrase "recognizes the wrongfulness and seriousness of the misconduct" as used in Rule 7.3(j)(5)(C), considering (1) the meaning of the term "recognize" as employed in the Rule, and (2) whether, as the Board contends, the Rule required Bailey to demonstrate that he is fully repentant and unambiguously accepts the wrongfulness and seriousness of all of his misconduct.

1. The Meaning of the Term "Recognize" as Employed in Rule 7.3(j)(5)(C)

[4] **[5]** [¶ 19] The underlying purpose of Rule 7.3(j)(5)(C)'s requirement that a previously disbarred applicant "recognizes the wrongfulness and seriousness of the misconduct" is to ensure that the applicant's readmission "will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest." M. Bar R. 7.3(j)(5). Because the purpose of the Rule centers on the protection of the public, its standard is directed at whether the disbarred applicant has been sufficiently rehabilitated to be trusted with the responsibilities of an attorney. *See In re Wigoda,* 77 Ill.2d 154, 32 Ill.Dec. 341, 395 N.E.2d 571, 574 (1979) ("Rehabilitation, the most important consideration in reinstatement proceedings, is a matter of one's return to a beneficial, constructive and trustworthy role." (quotation marks omitted)). Consistent with Rule 7.3(j)(5)'s purpose of protecting the public, we construe the term "recognize" to mean that the applicant must demonstrate that he or she (1) sincerely believes that the prior misconduct, as ultimately determined by the tribunal that imposed the discipline, was wrong and serious, and (2) is capable of identifying similar conduct as wrongful in the future if he or she were to engage in the active practice of law.

2. Whether M. Bar R. 7.3(j)(5)(C) Required Bailey to Prove That He Unambiguously Accepts the Wrongfulness and Seriousness of His Misconduct

[¶ 20] Having construed the term "recognize," we turn to the Board's argument that Rule 7.3(j)(5)(C) requires proof of nothing less than Bailey's unambiguous acceptance of all findings of misconduct that the Florida Supreme Court found. We find this contention unpersuasive.

[6] [¶ 21] Neither the language of the rule nor its purpose requires that an applicant demonstrate his complete and unambiguous acceptance of all of the findings of wrongdoing in order to establish his good character and fitness. *See* M.Bar R. 7.3(j)(5); *see also In re Williams,* 2010 ME 121, ¶ 10, 8 A.3d 666 (finding that an applicant failed to recognize the wrongfulness and seriousness of his misconduct because he "ignore[d] or minimize[d] the actual misconduct that led to his disbarment"). An

applicant's good faith and reasoned dispute with one or more of a tribunal's findings that formed the basis of his disbarment does not preclude the possibility that the applicant sincerely believes that the misconduct, as ultimately determined by the tribunal, was wrong and serious. An applicant could, in good faith, dispute one or more of a tribunal's findings while nonetheless demonstrating respect for the process that was employed and acceptance of the tribunal's conclusions.

***1148** [¶ 22] Other courts have recognized that an applicant's failure to be fully repentant does not preclude a determination that the applicant has been rehabilitated. *See, e.g., In re Sabo,* 49 A.3d 1219, 1228 (D.C.2012) ("[A] confession of guilt is not required for a petitioner seeking reinstatement to show that he recognizes the seriousness of his misconduct...." (quotation marks omitted) (alteration omitted)); *In re Mitchell,* 249 Ga. 280, 290 S.E.2d 426, 427 (1982) ("[C]ontinued assertion of innocence following conviction is not conclusive proof of lack of rehabilitation."); *In re Wigoda,* 32 Ill.Dec. 341, 395 N.E.2d at 573–74 (distinguishing repentance from rehabilitation); *In re Hiss,* 333 N.E.2d at 437 ("[W]e refuse to disqualify a petitioner for reinstatement solely because he continues to protest his innocence of the crime of which he was convicted."); *In re Page,* 94 P.3d 80, 83 (Okla.2004) ("[A]n applicant's assertion of innocence, standing alone, is not a bar to reinstatement...."); *In re Walgren,* 104 Wash.2d 557, 708 P.2d 380, 384 (1985) (en banc) ("The continued assertion by [the applicant] of his innocence does not reflect negatively on our assessment of his rehabilitation.").

[7] [¶ 23] Accordingly, that Bailey does not unambiguously accept all of the findings and conclusions of the Florida Supreme Court is not conclusive as to whether he sincerely believes that his misconduct was wrong and serious and whether he is capable of identifying similar conduct as such in the future as a practicing attorney. Common sense dictates, however, that the nature and extent of his failure to be fully repentant should be carefully considered when determining his fitness to practice law. *See, e.g., In re Walgren,* 708 P.2d at 384–85 (contrasting an applicant who maintained that he was wrongly convicted but who nonetheless "accepts the verdict as the law" and "accepts and respects the system which found him guilty of his acts" with one who blamed his misconduct on "bad judgment"). An applicant's attempt to minimize the wrongfulness and seriousness of his or her misconduct, as found by the presiding tribunal, casts doubt on whether the applicant believes the misconduct was wrong or serious. *See In re Williams,* 2010 ME 121, ¶ 10, 8 A.3d 666 (finding that an applicant failed to recognize the wrongfulness and seriousness of his misconduct because he "ignore[d] or minimize[d] the actual misconduct that led to his disbarment"); *see also In re Sabo,* 49 A.3d at 1225 ("If a petitioner does not acknowledge the seriousness of his or her misconduct, it is difficult to be confident that similar misconduct will not occur in the future." (quotation marks omitted)); *In re Silva,* 29 A.3d 924, 943 (D.C.2011) (finding that the applicant's acceptance of the seriousness of his misconduct "rings hollow" in part because "that acknowledgement is tempered by efforts to minimize the harm"); *In re Holker,* 765 N.W.2d 633, 638 (Minn.2009) (finding that an attorney did not demonstrate sufficient moral change when he "minimized several aspects of his misconduct, emphasizing that this was only one case out of thousands").

[8] [¶ 24] We conclude, contrary to the Board's position, that the fact that Bailey is not fully repentant and does not unambiguously admit to all of the misconduct for which he was disbarred does not, standing alone, preclude a finding that he has satisfied Rule 7.3(j)(5)(C)'s requirement.

B. Whether the Finding that Bailey Recognizes the Wrongfulness and Seriousness of His Misconduct is Supported by Clear and Convincing Evidence

[¶ 25] To determine whether an applicant recognizes the wrongfulness and seriousness ***1149** of his misconduct, a court must necessarily examine the specific misconduct the applicant committed. The Florida Supreme Court, in adopting Judge Ellis's findings regarding the six counts of ethical violations, found that Bailey had "committed some of the most egregious rules violations possible, evidencing a complete disregard for the rules governing attorneys":

> Misuse of client funds is one of the most serious offenses a lawyer can commit.... Bailey's false testimony and disregard of Judge Paul's orders demonstrate a disturbing lack of respect for the justice system and how it operates. Bailey's self-dealing and willingness to compromise client confidences are especially

> disturbing. Not only did Bailey use assets that his client intended to forfeit to the U.S. Government for Bailey's own purposes, but Bailey also attempted to further his own interests by disparaging his client in an ex parte letter to the judge who would sentence his client. Bailey's self-dealing constitutes a complete abdication of his duty of loyalty to his client. His willingness to compromise his client for personal gain shows an open disregard for the relationship that must be maintained between attorney and client: one of trust, and one where both individuals work in the client's best interest. Such misconduct strikes at the very center of the professional ethic of an attorney and cannot be tolerated.

Florida Bar, 803 So.2d at 694 (quotation marks omitted) (alteration omitted).

[9] **[10]** [¶ 26] The single justice concluded that Bailey had established that he recognizes the wrongfulness and seriousness of the above misconduct, finding:

> [Bailey] testified to this [recognition] at several points, perhaps more unequivocally than in his similar testimony before the Board of Bar Examiners. Particularly, the Court finds that Bailey recognizes that his ex-parte contacts with Judge Paul were wrong, as was his poor recordkeeping, comingling of client and personal funds, and failure to have an explicit written agreement with the Department of Justice lawyers regarding the uses of the Biochem stock and its proceeds that were transferred to him in trust.

In reviewing this determination, we defer to the single justice's credibility determinations. *See Dyer v. Superintendent of Ins.,* 2013 ME 61, ¶ 12, 69 A.3d 416 ("No principle of appellate review is better established than the principle that credibility determinations are left to the sound judgment of the trier of fact." (quotation marks omitted)). We further infer that the single justice would have found all additional facts necessary to support the judgment if those inferred findings are supported by the evidence in the record. [7] *See Pelletier v. Pelletier,* 2012 ME 15, ¶ 20, 36 A.3d 903. We therefore consider whether competent evidence supports the court's explicit and inferred findings, to the standard of clear and convincing evidence, in relation to the specific acts of misconduct for which Bailey was disbarred.

1. Counts I and II: Commingling Related to Duboc's "Japanese Stock"; Misappropriating Trust Funds and Commingling Related to Duboc's Biochem Stock Proceeds

[11] [¶ 27] We consider together the first two counts of ethical violations relating to Bailey's commingling of client assets ***1150** with his own and his misappropriation of the Biochem proceeds. Regarding Count I, the Florida Supreme Court adopted Judge Ellis's finding that Bailey, entrusted with the liquidation of Duboc's so-called "Japanese stock," commingled $730,000 of the stock's sale proceeds with his own funds for six weeks before turning the money over to the government. [8] *Florida Bar,* 803 So.2d at 686–87, 690. The Florida Supreme Court rejected Bailey's contention that he did not have any personal funds in his account and had inadvertently deposited the stock proceeds into this account. *Id.*

[¶ 28] Regarding Count II, the Florida Supreme Court adopted Judge Ellis's finding that Bailey commingled and misappropriated over $3 million of the proceeds from Duboc's Biochem shares, and rejected Bailey's arguments that the stock was transferred to him in fee simple absolute and that he properly treated it as his own property. [9] *Id.* at 687, 690–94. The court emphasized that, because the stock was given to Bailey for the benefit of Duboc and, ultimately, the federal government, regardless of the manner in which Bailey held the stock, he was "guilty of the most serious and basic trust account violations" ***1151** by commingling and treating the stock and its appreciation as his own property. *Id.* at 691. We address Bailey's commingling and misappropriation of proceeds separately.

a. Commingling

[¶ 29] Bailey admitted to commingling "on one occasion" when he was questioned before the Board about the Biochem stock. [10] Bailey did not testify or introduce other evidence regarding the commingling of the Japanese stock proceeds either before the Board or the single justice.

[¶ 30] With regard to the Japanese stock, because Bailey had the burden of production on this issue and there is no evidence in the record from which the court could have found that Bailey recognizes the wrongfulness and seriousness of having commingled the proceeds from Duboc's Japanese stock, we will not infer that the court found that Bailey recognizes the wrongfulness and seriousness of that transgression.

[¶ 31] Likewise, the evidence in the record does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of having commingled the proceeds from Duboc's Biochem stock, as required by the clear and convincing evidence burden of proof. As the Florida Supreme Court noted, "one of the most solemn obligations that separate lawyers from any other professionals relates to the safeguarding and segregation of a client's property." *Florida Bar,* 803 So.2d at 693. By commingling client assets, Bailey was "guilty of the most serious and basic trust account violations." *Id.* at 691. While Bailey's testimony before the Board that he "did on one occasion commingle" acknowledged the fact that he committed the misconduct, he offered no other testimony that sheds light on whether he believes that this "most serious and basic trust account violation" was indeed seriously wrong. On this record, we conclude that the fact-finder could not reasonably have been persuaded that the required factual finding—that Bailey recognizes the wrongfulness and seriousness of having commingled the proceeds from Duboc's Biochem stock—was proved to be highly probable, as required by the clear and convincing evidence standard. *See Taylor,* 481 A.2d at 153.

b. Misappropriation of the Biochem proceeds

[12] [¶ 32] At the hearing before the single justice, Bailey admitted to spending approximately $3 million of the Biochem proceeds for his own use, and testified that if the appreciation in the value of the Biochem stock ever belonged to him, as he claimed, "I lost it through my own negligence and perhaps substandard conduct." Bailey minimized the seriousness of this misconduct, however, by explaining that he spent no more than the appreciated value of the stock, which had risen from $5.9 million at the time of the original transfer to over $10 million by January 1996. [11] Bailey further testified before the single ***1152** justice that he believed that Judge Paul may have implicitly approved some of his personal use of the Biochem proceeds. [12] Bailey adheres to the view that it was reasonable to believe that he was entitled to use the stock to pay himself the attorney fees he believed he was owed, and to treat the appreciated value of the Biochem stock as his own, because the parties had agreed to transfer the stock to him in "fee simple and without restriction." [13] Bailey's view contradicts what was determined in the Florida disbarment proceeding. *See Florida Bar,* 803 So.2d at 690–91 (rejecting Bailey's assertion that he never held the stock in trust for Duboc or the United States because it was transferred to him in fee simple absolute, and concluding that, "regardless of the manner in which he was to hold the stock, Bailey is guilty of the most serious and basic trust account violations.").

[¶ 33] Consistent with his continued claim that the stock belonged to him in fee ***1153** simple, Bailey repeated before the single justice his position that he had not "misappropriated" the Biochem funds, [14] which was one of the specific ethical violations that the Florida Supreme Court found that Bailey committed. *See Florida Bar,* 803 So.2d at 687, 690. Bailey then explained that a portion of the withdrawn Biochem funds was for his attorney fees and that, even though he never applied to Judge Paul for approval of his fees, the judge had implicitly approved this arrangement. [15] This argument was also rejected in the Florida Bar proceeding. *Id.* at 692 (stating that even if some of the corpus of the initial Biochem stock was to be used for payment of attorney fees, "Bailey was not entitled to the fee until it was approved by Judge Paul—a fact that Bailey admits in his January 21 letter to Judge Paul, and that he admits in this case.").

[¶ 34] Lastly, when asked about the mistakes he made, Bailey stated that his mistake was his failure to recognize that the handling of the stock was "riddled with conflicts" and that "the United States Attorney didn't have the authority to make that deal as was ultimately ruled in the Court of Claims." [16] Bailey's professed understanding of these mistakes minimizes ***1154** the wrongfulness and seriousness of the actual misconduct for which he was disbarred: misappropriating his client's property.

[¶ 35] In short, Bailey continues to dispute that he misappropriated over $3 million of his client's property and the key predicate facts supporting that finding. The evidence in the record does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of his misappropriation of the Biochem stock proceeds, as required by the clear and convincing evidence burden of proof.

2. Count III: Violations of Two Federal Court Orders

[¶ 36] The Florida Supreme Court adopted Judge Ellis's finding that Bailey willfully violated Judge Paul's two orders issued in January 1996: first, by spending over $300,000 from the Biochem proceeds he held in trust despite Judge Paul's January 12 order freezing the funds; and second, by failing to surrender the Biochem shares and stock proceeds to the court despite the January 25 order requiring him to do so. [17] *Florida Bar,* 803 So.2d at 687–88, 690, 693–94.

[13] [¶ 37] At the hearing before the single justice, Bailey admitted to spending an additional $300,000 for personal purposes after the January 12 order was issued. However, he maintained that his violation of the order was unintentional because he mistakenly assumed that the January 25 order superseded the January 12 order. [18] There is simply no language, ***1155** however, in either order that would justify a reasonable attorney —particularly an attorney who claims not to have personally read either order prior to February 2, 1996 —in assuming that the January 25 order superseded the provision in the January 12 order freezing Duboc's assets in Bailey's possession. Although Bailey recognized that his decision to treat the January 25 order as superseding the January 12 order was "not good lawyering" and "a selfish position to take," he further testified that he did not violate the January 12 order "[u]nless you view [the January 12 and 25 orders] as running in parallel." This justification was squarely rejected in the Florida disbarment proceeding and minimizes the wrongfulness and seriousness of Bailey's misconduct in, among other things, "knowingly disobey[ing] an obligation under the rules of a tribunal." *Florida Bar,* 803 So.2d at 687–88.

[¶ 38] In addition, although Bailey admitted to the single justice that he violated the January 25 order, he continued to disavow responsibility for having arranged for the notice to the Swiss government that caused it to freeze Bailey's account. [19]

***1156** [¶ 39] Based on Bailey's testimony, it is not possible to conclude that it is highly probable that he recognizes the wrongfulness and seriousness of his violation of Judge Paul's orders, as required by the clear and convincing evidence burden of proof.

3. Count IV: False Testimony

[¶ 40] The Florida Supreme Court adopted Judge Ellis's finding that Bailey testified falsely before Judge Paul, and again in the Florida bar hearing, that he did not see either the January 12 or the January 25 order until the morning of the civil contempt hearing held on February 2, 1996. [20] *Florida Bar,* 803 So.2d at 688, 690.

[14] [¶ 41] In his testimony before the single justice, Bailey again asserted that he did not see or read the January 12 and January 25 orders until the morning of the contempt hearing. [21] Bailey also testified, ***1157** however, that he was to some degree aware of the contents of the orders because his associate had read them to him over the phone. Relying on this distinction, Bailey maintained that his testimony before Judge Paul that he had not physically seen the orders at the time he violated them was not false. [22]

[¶ 42] In sum, Bailey continued to dispute that he testified falsely before Judge Paul and Judge Ellis as the Florida Supreme Court had found. Based on Bailey's testimony, it is not possible to conclude that it is highly probable that Bailey recognizes the wrongfulness and seriousness of his false testimony, as required by the clear and convincing evidence burden of proof.

4. Count V: Self–Dealing in the Representation of Duboc

[¶ 43] The Florida Supreme Court adopted Judge Ellis's finding that Bailey engaged in two instances of self-dealing in his representation of Duboc. [23] *Florida Bar,* 803 So.2d at 688–689, 690. First, Bailey claimed ownership of the Biochem stock that belonged to Duboc and which Duboc planned to forfeit to the federal government in order to receive favorable treatment at sentencing. *Id.* at 688. Second, Bailey procrastinated in selling Duboc's estates in France. *Id.* at 688–89.

[15] [¶ 44] On the first point, as noted above, although Bailey explained to the single justice that he failed to recognize that his acceptance of the Biochem ***1158** stock was "riddled with conflicts," [24] he did not acknowledge the detriment that his treatment of the stock had to his client's interests. Rather, Bailey only expressed regret for not clarifying who would be entitled to the stock's appreciation, and for not accepting his fees in cash and selling the stock quickly. [25]

[¶ 45] On the second point, Bailey contended before the single justice that Judge Ellis had erred in finding that he had procrastinated in selling Duboc's estates to prolong his personal use of the properties; rather, he explained that he delayed selling the properties in order to garner a better price for them. [26]

[¶ 46] Bailey's present view of his actions minimizes the wrongfulness and seriousness of his self-dealing as determined in the Florida Bar proceeding. Based on Bailey's testimony, it is not possible to conclude that it is highly probable that he recognizes the wrongfulness and seriousness of this misconduct, as required by the clear and convincing evidence burden of proof.

5. Count VII: Ex Parte Communications, Self–Dealing, and Disclosure of Confidential Information

[¶ 47] The Florida Supreme Court adopted Judge Ellis's finding that Bailey sent an ex parte letter to Judge Paul in which he stated that Duboc had pleaded guilty because he had no defense due to the strength of the case, referred to Duboc as a "multimillionaire druggie," alleged that Duboc, by consulting with other attorneys, was no longer acting in a spirit of cooperation, and disparaged Duboc's new counsel. *Florida Bar,* 803 So.2d at 689, 690. [27] Judge Ellis also found that Bailey ***1159** then sent a second letter to Judge Paul, this time copying the U.S. Attorney's Office, threatening to seek an order waiving attorney-client privilege, thereby compromising Duboc's interests in order to protect his own. *Id.* at 689.

[¶ 48] At the hearing before the single justice, Bailey admitted to sending the ex parte letter to Judge Paul. He admitted that his ex parte communication constituted "unethical conduct" and a "knee-jerk reaction," and expressed regret in writing the letter without having consulted another attorney. [28] He, however, minimized the seriousness of the violation by contending that he sent the letter in an attempt to "alert [Judge Paul] to a serious condition which [Bailey] planned to tell him might involve an attempt to bribe him" for $1 million. [29] Although the ex parte letter to ***1160** Judge Paul did not mention that Duboc or his new attorneys might attempt to bribe the judge, Bailey maintained that his use of the words "seclusion" and "clear watershed" would suggest to Judge Paul—had he read the letter—that "something improper is in the wind." [30]

[¶ 49] Before the single justice, Bailey also denied having disparaged Duboc in his letter to Judge Paul, testifying that he had put the phrase "multimillionaire druggie" in quotes to denote that he only repeated what other attorneys had called Duboc. [31] Bailey further denied that the letter revealed to Judge Paul that Duboc had violated the plea agreement or that it breached confidentiality and attorney-client privilege, [32] explaining that the government knew and had disclosed to Bailey the information alleged in the letter. [33] ***1161** These explanations minimize the wrongfulness and seriousness of the misconduct of self-dealing and disclosure of confidential client information.

[16] [¶ 50] Although different conclusions may be drawn from Bailey's testimony regarding the letter, the single justice's finding that Bailey recognized the wrongfulness and seriousness of having sent an ex parte letter to Judge Paul is supported by competent evidence in the record. The evidence, however, does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of his self-dealing and disclosure of confidential client information, as required by the clear and convincing evidence burden of proof.

6. Additional Testimony by Bailey Regarding the Wrongfulness and Seriousness of His Misconduct

[¶ 51] Bailey testified that although he believed, in retrospect, that the Florida Supreme Court had "some grounds ... that warranted disbarment," he believed that his disbarment was "kind of harsh." [34] He also testified before the Board and the single justice to his continued belief that the bias and animus of others contributed to his disbarment and related setbacks. He testified that the Department of Justice engaged in "obstructive

efforts" to "engineer[ ]" his disbarment; that Judge Ellis was "hostile" toward him; that Judge Paul had developed "distaste" for him; that the Department of Justice obstructed the renomination of Judge Horn to the U.S. Court of Federal Claims "in the hope that she would get the message" to rule against him in the civil complaint he had brought against the federal government in the U.S. Court of Federal Claims; and that the tax agent who investigated Bailey's failure to report income associated with the Biochem proceeds improperly altered his investigative records. Bailey also acknowledged that he filed a pleading with the Tax Court in which he alleged that the Florida Bar, the Department of ***1162** Justice, and the IRS had conspired to violate his constitutional rights. [35] Accordingly, in his testimony, Bailey questioned the integrity of almost all of the legal proceedings related to his misappropriation of Duboc's Biochem stock. This lack of respect for the judicial process casts further doubt on whether he believes his misconduct was wrong or serious. [36] *See Bd. of Overseers of the Bar v. Campbell,* 663 A.2d 11, 13 (Me.1995) ("The efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court, opposing counsel or the jury.... Turbulent, intemperate or irresponsible behavior is a proper basis for the denial of admission to the bar." (quoting *In re Feingold,* 296 A.2d 492, 500 (Me.1972))).

7. Testimony By Other Witnesses Bearing on Whether Bailey Recognizes the Wrongfulness and Seriousness of the Misconduct

[¶ 52] Before the single justice, multiple witnesses testified to Bailey's love of the law, the devastating effect that disbarment has had on him, and his regret and reformation since disbarment. For example, witnesses testified that Bailey "had lost something he deeply loved and was going through a lot of pain"; that the Duboc case was Bailey's "one regret" and he was "very sorry for what had happened"; that since his disbarment Bailey has become "a new man," "far more humble," and "much more measured"; that Bailey is actively involved in business and community activities in Maine and elsewhere; and that it was clear that Bailey has recognized his mistakes in the Duboc matter and those mistakes would not be repeated. In particular, Judge Kenneth Fishman of the Superior Court of Massachusetts testified that Bailey's conduct in his representation of Duboc was an "aberration":

> I think Lee recognizes this as well—that he made some serious mistakes with regard to that case and have lapses of judgment, good judgment in that regard.
>
> But as I've described it before, when you compare what happened in that case with a long distinguished career as a criminal defense attorney, I feel that *DuBoc* was an aberration. It was not indicative of the kind of man or attorney that he is.

[¶ 53] Witnesses further testified as to the personal difficulty that Bailey faced during the period leading to his disbarment—Bailey was handling too many high-profile cases at once and was constantly traveling; his wife had fallen ill in 1998 and passed away in 1999; and her death caused him great personal suffering. [37]

***1163** **[17]** **[18]** [¶ 54] Bailey's character witnesses testified to their strong beliefs that Bailey regrets the mistakes he made in defending Duboc and that he has suffered profoundly negative personal and professional consequences as a result of his disbarment. Their testimony also demonstrates the high regard in which Bailey is held by many of his professional peers, friends, and business associates, and underscores his advanced skills as a legal advocate. As the California Supreme Court recently recognized, however, "the testimony of character witnesses will not suffice by itself to establish [an applicant's] rehabilitation." *In re Glass,* 58 Cal.4th 500, 525, 167 Cal.Rptr.3d 87, 316 P.3d 1199 (Cal.2014). Here, the character witnesses' testimony does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of his misconduct to the extent that Bailey's testimony suggests otherwise. [38]

***1164** C. Conclusion

[¶ 55] The clear and convincing standard is applied where "a higher than ordinary degree of certitude" is required to achieve the applicable public policy. *Taylor v. Comm'r of Mental Health & Mental Retardation,* 481 A.2d 139, 149 (Me.1984). We apply this heightened burden of proof in deciding whether to readmit previously disbarred applicants because "we are required specifically to determine that [such] reinstatement will not be detrimental to the public interest." *In re Hughes,* 594 A.2d 1098, 1101 (Me.1991). Further, "the policies that motivated the imposition of the clear and convincing evidence standard apply with equal force at both the

factfinding and appellate stages." *Taylor,* 481 A.2d at 153 (quotation marks omitted).

[¶ 56] Viewing Bailey's actions as identified in the six counts of misconduct, we conclude that Bailey met his burden of proof by clear and convincing evidence only with respect to the question of whether he recognizes the wrongfulness and seriousness of having sent an ex parte communication to Judge Paul (Count VII). As to the remaining misconduct, the evidence in the record does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of commingling the Japanese stock (Count I), commingling and misappropriating the Biochem stock (Count II), violating two federal court orders (Count III), false testimony (Count IV), self-dealing in his treatment of the Biochem stock (Count V), and self-dealing and disclosure of confidential client information (Count VII). By continuing to question many of the findings and conclusions reached by the Florida Supreme Court, and by suggesting that Judge Ellis and the other judges who presided in his cases were biased and that the Florida proceedings were the product of a conspiracy to deprive him of his constitutional rights, Bailey minimizes the wrongfulness and seriousness of the misconduct for which he was disbarred.

[¶ 57] As previously discussed, an applicant is not required to demonstrate that he or she completely and unambiguously accepts all of the findings of misconduct to satisfy the requirement of M. Bar R. 7.3(j)(5)(C). Here, however, Bailey failed to demonstrate that he is sufficiently rehabilitated by proving that it is highly probable that he recognizes the wrongfulness and seriousness of most of the misconduct he committed. Considered as a whole, the record evidence was insufficient to prove, by clear and convincing evidence, that Bailey recognizes the wrongfulness and seriousness of his misconduct. Accordingly, the single justice erred by reaching the opposite conclusion and, consequently, by ultimately concluding that Bailey's "reinstatement will not be detrimental to the integrity and standing of the Bar, the administration of justice, or the public interest." *See* M. Bar R. 7.3(j)(5).

The entry is:

Judgment vacated. Remanded for entry of a judgment affirming the order of the Board of Bar Examiners.

SAUFLEY, C.J., and CLIFFORD, J., dissenting.

[¶ 58] Because the Court has acted outside its appellate function in vacating the ***1165** factual findings of the single justice who heard the evidence in this matter, and because we would instead remand this matter on the single issue of F. Lee Bailey's plan for avoiding violations of the Maine Bar Rules while responsible for a significant federal tax obligation, we respectfully dissent.

I. LEGAL FRAMEWORK

[¶ 59] We have no quarrel with the Court's well-crafted analysis of the applicant's burden of proof and the Court's standard of review on appeal. As the Court properly observed, it was Bailey's "burden to present 'clear and convincing evidence demonstrating the moral qualifications, competency, and learning in law required for admission to practice law in this State,' " and to establish that " 'reinstatement will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest.' " *In re Williams,* 2010 ME 121, ¶ 6, 8 A.3d 666 (quoting M. Bar R. 7.3(j)(5)). [39] On appeal, we review the factual findings of the single justice reached by clear and convincing evidence for clear error to determine whether the justice, based on the evidence and any reasonable inferences that may be drawn from that evidence, [40] "could reasonably have been persuaded that the required findings were proved to be highly probable." *Me. Eye Care Assocs. P.A. v. Gorman,* 2008 ME 36, ¶ 12, 942 A.2d 707 (quotation marks omitted); *see In re Hughes,* 608 A.2d 1220, 1220 (Me.1992) (reviewing whether a single justice erred in finding that an applicant for admission to the Bar had proved her good moral character "to a high degree of probability").

[¶ 60] The Court also properly analyzed the law and determined that complete and unambiguous acceptance of previous wrongdoing is not a prerequisite for a finding of good character and fitness pursuant to Maine Bar Rule 7.3(j)(5). Court's Opinion ¶ 21. We agree with the Court that common sense requires an analysis of "the nature and extent of [an applicant's] failure to be fully repentant." Court's Opinion ¶ 23.

II. FACTUAL FINDINGS

[¶ 61] Despite the Court's recognition of the standards applicable to its appellate review, however, it fails to apply those standards, instead making credibility determinations of its own and choosing to give weight to different evidence than was credited by the single justice. The Court goes astray from its own pronouncements when it decides which facts it believes from among many facts presented at a full hearing.

[¶ 62] Specifically, the Court today concludes that the evidence presented could ***1166** not reasonably have persuaded the single justice that it was highly probable that Bailey "recognizes the wrongfulness and seriousness of the misconduct" that led to his disbarment in another jurisdiction. M. Bar R. 7.3(j)(5)(C). In doing so, the Court reviews the testimony that Bailey provided before the single justice and determines from his uninflected words on the transcript pages that the single justice could not have been persuaded that Bailey recognized the wrongfulness and seriousness of each act that formed a basis for his disbarment. Despite evidence that supports the single justice's findings, the Court amasses other evidence to justify its decision to vacate those findings. As this gathering of evidence suggests, the Court is, in function, making credibility determinations.

[¶ 63] Credibility determinations are not, however, properly undertaken by an appellate court. "[T]he fact finder who hears and sees the witnesses, who observes their hesitations, inflections and emphases, is in a more favorable position to judge their credibility than the appellate court which only reads the printed testimony." *Michaud v. Charles R. Steeves & Sons, Inc.,* 286 A.2d 336, 341 (Me.1972) (quotation marks omitted). A witness's credibility is "for the presiding justice to weigh." *Bd. of Overseers of the Bar v. Dineen,* 481 A.2d 499, 502 (Me.1984). "Fact-finders are not required to believe or disbelieve witnesses and are called upon to determine the significance of the evidence and decide what inferences, if any, to draw from that evidence." *Huber v. Williams,* 2005 ME 40, ¶ 15, 869 A.2d 737. Furthermore, "the fact-finder may believe some, all, or none of a witness's testimony," *In re Cyr,* 2005 ME 61, ¶ 16, 873 A.2d 355, and "has the prerogative to selectively accept or reject testimony and to combine such testimony in any way," *Jenkins, Inc. v. Walsh Bros., Inc.,* 2001 ME 98, ¶ 22, 776 A.2d 1229 (quotation marks omitted).

[¶ 64] Given the testimony of Bailey and other witnesses about Bailey's awareness and acknowledgement of his wrongdoing, we would conclude that the evidence, and any reasonable inferences that may be drawn from that evidence, could reasonably have persuaded the single justice that it was highly probable that Bailey "recognize[d] the wrongfulness and seriousness of the misconduct" that led to his disbarment. M. Bar R. 7.3(j)(5)(C).

[¶ 65] Specifically, as the Court recognizes in its opinion, Bailey conceded in his testimony that there were some grounds for disbarment because he did engage in some improper conduct. He testified that he made a mistake in accepting stocks instead of an agreed $3 million fee in the Duboc case: "[T]he acceptance of the stock was riddled with conflicts I really didn't see at the outset." *See* Court's Opinion ¶ 34 & n. 16. He also testified that, when he sent the ex parte letter to Judge Paul concerning Duboc, he acted improperly: "I would certainly agree now that it was unethical conduct, improper, unwise, and a knee-jerk reaction at a time when I was totally focused on a different case. And I make no excuses for having that transgression." *See* Court's Opinion ¶ 48 & n. 28.

[¶ 66] He took responsibility for having failed to read the Florida court's January 12, 1996, order prohibiting any sale of stock as soon as the order arrived at his office: "I must hasten to add that certainly was substandard performance on my part. I should have made it my business to read the letter and not assume anything, to read the order. And I just didn't do that." *See* Court's Opinion ¶ 41 n. 21. He also accepted responsibility for selling stock after receiving a second order on January 25 without getting clarification about whether ***1167** the January 25 order supervened the January 12 order: "That was a presumption I never should have made. I should have found out whether the government thought it supervened the original order or whether the judge did, and so those transfers where made improperly." *See* Court's Opinion ¶ 37 n. 18 (quoting, additionally, Bailey's admission before the single justice that, after January 25, he "improperly" spent additional stock proceeds on his personal and business obligations and, "[i]n retrospect, [he] would say [he] did" violate the January 25 order).

[¶ 67] Bailey's colleagues also testified about their observations of his acknowledgment of the seriousness and wrongfulness of his misconduct since the disbarment. Bailey's former law partner, now a Superior Court Justice in Massachusetts, described Bailey as having been arrogant before his disbarment but more "humble" and "careful" since. He testified that Bailey realizes that he had lapses in judgment and made serious mistakes that he would never repeat. A Maine attorney who has befriended Bailey in Maine since the disbarment also testified that he is "humble." Another Maine lawyer testified that Bailey had expressed to him that he regretted and was sorry for what happened in the Duboc case. A lawyer and former Massachusetts State Senator who has known Bailey since before the disbarment testified that Bailey had "without a doubt" learned from the disbarment. A private investigator and former probation officer who worked with Bailey extensively before the disbarment and remains a friend of his testified that Bailey is remorseful and accepts his responsibility for what has happened.

[¶ 68] Although, given Bailey's testimony explaining or rationalizing his past behavior, the Justices in the majority might not have found as the single justice did if any of them had sat as the trial justice, the function of an appellate court is not to re-weigh the evidence and substitute its findings for those of the fact-finder. Rather, as an appellate court reviewing the findings in this matter, the Court must determine on appeal whether there is evidence in the record from which the single justice could reasonably have found that it was highly probable that Bailey "recognize[d] the wrongfulness and seriousness of [his] misconduct." M. Bar R. 7.3(j)(5)(C). The evidence presented here can support a finding that Bailey recognized the wrongfulness and seriousness of his conduct. We would therefore affirm the single justice's finding that Bailey demonstrated his recognition of the wrongfulness and seriousness of his misconduct.

III. REVIEW OF OTHER FINDINGS

[¶ 69] Because we would affirm the finding on the recognition of wrongfulness, it would be necessary to review the single justice's other findings of fact.

A. Maine Bar Rule 7.3(j)(5)(A), (B), (D), (E), and (F)

[¶ 70] There is ample evidence in the record to demonstrate that Bailey has complied with the terms of all prior disciplinary orders.[41] *See* M. Bar R. 7.3(j)(5)(A). He has "neither engaged nor attempted to engage in the unauthorized practice of law," M. Bar R. 7.3(j)(5)(B); has not engaged in any additional misconduct since being disbarred, *see* M. Bar R. 7.3(j)(5)(D); and does not have continuing legal education obligations in Maine because ***1168** he has never been admitted here before, *see* M. Bar R. 7.3(j)(5)(F). There is also evidence that can support a finding of the requisite honesty and integrity to practice law. *See* M. Bar R. 7.3(j)(5)(E). The remaining question is whether there are any other circumstances that the single justice was required to consider in determining whether Bailey's admission would "be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest." M. Bar R. 7.3(j)(5).

B. Detriment to the Integrity and Standing of the Bar, the Administration of Justice, or the Public Interest

[¶ 71] The only remaining factual issue that is relevant here but not addressed by the factors set forth in the rule is whether Bailey's substantial tax debt creates an unacceptable risk that Bailey's admission would "be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest." M. Bar R. 7.3(j)(5). Following the initial evidentiary hearing, the single justice in this matter declined to authorize Bailey's admission to the Bar until Bailey adequately addressed an outstanding judgment against him for a tax obligation that was then estimated to be approximately $2 million. After Bailey moved for reconsideration, the single justice determined that Bailey could be admitted because he was making a genuine effort to meet his tax responsibilities by seeking to resolve the matter through the litigation process and because he had paid or resolved every other obligation that had been imposed on him in a final judgment. As the majority notes, we have learned, since the single justice's ruling, that the United States Court of Appeals has affirmed the decision of the Tax Court. *See Bailey v. IRS,* No. 13–1455 (1st Cir. Mar. 14, 2014). The IRS has filed tax liens of more than $4.5 million against Bailey's property. Accordingly, we would conclude that the single justice's findings must be augmented on this issue.

[¶ 72] In determining the propriety of admission, a single justice must consider whether a particular candidate presents a risk to the public if entrusted with client

funds. [42] Bailey admittedly used the appreciation in value of stock entrusted to him as Duboc's attorney to pay personal expenses associated with developing an airplane, paying for a house, and maintaining his yacht. He also concedes that he was found in contempt and incarcerated when he could not repay sums that he obtained through sale of that stock, and that he stopped paying his mortgage and consented to a foreclosure on a Florida home when he could not afford payments on that property. In preparation for the pending application to the Maine Bar, he neglected to include information about several aspects of his finances or holdings, and indicated, once again, that he "made a mistake" and "overlooked" certain property. A consistent difficulty in maintaining accurate financial records is evident on this record.

[¶ 73] Because we now know that the United States Court of Appeals has affirmed ***1169** the Tax Court's decision and that Bailey is therefore subject to tax liens of approximately $4.5 million, and because the record contains evidence that Bailey has difficulty maintaining proper financial records, additional evidence and analysis are necessary to evaluate whether Bailey's personal obligations could create a risk to the public. Accordingly, we would remand the matter for the single justice to take evidence and reconsider whether the risk that Bailey would mismanage funds in the context of paying his substantial tax debt would render his admission to the Bar "detrimental ... to the public interest." M. Bar R. 7.3(j)(5).

All Citations

90 A.3d 1137, 2014 ME 58

Footnotes

1 The Board challenges the judgment's factual findings and legal conclusions, arguing that (1) Bailey has not recognized the wrongfulness and seriousness of the ethical violations that led to his disbarment in Florida in 2001; (2) Bailey was not honest in his bar application and in his testimony before the Board; (3) at least three tribunals have found that Bailey testified falsely since 1996; (4) Bailey provided a false proffer of evidence to the United States District Court for the District of Massachusetts in 2005 in connection with his reciprocal disbarment in that court; (5) Bailey underreported his income for federal tax purposes and had an outstanding federal tax obligation in the amount of $4.5 million; (6) Bailey made several unwarranted attacks on the judges who have ruled against him as well as on the Department of Justice; and (7) Bailey failed to comply with Massachusetts income tax laws when he was a resident of that state.

2 For purposes of consistency with the single justice's opinion and *Florida Bar v. Bailey,* 803 So.2d 683 (Fla.2001) (per curiam), we refer to Biochem Pharma as "Biochem."

3 In ordering Bailey's disbarment, the Massachusetts Supreme Judicial Court denied Bailey's request for a de novo hearing based on his allegation, among others, that Judge Ellis was biased against him. *In re Bailey,* 439 Mass. 134, 786 N.E.2d 337, 340–41 (2003). Likewise, in Bailey's reciprocal disbarment proceeding in the United States District Court for the District of Massachusetts, a three-judge panel denied Bailey's request for an evidentiary hearing to present new evidence regarding the agreement Bailey entered into with the prosecutors in the Duboc case, noting that the precise nature of the agreement was not dispositive because Bailey's disbarment did not hinge exclusively on his mishandling of the stock. *In re Bailey,* No. M.B.D. NO. 02–10093, 2005 WL 2901885, at *4 (D.Mass. Nov. 1, 2005), *aff'd, In re Bailey,* 450 F.3d 71 (1st Cir.2006) (per curiam).

4 Pursuant to M.R. Evid. 201, we take judicial notice of the publicly available federal tax liens.

5 The Board does not contend that the Maine Bar Rules require disbarred applicants to obtain readmission in the disbarring jurisdiction prior to petitioning for admission in Maine. *See In re Hughes,* 594 A.2d 1098, 1101 n. 2.

6 Rule 7.3(j)(5) enumerates a list of required factors to be considered:

> (A) The petitioner has fully complied with the terms of all prior disciplinary orders;
> (B) The petitioner has neither engaged nor attempted to engage in the unauthorized practice of law;
> (C) The petitioner recognizes the wrongfulness and seriousness of the misconduct;
> (D) The petitioner has not engaged in any other professional misconduct since resignation, suspension or disbarment;
> (E) The petitioner has the requisite honesty and integrity to practice law;
> (F) The petitioner has met the continuing legal education requirements of Rule 12(a)(1)....

M.Bar R. 7.3(j)(5)(A)-(F). "[T]he petitioner must present clear and convincing evidence concerning each of the factors described in Rule 7.3(j)(5)." *Bd. of Overseers of the Bar v. Campbell,* 663 A.2d 11, 13 (Me.1995).

7 The Board's motion for findings of fact and for reconsideration, filed in June 2013, did not request findings of fact relating to each of the specific acts of misconduct for which Bailey was disbarred.

8 The Florida Supreme Court explained:

> Count I of the Bar's complaint charged Bailey with commingling. Bailey was entrusted with liquidating stock that belonged to Duboc, referred to as "the Japanese Stock." Upon liquidation, Bailey was then to transmit the proceeds to the United States. Bailey sold the Japanese stock and deposited approximately $730,000 into his Credit Suisse account on or about July 6, 1994. Bailey then transferred the money into his Barnett Bank Money Market Account. The money was paid to the United States Marshal on or about August 15, 1994. The referee found that Bailey admitted that his money market account was not a lawyer's trust account, nor did Bailey create or maintain it as a separate account for the sole purpose of maintaining the stock proceeds. In concluding that Bailey had engaged in commingling, the referee rejected Bailey's claims that there were no personal funds in the Barnett Bank account at the time Bailey transferred the funds from the Japanese Stock into this account, and that Bailey's deposit of the proceeds into a non-trust account was "inadvertent error." The referee concluded that Bailey violated Rule Regulating the Florida Bar 4–1.15(a) by failing to set up a separate account for these funds and also by commingling client funds with his personal funds.

Florida Bar, 803 So.2d at 686–87.

9 The Florida Supreme Court explained:

> Count II of the Bar's complaint charged Bailey with misappropriating trust funds and commingling. On or about May 9, 1994, the 602,000 shares of Biochem stock were transferred into Bailey's Credit Suisse Investment Account. Bailey sold shares of stock and borrowed against the stock, deriving over $4 million from these activities. Bailey then transferred $3,514,945 of Biochem proceeds from the Credit Suisse account into his Barnett Bank Money Market Account. Bailey had transferred all but $350,000 of these proceeds into his personal checking account by December 1995. From this account, Bailey wrote checks to his private business enterprises totaling $2,297,696 and another $1,277,433 for other personal expenses or purchases. Bailey further paid $138,946 out of his money market account toward the purchase of a residence.
>
> The referee rejected Bailey's two defenses to the Bar's charge of misappropriation: (1) he never held the stock in trust for Duboc or the United States; rather, it was transferred to him in fee simple absolute; and (2) this stock was not subject to forfeiture. The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3–4.3 (lawyer shall not commit any act that is contrary to honesty and justice), 4–1.15(a) (commingling funds), 4–8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 4–8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and 5–1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a specific purpose).

Florida Bar, 803 So.2d at 687.

10 Bailey testified before the Board:

> [BOARD]: So do you agree that you commingled funds when you transferred the [Biochem] funds from your Credit Suisse account to your money market account and then to your personal checking account?
>
> [BAILEY]: I did on one occasion commingle.

11 Specifically, Bailey testified before the single justice:

> Q. So you spent roughly $3 million of the BioChem Pharma's stock during 1994, 1995, and 1996?
>
> A. Well, I think lumping them together is a bad idea for this reason: I was allowed to draw down, in my view, fees from the original shares of stock and—and the loans against them. When the stock began to rise, I believe that all of that money was mine. And most of the money that you're speaking of was drawn down after it began to show a profit.

12 Bailey provided the following testimony before the single justice:

> Q. Would you agree that Judge Paul had not approved any of those roughly $3 million in expenditures that you made from the BioChem Pharma proceeds?
>
> A. They were never presented to him, to my knowledge.
>
> Q. So that's a yes, he did not ever approve them?
>
> A. I—I think implicitly he may have approved some but certainly not the way they should have been approved and that's by court order.
>
> Q. And would you agree the Department of Justice did not expressly approve of your spending that $3 million on your personal and business ventures?
>
> A. That is a conflict which will go on forever, but I will agree to this: I was unable to show their approval at a critical time and have suffered mightily because of it.

13 Bailey provided the following testimony before the single justice:

> Q. Another piece of this that I've heard you testify to, Mr. Bailey, is that you believed the appreciated value of the BioChem Pharma stock belonged to you?
>
> A. Yes, I have testified to that.
>
> Q. And is that what your testimony is today?
>
> A. Well, my testimony today is if it ever did, I lost it through my own negligence and perhaps substandard conduct. There was a time when I thought it was clear that he who takes the downside risk necessarily gets the upside gain; otherwise, you sell the asset as fast as you can and avoid both.
>
> Q. Fair to say the Department of Justice didn't share your view of that agreement?
>
> A. Oh, they denied it, yes.
>
> ....
>
> Q. And there was nothing in writing to support your claim, correct? No letters, no e-mails, no written agreement?
>
> A. Well, I think there is.
>
> Q. There are letters that support your view that you were entitled—
>
> A. You said no written agreements. Do you have the transfer letter that caused the funds to go to my account?
>
> Q. All right. Is that your—your view? That's the document [transferring the Biochem stock to Bailey's account] that entitled you to the appreciation in the stock?
>
> A. Well, the transfer purported to be in fee simple and without restriction. Although I didn't see [the transferring document] at the time, I was told that's what it said, and indeed, it does, both in French and in English.
>
> ....
>
> Q. At the end of the day, Mr. Bailey, it's fair to say that you spent $3 million that didn't belong to you on your personal and business affairs?
>
> A. I spent $3 million that has been adjudged was not mine. At the time I spent it, I think I had a reasonable belief that it was mine.

14 Bailey testified before the single justice:

> Q. So would you agree, Mr. Bailey, that you misappropriated roughly $3 million?
>
> A. No, sir. Because misappropriated is a word used in criminal law, which is the equivalent of larceny and that takes an intent, and I never had an intent to steal anyone—anything from anyone.

15 Bailey testified before the single justice:

> [BAILEY]: [United States Attorney] Gregory Miller said, “No. We've given $6 million to the defense for fees and that's enough.”
>
> And I said, “Your Honor, we've agreed that we'll be accountable to you ultimately and no money has been taken so far.”
>
> And Judge Paul did this, kind of don't worry about that, and we went on. That was what I thought was implicit approval of Miller's statement to him that we have—
>
> ....
>
> THE COURT: You're going to have to describe what you just did.
>
> [BAILEY]: Yes. I meant the motion to show that Judge Paul was showing I'm not worried about that. It's not of great importance. We don't—
>
> THE COURT: He's motioning his arm away.
>
> [BAILEY]: It was kind of—pff—I realize—
>
> THE COURT: Describe that.
>
> [BAILEY]: P-f-f I thought that he accepted the notion and didn't want any further discussion or didn't need any further, I should say.

16 Bailey testified before the single justice:

> Q. I'd just like you from your perspective, if you could, summarize to the Court what you think happened in *DuBoc.* What mistakes did you make that led you to be—to the order of disbarment there and then the reciprocal order in Massachusetts?
>
> A. They began, Your Honor, over the acceptance of a fee in the form of stock on April 26th, 1994, a month after I'd been hired and we had a tentative plea agreement in the case. We had an agreed fee of $3,000,000. And it was about to be transferred to my account when a DEA agent said, look, we got stock here which we'll have to really impair. Why don't you take that instead?

And I didn't know much about stock and didn't think it was a great idea, but my client insisted that I should take the stock. And so I did after a conversation where the prosecutor said, you can have whichever you want, but you understand that if the stock goes down, there's nothing left for you to get a fee.
And I said fine. And I did that very unwisely.

....

A. In any event, the acceptance of the stock was riddled with conflicts I really didn't see at the outset. Beyond that, it never occurred to me at the time but the United States Attorney didn't have the authority to make that deal as was ultimately ruled in the Court of Claims.

17 The Florida Supreme Court explained:

Count III charged Bailey with continuing to expend Biochem funds in contravention of two federal court orders. In January 1996, Judge Paul issued two orders regarding the Duboc criminal case; one on the 12th and the other on the 25th. The January 12 order relieved Bailey as Duboc's counsel, substituting the Coudert Brothers law firm. The order further required Bailey to give within 10 days "a full accounting of the monies and properties held in trust by him for the United States of America." The order froze all of the assets received by Bailey from Duboc and further prohibited their disbursement. The January 25 order directed Bailey to bring to a February 1, 1996, hearing all of the shares of Biochem stock that Duboc had turned over to Bailey. The referee found that Bailey continued to use the Biochem proceeds that he held in trust after service and knowledge of the January 12 and January 25, 1996, orders. The referee rejected Bailey's argument that the January 25 order did not restrain him from utilizing the funds to meet his prior financial obligations, finding that "the order ... require[d] [Bailey] to bring with him the Biochem Pharma stock or any replacement asset.... Clearly there were judicial restraints in place when the money was disbursed."

The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3–4.3 (lawyer shall not commit an act that is contrary to honesty and justice), rule 4–8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), rule 4–8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and rule 5–1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a specific purpose). The referee further found that by knowingly expending trust account funds from the money market account after entry of the January 12 order, Bailey violated Rules Regulating the Florida Bar 3–4.3, 4–3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal), 4–8.4(a) (lawyer shall not violate the Rules of Professional Conduct), and 4–8.4(d) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Florida Bar, 803 So.2d at 687–88.

18 Bailey testified before the single justice:

Q. Do you recall that after learning of [the January 12] order you spent at least an additional $300,000 of BioChem Pharma proceeds on your personal and business obligations?

A. Well, I did spend additional funds, and I did so improperly because I assumed that the January 25th order had supervened any prior orders now that suit had been filed. And I didn't read it as prohibiting distribution of what was already in my account. That was a presumption I never should have made. I should have found out whether the government thought it supervened the original order or whether the judge did, and so those transfers were made improperly.

Q. So is it your testimony, Mr. Bailey, that you assumed that one order that you claim not to have read supervened an earlier order that you claimed not to have read?

A. No. I'm saying that an order which was read to me, and I don't see a distinction between reading and having something read to you, if you have a reasonably well-developed memory. I'm claiming that I thought that order was the new order and controlled by supervening, and I'm saying to you that was not good lawyering on my part. It was a selfish position to take.

Q. Would you agree that Exhibit 27 [the January 25 order] did not supervene Exhibit 26 [the January 12 order]?

A. It doesn't say anything about supervening it nor does it say anything about 26 still being in force. It doesn't speak either way. But I think a lawyer should assume that they're both in force, and I did not.

Q. Well, rather than make assumptions, Mr. Bailey, let—let's look at Exhibit 26 for a second, the order of Judge Paul.

A. Uh-huh.

Q. And Paragraph 5 frees all DuBoc-related assets unless off—excuse me—and prohibits any further disbursement unless authorized by this court?

A. Yes, that's what it says.

Q. Did Judge Paul ever authorize any further disbursements of DuBoc funds in your accounts after January 12, 1996?

A. No, he did not. But please bear in mind between January 12th and January 25th I made no disbursements of DuBoc's money. I spent money that came in from other cases.

Q. And is it your contention that Exhibit 27, the January 25th order, authorized you to spend DuBoc money in your bank accounts?

A. No. It did not authorize anything.

Q. Would you agree that you violated [the January 25 order], Mr. Bailey?

A. In retrospect, I would say I did.

Q. And would you agree that you violated [the January 12 order]?

A. No. Unless you view them as running in parallel after January 27th and the answer is yes.

What I'm telling you is between January 12th of #96 and January 25th, I spent $40,000, which came from a law firm in New York for cases we had settled, not any money attributable to *DuBoc.* So I don't think this order [January 12 order] is violated until after this one [January 25 order] comes into existence.

But you're quite right. It's proper to consider this one [January 12 order] still viable, and then it was violated.

19 Bailey testified before the single justice:

Q. The referee in Florida found that after you learned of the substance of Exhibit 27 [the January 25 order], you arranged for the Swiss government to be notified so that the BioChem Pharma shares were frozen by the Swiss government?

A. She found as a fact that I engineered that. The truth is my lawyer did do it. I learned about it afterwards, but I don't think it made any difference. It was frozen under Swiss law, and the freeze was rather quickly removed, thanks mostly to my efforts.

20 The Florida Supreme Court explained:

> Count IV of the Bar's complaint charged Bailey with giving false testimony. The referee found that Bailey testified falsely before Judge Paul and the U.S. Attorneys that he did not see the January 12 or January 25 orders until the morning of a civil contempt hearing held on February 2, 1996. The referee further found that Bailey was not being truthful when: (1) in his answer to the Bar's complaint, Bailey denied that he had received the orders and that he had testified falsely before Judge Paul; and (2) Bailey testified before the referee at the final hearing.
>
> Specifically, the referee found numerous reasons why this testimony was false. First, Bailey had a conversation with the Assistant U.S. Attorney about the terms of the January 12 order following its entry. Indeed, on January 19, when Bailey met with the Assistant U.S. Attorneys, he accused them of obtaining the order from the judge ex parte. In addition, when Bailey returned to his Palm Beach office on January 18, he marshaled documents in support of the accounting that the January 12 order required him to provide. In the letter to Judge Paul dated January 21, 1996, Bailey "plainly concedes that he knew of the terms of the order as early as January 16, 1996." In that letter, he referred to the manner, mode and method by which Judge Paul entered the order. He complained in the letter that "Your Honor was persuaded to act on representations which are *at a minimum* subject to sharp challenge." As the referee notes, "these assertions could not have been made *unless* [Bailey] had seen the January 12 order." Further, as to the January 25, 1996, order, it was served upon Bailey by "fax transmission, United States mail, and personally by the U.S. Marshal's Service pursuant to the very terms of the order." Based on these factual findings, the referee found Bailey guilty of violating Rules Regulating the Florida Bar 3–4.3, 4–8.4(b), 4–8.4(c), and 4–3.3(a)(1) (lawyer shall not knowingly make a false statement of material fact or law to a tribunal).

Florida Bar, 803 So.2d at 688 (alteration in original).

21 Bailey testified before the single justice:

Q. Is it your testimony that you did not read Exhibit 26 [the January 12 order] until February [2], 1996?

A. It was never in front of me. I certainly would have read it if it had been, but I thought I knew what was in it. It—I must hasten to add that certainly was substandard performance on my part. I should have made it my business to read the letter and not assume anything, to read the order. And I just didn't do that.

....

Q. Mr. Bailey, is it fair to say that you have testified previously that you did not see Exhibit 27 [the January 25 order] until February 2nd, 1996?

A. That's the date on which it was shown to me by Mr. Zuckerman, and that is what I have testified to. I am not testifying that I was unaware of its contents until that date.

Q. And your testimony is that February 2nd, 1996, was the first time that you saw Exhibit 27?

A. The first time it was physically in my presence, that's correct.

22 Bailey testified before the single justice: “And I think technically it was after midnight on February 2nd when I first saw [the orders]. But I knew what was in the order. I'm not backing away from that.”

23 The Florida court explained:

> Count V of the Bar's complaint charged Bailey with self-dealing in the course of his representation of Duboc. The referee found that Bailey's claim that he owned the stock in fee simple created a financial conflict of interest between Bailey and Duboc. “The more [Bailey] received, the less his client would produce in his column at the time of sentencing.” This finding refers to the fact that under the plea agreement, it was in Duboc's interest to maximize the amount of assets he forfeited to the United States Government in hopes of receiving a reduced sentence, and that for Bailey to claim entitlement to the appreciation of the stock would be directly contrary to the interests of his client. The referee concluded that Bailey's claim of entitlement to the stock was in no way consistent with the premise that ultimate approval and payment of fees rested with Judge Paul.
>
> The referee further found that Bailey used information relating to his representation of Duboc to the disadvantage of his client. The referee found that Bailey managed one of the French properties to his own personal benefit by procrastinating in his efforts to sell the property. The referee ultimately concluded that Bailey had engaged in self-dealing, and therefore violated Rules Regulating the Florida Bar 4–1.7(b) (lawyer shall not represent a client if lawyer's exercise of independent professional judgment may be materially limited by the lawyer's own interest), 4–1.8(a) (lawyer shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client), and 4–1.8(b) (lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation).

Florida Bar, 803 So.2d at 688–89.

24 *See* Bailey's testimony before the single justice *supra* n. 16.

25 Bailey testified before the Board:

> [BOARD]: And did you not see it as a conflict at the time to retain the increase in value of the stock when that could have been put to your client's benefit by producing that to the Government which might have had a direct impact on his sentencing?
>
> [BAILEY]: I didn't see it as a conflict at the time. He had given them 30 million; I was trying to give them another 35 from the French properties. I had been offered cash and should have taken it and we wouldn't be here, and it was a mistake not to clarify from the outset where any profits would go.
>
> [BOARD]: In retrospect, do you see that as a conflict?
>
> [BAILEY]: Oh, certainly, a bad conflict.
>
> [BOARD]: Yeah, and had you not made a—taken the position that you were entitled to that increase in value but rather had turned it over to the Government, then that may have had an impact on proceedings at that point in time in your client's benefit?
>
> [BAILEY]: Well, in retrospect, sir, I should have sold the stock very quickly and turned it into cash and avoided this issue. The reason the stock was given to me was because the Government felt they had to sell it in a block, and this little company might have croaked; more important, they had agreed to give me 3.5 million in cash. It was in the same account in Luxembourg and they asked me to take the stock. I never should have done it. When I did it, I should have sold it as quickly as I could and given the balance, if it was more than 3.5, the agreed amount, to whoever the Government told me to.

26 Bailey testified before the single justice:

> Q. The trial judge who presided over your disbarment proceeding found that you deliberately procrastinated with respect to the sale of Le Belvoire so that you could enjoy it, is that correct?
>
> A. Well, with all due respect to Referee Ellis, she was in error. I wrote a letter saying I was in no hurry to sell it because we were being offered crumbs, and it was a ploy to tell the marketplace to stop offering crumbs.

27 The Florida Supreme Court explained:

> Count VII of the Bar's complaint charged Bailey with ex parte communications, self-dealing, and disclosure of confidential information. In connection with this count, the referee found that on May 17, 1994, Duboc appeared before Judge Paul and entered a plea and cooperation agreement. Duboc pled guilty to counts II and III of the indictment. The referee found that the only way Duboc would get a reduced sentence was if Judge Paul was convinced that Duboc had completely and totally cooperated and had forfeited all of his assets to the United States. On January 4, 1996, Bailey wrote a letter to Judge Paul stating, “*I have sent no copies of this letter to anyone,* since I believe its distribution is within Your Honor's sound discretion.” (Emphasis added.) This letter contains an express admission that it was ex parte. In this ex parte letter to Judge Paul, Bailey stated that: (1) Duboc pled guilty because

he had no defense due to the strength of the case, (2) Duboc chose this course because it was his only option, not in a spirit of remorse or cooperation, (3) Duboc was a "multimillionaire druggie," (4) by consulting with other counsel, Duboc was no longer acting in the spirit of cooperation, and (5) Duboc's new defense team had interests contrary to those of his client and the court. Bailey sent a second letter to Judge Paul on January 21, 1996, a copy of which was sent to the U.S. Attorney's Office, threatening to seek an order to invade the attorney-client privilege in an attempt to defeat Duboc's position that the stock was held in trust.

The referee found that both of Bailey's letters were sent to compromise Duboc before the sentencing judge and to protect Bailey's interest and control of Duboc's and the U.S. Government's money. The referee recommended that Bailey be found guilty of violating Rules Regulating the Florida Bar 4–1.6(a) (lawyer shall not reveal information relating to representation of a client), 4–1.8(a), 4–1.8(b), 4–3.5(a) (lawyer shall not seek to influence a judge), 4–3.5(b) (in an adversary proceeding, lawyer shall not communicate as to the merits of the cause with a judge).

Florida Bar, 803 So.2d at 689.

28 Bailey testified before the single justice:

A. But I was very concerned about Uscinski [Duboc's new counsel] and his representation of DuBoc. I thought it would not go well. And so quite improperly I wrote a letter to Judge Paul, because I could not get down to see him personally, and tried to warn him that things might not go very well. And it was kind of a you should keep your hands high. And in one paragraph of that letter I used language which I thought he would interpret as very serious language. But he never read the letter, he says.

In reflection, without question I should have consulted someone, and preferably, I think, a retired judge, because I had access to some, to find out what, if any, would be a proper method to notify a judge ex parte of a situation that I thought should be of his concern. I consulted nobody. I simply wrote the letter.

Bailey further testified before the single justice:

Q. Mr. Bailey, when you sent this letter, did you understand you were engaging in unethical conduct?

A. If I'd stopped and thought about it, I guess I would have. I would certainly agree now that it was unethical conduct, improper, unwise, and a knee-jerk reaction at a time when I was totally focused on a different case. And I make no excuses for having that transgression.

29 Bailey testified before the single justice:

Q. Mr. Bailey, do you—do you stand by your testimony that the reason you wrote [the ex parte letter] was to alert Judge Paul to a bribe?

A. No. The reason I wrote Exhibit 25 was to alert him to a serious condition which I planned to tell him might involve an attempt to bribe him, but he never read the letter. We never had that conversation.

Q. Because it's fair to say that Exhibit 25 doesn't use the word "bribe," agreed?

A. It does not use the word "bribe," but if you ascribe the plain meaning to seclusion and clear watershed, I think you get the idea that something improper is in the wind. That's all I was trying to say.

30 The relevant excerpt from this ex parte letter stated:

Not without some pride in authorship, I believe that I set Mr. Duboc on a course which—if assiduously followed—would have caused his release at the earliest possible date, whatever Your Honor might have determined that to be. It is my fervent wish that if this noble purpose is to be confounded by lawyers who have some other agenda in seclusion, a clear watershed be documented at this juncture of the case.

31 Bailey testified before the single justice:

Q. And it's fair to say the letter disparaged your client, Mr. DuBoc, didn't it?

A. No.

Q. The letter referred to him as a multi-millionaire druggy?

A. No, sir. And that's totally unfair. In quotes I said very specifically every lawyer around sees him as a multi-millionaire druggy and they're all giving him advice and it's making things very difficult.

The letter stated, in pertinent part: "In short order, word got out that a 'multi-millionaire druggie' had been arrested, and the interest of many lawyers was evidently stimulated. Mr. Duboc began to consult more attorneys than I can count—which he had every right to do—and was given advice by many that he should have gone to jury verdict."

32 The letter stated, in pertinent part:

The central purpose of this letter is to alert the Court to the fact that—as never before in my experience—Mr. Duboc's foray into the thicket of legal advice has served him badly in many instances. Without pointing the finger at specific attorneys, suffice it to say that Mr. Duboc was at one time urged to help set up a drug offense so that he could disclose it to the government and win "brownie points" for sentencing purposes. On two other occasions Mr. Duboc

was counseled to "hold back" information from Special Agent Carl Lilley and others connected to the prosecution, in order to have "a little something left" to offer in exchange for a Rule 35 motion by the government. A failure to be totally forthcoming during his debriefings would of course have been in total violation of his plea agreement, something I'm sure Mr. Duboc did not comprehend when he received and acted upon this advice.

Footnote 1 of the letter further stated: "I wish to make it very clear that none of these matters represents an incursion upon the attorney-client privilege. Each was known to the government before it was disclosed to me."

33 Bailey testified before the single justice:

Q. Mr. Bailey, did you tell Judge Paul that your client had violated the plea agreement on page 2 of your letter? ... The last full paragraph that begins, A failure to be totally forthcoming during his debriefings would, of course, have been in total violation of his plea agreement, something I'm sure Mr. DuBoc did not comprehend when he received and acted upon this advice.

A. Yes. I was not accusing Mr. DuBoc of anything. I said the two lawyers were deliberately giving him legal advice which was totally improper. He had pledged total cooperation and total transparency prior to his plea agreement. And these two fellows who were not his lawyers were advising him to hold back information. And I said I don't think DuBoc realizes that that is a flat violation of his plea agreement, and that's why I'm concerned about his representation.

Q. Mr. Bailey, isn't it fair to say that you told Judge Paul that, in fact, your client had violated the plea agreement?

A. I don't think that's what the words say, but—

Q. All right.

A. —without sounding too lawyer-like, may I not suggest that the words speak for themselves. I think I'm telling the judge that he's getting bad advice, and if he acts on it, will be a violation of the plea agreement. I don't think I told the judge that he is withholding the evidence.

But I think you ought to, in fairness, read Footnote 1, which says, I wish to make it clear that none of these matters represents an incursion on the attorney/client privilege. Each was known to the government before it was disclosed to me. And by that I meant they told me about it.

34 Bailey testified before the single justice:

Q. Mr. Bailey, it's fair to say that you dispute the legitimacy of the disbarment rendered by the Florida courts?

A. I don't dispute the legitimacy because they did it, the Supreme Court refused cert, and that's the end of the road. And I think they had some grounds, in retrospect, that warranted disbarment. I do think it was kind of harsh.

35 Bailey testified before the single justice:

Q. It's fair to say, Mr. Bailey, that you told the Tax Court you believe there's an ongoing conspiracy involving the Florida bar, the Department of Justice, and the IRS to violate your constitutional rights?

A. I think I put that in a pleading, yes. Or perhaps an offer of proof.

36 The Florida Supreme Court made a similar observation: "Bailey's false testimony and disregard of Judge Paul's orders demonstrate a disturbing lack of respect for the justice system and how it operates." *Florida Bar,* 803 So.2d at 694.

37 Patrick McKenna, a private investigator who worked with Bailey, provided the following testimony regarding Bailey's life in the 1999–2000 time period during the Florida bar proceeding:

Q. Can you tell us whether at that particular time [in 1999–2000] in Lee's life, what do you recall about the circumstances of that time?

A. Well, I remember when it started, we had a case in New York that I think Judge Fishman referred to. There was a lot of stuff going on in Lee's life. I remembered we had a case in North Carolina that there were a number of lawyers involved. Lee was the lead lawyer. And I think it was right before closing argument—pardon me—that Lee got a call from the hospital that Patty [his late-wife] was unconscious and may not make it. So Lee went on and delivered a closing. I think the jury was out 13 minutes, and they acquitted our client. That night at the hotel, Lee broke down in my arms. Sorry.

It then became—I'm not an expert in grief process, but I think that became a point of anger and denial in Lee's life that Patty was going down. So and then the *McCorkle* case, she was dying during the *McCorkle* case, so I was able to, you know, kind of observe Lee, banging away, doing his job as best as he could. But in terms of personal, it was very difficult.

Debbie Elliot, Bailey's current partner, also testified as to Bailey's difficulty during the time of his wife's illness:

Q. Do you believe that Lee also intends and expects to stay here in Maine?

A. Yes, yes. He's very—I suspect, and maybe you've heard testimony about Patty dying, that was not a quick process. She was given that death sentence.... And she was told that she had three months to live with pancreatic cancer.

> And they stretched it to 13 months, but probably the last 12 months of it was not easy for anybody including her. And she would not let Lee tell anybody that she was dying. She didn't want people to feel sorry for her. She was very proud.
>
> ... Lee is a very private person. Patty was too. I mean that was not a quick process, and that was going on during all of those cases. And he was still functioning at a very high level while emotionally he was breaking. I mean, there was no way you couldn't break. I mean Patty was an incredible person.

38 After serious consideration, we must reject the dissenting opinion's assertion that this opinion engages in improper "credibility determinations of its own" regarding Bailey's testimony. *See* Dissenting Opinion ¶ 61. By so asserting, the dissenting opinion mischaracterizes what is at issue in this appeal.

> The central question here is not witness credibility or the adequacy of the single justice's factual findings, but rather whether the sum of the evidence, viewed in the light most favorable to the court's judgment, supports the single justice's findings and ultimate conclusion that Bailey recognizes the wrongfulness and seriousness of his various acts of misconduct as required by Maine Bar Rule 7.3(j)(5)(C). Our analysis turns on the sufficiency of the evidence and not on a reexamination of witness credibility. *See Me. Eye Care Assocs. P.A. v. Gorman,* 2008 ME 36, ¶ 12, 942 A.2d 707; *Taylor v. Comm'r of Mental Health & Mental Retardation,* 481 A.2d 139, 153 (Me.1984).
>
> The dissenting opinion contains no discussion of the record evidence concerning each of the six counts of ethical violations that formed the basis of Bailey's disbarment. By treating "misconduct" as used in Rule 7(j)(5) as an amorphous and general concept, the dissenting opinion avoids the tedious but necessary consideration of the sufficiency of the evidence in relation to specific acts of misconduct. As we discussed at length earlier, in his testimony before the single justice, Bailey failed to acknowledge as wrongful and serious his misconduct in commingling the Japanese stock (Count I); commingling and misappropriating client trust funds (Count II); failing to freeze assets and surrender the Biochem stock pursuant to the January 12 and 25 orders (Count III); giving false testimony before Judge Paul (Count IV); self-dealing (Count V and VII); and disclosing confidential client information (Count VII). These acts of misconduct were among those justifiably characterized by the Florida Supreme Court as "some of the most egregious rules violations possible." *Florida Bar,* 803 So.2d at 694. Bailey's failure to prove that he recognizes the wrongfulness and seriousness of these acts—acts of misconduct that are central to Bailey's disbarment—defeats his request.

39 Maine is not a jurisdiction in which an attorney who is subject to disciplinary sanctions in another jurisdiction is barred from seeking admission to practice. *Compare* M. Bar R. 7.3(h) *with* Tex.R. Governing Admission to the Bar IV(e)(2) (stating that an individual disciplined for professional misconduct in another jurisdiction "is deemed not to have present good moral character and fitness and is therefore ineligible to file an Application for Admission to the Texas Bar during the period of such discipline" unless the attorney has regained a license in the other jurisdiction or five years have passed). Nor does Maine have a reciprocal discipline provision similar to the type in place in Florida, which precludes admission or readmission if the in-state disbarment or disciplinary resignation is based on conduct that occurred in a foreign jurisdiction and the person has not been "readmitted in the foreign jurisdiction in which the conduct that resulted in discipline occurred." Fla. State Bar Admission R. 2–13.1.

40 *See U.S. Bank, Nat'l Ass'n v. Thomes,* 2013 ME 60, ¶ 15, 69 A.3d 411.

41 Although Bailey may not fully respect the individual adjudicators who found him to have committed ethical violations, he has by all accounts complied with the resulting orders themselves.

42 For instance, in *In re Hughes,* a single justice admitted a candidate to the Bar although she owed $400,000 in restitution after illegally diverting funds from an escrow account to cover law firm and personal expenses in another state. 608 A.2d 1220, 1220 (Me.1992); *In re Hughes,* 594 A.2d 1098, 1099 (Me.1991). Her admission was affirmed because she had been working for approximately five years as a paralegal in the Legal Division of the Maine Department of Transportation, had "supervise[d] the expenditure of large amounts of public funds," evidently without incident, and had a financial history that did not preclude a finding of good character despite her failure to make restitution. *In re Hughes,* 608 A.2d at 1220; *In re Hughes,* 594 A.2d at 1099.

EJIS-NewKirk
GC

DIRECT INDICTMENT

Clerk No. 16SC144430

FULTON SUPERIOR COURT

THE STATE OF GEORGIA

V.

MYE BROOKE BRINDLE Ct 1, 2, 3 & 4
DA #: 16DA02635
JOHN BUTTERS Ct 1, 2 & 3
DA #: 16DA02630/4113351
DAVID COHEN Ct 1, 2 & 3
DA #: 16DA02629

1 **CONSPIRACY TO COMMIT EXTORTION O.C.G.A. §16-8-16 A FELONY O.C.G.A. §16-4-8**
2 **CONSPIRACY TO COMMIT UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62 A FELONY O.C.G.A. §16-4-8**
3 **UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62**
4 **UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62**

TRUE BILL

06/17, 2016

FILED IN OFFICE
JUN 17 2016
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

Grand Jury Foreperson

PERSONID: 4113384

PAUL L. HOWARD, JR., District Attorney

The Defendant waives copy of indictment, list of witnesses, formal arraignment and pleads _____ Guilty.

Defendant

Attorney for Defendant

Assistant District Attorney

This____day of_____,_____

The Defendant waives copy of indictment, list of witnesses, formal arraignment and pleads _____ Guilty.

Defendant

Attorney for Defendant

Assistant District Attorney

This____day of_____,_____

The Defendant waives copy of indictment, list of witnesses, formal arraignment and pleads _____ Guilty.

Defendant

Attorney for Defendant

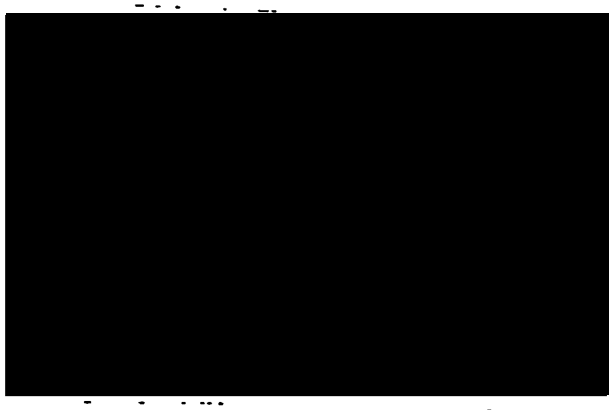
Assistant District Attorney

This____day of_____,_____

STATE OF GEORGIA, COUNTY OF FULTON

IN THE SUPERIOR COURT OF SAID COUNTY

THE GRAND JURORS, selected, chosen and sworn for the County of Fulton, to wit:



in the name and behalf of the citizens of Georgia, do charge and accuse **MYE BROOKE BRINDLE, JOHN BUTTERS, and DAVID COHEN** with the offense of **CONSPIRACY TO COMMIT A FELONY O.C.G.A. §16-4-8,** for the said accused, in the County of Fulton and State of Georgia, on the **6th day of June, 2012, did unlawfully, together, conspire to commit the crime of EXTORTION O.C.G.A. §16-8-16, and at least one of those persons did an overt act to effect the object of said conspiracy, to wit:**

OVERT ACTS

1.

On or about **the 3rd day of June, 2012, JOHN BUTTERS,** an attorney authorized to practice law in Georgia, contacted Thomas Hawkins, a private investigator, to arrange a meeting to discuss making a covert video recording of a wealthy individual without that person's knowledge or consent.

2.

On or about **the 4th day of June, 2012,** attorneys **JOHN BUTTERS and DAVID COHEN** met with private investigators Michael Deegan and Thomas Hawkins at the offices of Hawk Private Investigations ("Hawk P.I.") in **Fulton County** to discuss making a covert video recording of a wealthy person inside his residence without that person's knowledge or consent. **BUTTERS and COHEN** did not reveal the name of the wealthy person.

3.

At the conclusion of this meeting, Michael Deegan and Thomas Hawkins agreed to help **JOHN BUTTERS and DAVID COHEN** purchase the spy camera even after expressly stating to **BUTTERS and COHEN** that it would be illegal to covertly record someone in their residence without that person's knowledge or consent.

4.

On or about **the 6th day of June, 2012,** attorneys **JOHN BUTTERS and DAVID COHEN** met with investigator Michael Deegan a second time at the offices of Hawk P.I. in **Fulton County.** Accompanying **BUTTERS and COHEN** to this meeting was a person they identified as their client "Sam" and another person they identified as "Sam's mother." The purpose of this meeting was to further discuss the making of a covert video recording of a wealthy individual without that person's knowledge or consent.

5.

At the conclusion of the meeting at the offices of Hawk P.I. in **Fulton County, DAVID COHEN** purchased a spy camera made to look like a cell phone and designed to create covert video recordings.

6.

On or about **the 11th day of June, 2012,** Michael Deegan delivered the spy camera to **MYE BRINDLE,** the person previously identified as "Sam," and showed her how to use it.

7.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped the victim, later identified as **JOE ROGERS,** without his knowledge or consent, naked in the bathroom of his residence at 3303 Chatham Road in **Fulton County.**

8.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped **JOE ROGERS,** without his knowledge or consent, naked in the bedroom of his residence at 3303 Chatham Road in **Fulton County.**

9.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped a sexual encounter between her and **JOE ROGERS,** without his knowledge or consent, which took place in the bedroom of his residence on 3303 Chatham Road in **Fulton County.**

10.

On or about **the 22nd day of June, 2012, MYE BRINDLE** delivered the spy camera and the video recordings referenced in Overt Acts 7 through 9 to Michael Deegan.

11.

On or about **the 22nd day of June, 2012,** Michael Deegan had the video recording made by **MYE BRINDLE** of **JOE ROGERS** on June 20, 2012 placed on DVD(s) and then delivered the DVD(s) to **DAVID COHEN** in Marietta, Georgia.

12.

On or about the 16th day of July, 2012, DAVID COHEN sent a letter to **JOE ROGERS** threatening a lawsuit on behalf of **MYE BRINDLE.** Said letter stated that there were

"[n]umerous audio and video recordings" of sexual harassment and abuse by **ROGERS** upon **BRINDLE**. This letter sought to settle the matter before public litigation so that Joe Rogers may avoid potential "media attention ... intrusive governmental investigations, Department of Justice, Attorneys General or SEC involvement, as well as civil and criminal charges ...."

13.

On or about **the 2nd day of August, 2012, JOHN BUTTERS, DAVID COHEN,** and Hylton Dupree, attorneys for **MYE BRINDLE** met with Robert Ingram and Jeffrey Daxe, attorneys for **JOE ROGERS,** to discuss the claims listed in the July 16, 2012 letter addressed to **ROGERS. COHEN** played an edited video of the sexual encounter that was secretly recorded by **MYE BRINDLE** on June 20, 2012, in the bedroom of Joe Rogers' residence, without his knowledge or consent, at 3303 Chatham Road in **Fulton County. BUTTERS** informed Robert Ingram and Jeffrey Daxe that **MYE BRINDLE** wanted "millions" of dollars to settle her claim.

14.

On or about **the 2nd day of August, 2012, DAVID COHEN** told attorneys Robert Ingram and Jeffrey Daxe that he possessed videos of other sexual encounters between **JOE ROGERS** and **MYE BRINDLE.** Said statements made by **COHEN** furthered the extortion plot by asserting that there was another embarrassing video of **ROGERS,** which would tend to subject **ROGERS** to even more contempt and ridicule.

15.

On or about **the 14th day of September, 2012,** mediation was held in which, **JOHN BUTTERS, DAVID COHEN,** and Hylton Dupree asked for twelve million dollars to settle **MYE BRINDLE'S** claims which they argued were supported by the June 20, 2012 video of **JOE ROGERS** taken without his knowledge or consent.

16.

On or about **the 19th day of September, 2012, DAVID COHEN** filed a civil lawsuit in **Fulton County** on behalf of **MYE BRINDLE,** which stated that **BRINDLE** "made audio and video recordings of some of the incidents of sexual harassment and battery" which occurred in **Fulton County** and at Sea Island in Glynn County, Georgia.

17.

On or about **midnight of the 28th day of September, 2012, MYE BRINDLE** and one of her attorneys went to the Atlanta Police Department, hours before a court order sealing the record in Cobb County took effect, to report that **JOE ROGERS** physically forced himself sexually upon **BRINDLE** on numerous occasions.

18.

On or about **the 9th day of October, 2012,** the Honorable Judge Susan Forsling of Fulton County State Court, questioned **DAVID COHEN** during a hearing about the existence of another covert videotape of **JOE ROGERS** and **MYE BRINDLE** engaged in a sexual encounter. **COHEN** responded that **ROGERS** was "[p]artially naked" in the videotape. Said statements made by **COHEN** furthered the extortion plot by asserting that there was another embarrassing video of **ROGERS,** which would tend to subject **ROGERS** to even more contempt and ridicule.

19.

On or about **the 24th day of October, 2012, JOHN BUTTERS, DAVID COHEN,** and **MYE BRINDLE** served discovery requests on **JOE ROGERS** asking him to admit that a particular video recording labeled as "Exhibit 1 hereto is a true and correct video recording of a sexual encounter involving **ROGERS** and **BRINDLE** at the Roger's[sic] Sea Island residence." Said request was made by **BUTTERS** and **COHEN** to further the extortion plot by asserting that there was another embarrassing video of **ROGERS**, which would tend to subject **ROGERS** to even more contempt and ridicule.

Said offense in the County of Fulton and State of Georgia –contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT 2 of 4

and the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, do charge and accuse **MYE BROOKE BRINDLE, JOHN BUTTERS, and DAVID COHEN** with the offense of **CONSPIRACY TO COMMIT A FELONY O.C.G.A. §16-4-8,** for the said accused, in the County of Fulton and State of Georgia, on the **20th day of June, 2012, did unlawfully, together, conspire to commit the crime of UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62, and at least one of those persons did an overt act to effect the object of said conspiracy, to wit:**

OVERT ACTS

1.

On or about **the 3rd day of June, 2012, JOHN BUTTERS,** an attorney authorized to practice law in Georgia contacted Thomas Hawkins, a private investigator, to arrange a meeting to discuss making a covert video recording of a wealthy individual without that person's knowledge or consent.

2.

On or about **the 4th day of June, 2012,** attorneys **JOHN BUTTERS and DAVID COHEN** met with private investigators Michael Deegan and Thomas Hawkins at the offices of Hawk Private Investigations ("Hawk P.I.") in **Fulton County** to discuss making a covert video recording of a wealthy person inside his residence without that person's knowledge or consent. **BUTTERS and COHEN** did not reveal the name of the wealthy person.

3.

At the conclusion of this meeting, Michael Deegan and Thomas Hawkins agreed to help **JOHN BUTTERS and DAVID COHEN** purchase the spy camera even after expressly stating to **BUTTERS and COHEN** that it would be illegal to covertly record someone in their residence without that person's knowledge or consent.

4.

On or about **the 6th day of June, 2012,** attorneys **JOHN BUTTERS and DAVID COHEN** met with investigator Michael Deegan a second time at the offices of Hawk P.I. in **Fulton County.** Accompanying **BUTTERS and COHEN** to this meeting was a person they identified as their client "Sam" and another person they identified as "Sam's mother". The purpose of this meeting was to further discuss the making of a covert video recording of a wealthy individual without that person's knowledge or consent.

5.

At the conclusion of the meeting at the offices of Hawk P.I. in **Fulton County, DAVID COHEN** purchased a spy camera made to look like a cell phone and designed to create covert video recordings.

6.

On or about **the 11th day of June, 2012,** Michael Deegan delivered the spy camera to **MYE BRINDLE,** the person previously identified as "Sam," and showed her how to use it.

7.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped the victim, later identified as **JOE ROGERS,** without his knowledge or consent, naked in the bathroom of his residence at 3303 Chatham Road in **Fulton County.**

8.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped **JOE ROGERS,** without his knowledge or consent, naked in the bedroom of his residence at 3303 Chatham Road in **Fulton County.**

9.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped a sexual encounter between her and **JOE ROGERS,** without his knowledge or consent, which took place in the bedroom of his residence on 3303 Chatham Road in **Fulton County.**

10.

On or about **the 22nd day of June, 2012, MYE BRINDLE** delivered the spy camera and the video recordings referenced in Overt Acts 7 through 9 to Michael Deegan.

11.

On or about **the 22nd day of June, 2012,** Michael Deegan had the video recording made by **MYE BRINDLE** of **JOE ROGERS** on June 20, 2012 placed on DVD(s) and then delivered the DVD(s) to **DAVID COHEN** in Marietta, Georgia.

12.

On or about the 16th day of July, 2012, DAVID COHEN sent a letter to **JOE ROGERS** threatening a lawsuit on behalf of **MYE BRINDLE.** Said letter stated that there were "[n]umerous audio and video recordings" of sexual harassment and abuse by **ROGERS** upon **BRINDLE.** This letter sought to settle the matter before public litigation so that Joe Rogers may

avoid potential "media attention ... intrusive governmental investigations, Department of Justice, Attorneys General or SEC involvement, as well as civil and criminal charges ...."

13.

On or about **the 2ND day of August, 2012, JOHN BUTTERS, DAVID COHEN,** and Hylton Dupree, attorneys for **MYE BRINDLE** met with Robert Ingram, and Jeffrey Daxe, attorneys for **JOE ROGERS** to discuss the claims listed in the July 16, 2012 letter addressed to **JOE ROGERS. DAVID COHEN** played an edited video of the sexual encounter that was secretly recorded by **MYE BRINDLE** on June 20, 2012, in the bedroom of Joe Rogers' residence, without his knowledge and consent, at 3303 Chatham Road in **Fulton County.** Further, Robert Ingram and Jeffrey Daxe were given a copy of the June 20, 2012 video taken by **MYE BRINDLE** of the naked **JOE ROGERS** by **JOHN BUTTERS** and **DAVID COHEN.**

Said offense in the County of Fulton and State of Georgia –contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT 3 of 4

and the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, do charge and accuse **MYE BROOKE BRINDLE, JOHN BUTTERS, and DAVID COHEN** with the offense of **UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62,** for the said accused, in the County of Fulton and State of Georgia, on the **20th day of June, 2012, through the use of a SPY CAMERA, a device, without the consent of all persons observed, did unlawfully record the activities of JOE ROGERS which occurred at 3303 CHATHAM RD, ATLANTA, GA 30305, a private place, out of the public view** -contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT 4 of 4

and the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, do charge and accuse **MYE BROOKE BRINDLE** with the offense of **UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62,** for the said accused, in the County of Fulton and State of Georgia, on the **20th day of June, 2012, through the use of a SPY CAMERA, a device, without the consent of all persons observed, did unlawfully record the activities of KATHERINE MARIE MAYNARD which occurred at 3303 CHATHAM RD, ATLANTA, GA 30305, a private place, out of the public view** -contrary to the laws of said State, the good order, peace and dignity thereof.

PAUL L. HOWARD, JR., District Attorney

Related Clerk No:

Complaint #:

Defendant	DA #	Booking	Race	Sex	Birthdate	OTN	Agency
BRINDLE, MYE BROOKE	16DA02635						
BUTTERS, JOHN	16DA02630						
COHEN, DAVID	16DA02629						

WITNESS LIST

Cameron Crandall
136 Pryor ST
Atlanta GA 30303

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

JOE ROGERS, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DAVID M. COHEN, COMPLEX LAW GROUP, LLC, D.M. COHEN, INC., HYLTON B. DUPREE, JR., DUPREE & KIMBROUGH LLP, HYLTON B. DUPREE, JR., P.C., JOHN C. BUTTERS, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, ABC COMPANY 1, ABC COMPANY 2, ABC COMPANY 3, ABC COMPANY 4 AND ABC COMPANY 5,	)	CIVIL ACTION NO.: 14-1-4143-53
	)	
	)	JURY TRIAL DEMANDED
Defendants.	)	

COMPLAINT

Plaintiff Joe Rogers, Jr. ("Plaintiff" or "Rogers") hereby files his Complaint and shows the Court as follows:

THE PARTIES

1.

Plaintiff is an individual and is a citizen of Georgia.

2.

Defendant David M. Cohen ("Cohen") is an individual who resides in Cobb County, Georgia. Service may be made on Cohen by personally serving him at 40 Powder Springs Street, Marietta, Georgia 30064. Cohen is an attorney licensed to practice law in Georgia.

3.

Defendant Complex Law Group, LLC ("Complex Law Group") is a limited liability company organized and existing under the laws of the State of Georgia and its principal place of business in Georgia is located at 40 Powder Springs Street, Marietta, Georgia, 30064. Complex Law Group may be served through its registered agent, Charles M. Cushing, Jr. at 191 Peachtree Street, Atlanta, Georgia 30303. Complex Law Group is a law firm, and Cohen manages and controls its operations.

4.

Defendant D.M. Cohen, Inc. ("Cohen, Inc.") is a corporation organized and existing under the laws of the State of Georgia with its principal place located at 40 Powder Springs Street, Marietta, Georgia 30064. Cohen, Inc. uses the trade name "Complex Law Group, LLC", and represents that the nature of its business is the practice of law. Cohen is the President of Cohen, Inc. and controls its operations. Cohen, Inc. may be served by serving Cohen at 40 Powder Springs Street, Marietta, Georgia 30064.

5.

Defendant Hylton B. Dupree, Jr. ("Dupree") is an individual who resides in Cobb County, Georgia. Service may be made upon Dupree by personally serving him at 49 Green Street, Marietta, Georgia 30061. Dupree is an attorney licensed to practice law in Georgia.

6.

Defendant Dupree & Kimbrough LLP holds itself out as a limited liability partnership with its principal place of business at 49 Green Street, Marietta, Georgia, 30061. Dupree & Kimbrough may be served by serving Dupree at the above-referenced address. Dupree &

Kimbrough LLP is a law firm, of which Dupree is a named partner with substantial control over its operations.

7.

Defendant Hylton B. Dupree, Jr., P.C. ("Dupree PC") is an entity which has its principal place of business at 49 Green Street, Marietta, Georgia 30061. Dupree PC may be served by serving Dupree at the above-referenced address. The nature of Dupree PC's business is the providing of legal services, and Dupree controls its operations.

8.

Defendant John C. Butters ("Butters") is an individual who resides in Cobb County, Georgia. Service may be made upon Butters by personally serving him at 40 Powder Springs Street, Marietta, Georgia 30064. Butters is an attorney licensed to practice law in Georgia.

9.

Defendants John Doe 1, John Doe 2, John Doe 3, John Doe 4 and John Doe 5 are unknown individuals who conspired with the other Defendants and engaged in the wrongful conduct described herein. One unknown individual is the private investigator who provided the illegal spy camera at issue and worked with other Defendants in the making of an illegal video recording. After Plaintiff unearths the identity of the John Doe Defendants, this pleading will be amended to reflect their names and these Defendants will be served.

10.

ABC Company 1, ABC Company 2, ABC Company 3, ABC Company 4, and ABC Company 5 are unknown corporate entities who conspired with and participated in the wrongful conduct described herein. After Plaintiff unearths the identity of the ABC Company Defendants, this pleading will be amended to reflect their names and these Defendants will be served.

JURISDICTION AND VENUE

11.

Because Defendants conspired and worked with one another to commit and committed tortious acts in Cobb County, Georgia, thereby causing injury and giving rise to the causes of action set forth herein, this Court has jurisdiction over each of the Defendants. Venue is also proper in this Court with respect to each of the Defendants. Several Defendants, including many of the principal actors, reside in Cobb County. Substantial relief is sought against the Defendants residing in Cobb County, and Defendants are co-conspirators, joint tortfeasors, and joint actors.

FACTUAL BACKGROUND

12.

From approximately May 2003 to January 2009, Mye Brindle ("Brindle") provided housekeeping services at Rogers' Residence. During this time period, Brindle, who was employed by others, engaged in consensual sexual activity with Rogers. On numerous occasions, Brindle would initiate the sexual activity.

13.

When Brindle stopped providing the housekeeping services in January 2009, the consensual sexual activity between Rogers and Brindle also ended at that time.

14.

In October 2009, Rogers contacted Brindle to determine if she would be interested in interviewing for a house manager position. Brindle interviewed for and was offered the position, which she accepted.

15.

At the time she accepted the position, Brindle was an employee of a company known as "The Balancing Act", which was Brindle's mother's business. Brindle was placed at the Rogers' home as the house manager through The Balancing Act's employee leasing program.

16.

After Brindle began working again in Rogers' residence, the consensual sexual activity resumed.

17.

In late 2011 and early 2012, Brindle and her mother began experiencing significant financial distress, and Brindle's work performance deteriorated.

18.

When Rogers addressed the financial issues with Brindle, Brindle became upset. Thereafter, Brindle decided that she would record her sexual encounters with Rogers so she could use the recordings and threats of public disclosure in an attempt to obtain money from Rogers.

19.

In 2012, without Rogers' knowledge or consent, Brindle began recording certain of their sexual encounters.

20.

Without Rogers' knowledge or consent, Brindle also took towels which had been used during the sexual encounters.

21.

In or around late spring 2012, Brindle approached Defendants about representing and assisting her in attempting to extract money from Rogers.

22.

On or around June 6, 2012, Brindle formally engaged Defendants to represent her.

23.

Brindle provided Defendants with recordings and stolen towels. Recognizing that there was no evidence to support any legal claims, Defendants designed a scheme and conspired to extort money from Rogers.

24.

The scheme designed by Defendants would include obtaining evidence via illegal means, misrepresenting the existence of evidence, filing false police reports if necessary, threatening the public disclosure of the sexual encounters between Rogers and Brindle, demanding an exorbitant sum from Rogers, and, if necessary, causing the public disclosure of the sexual relationship to pressure Rogers into meeting their demands.

25.

As part of their scheme, Defendants decided that a video clearly depicting the sexual encounters would enable them to force Rogers to pay exorbitant sums under the threat that they would disclose publicly the sexual encounters which had occurred between Brindle and Rogers.

26.

Defendants convinced Brindle to make a video of her sexual activity with Rogers without his knowledge or consent, and advised her on how to obtain this illegal evidence.

27.

Defendants arranged for a meeting between Brindle and a private investigator so that the investigator could provide to her an illegal spy camera and instruct her on how to make the video.

28.

A meeting took place between all or some of the Defendants, Brindle, and the private investigator. At this meeting the private investigator provided Brindle with a video recorder which was disguised as a cell phone.

29.

The possession of the video recording device (*i.e.*, an illegal eavesdropping device) provided by the private investigator to Brindle at Defendants' direction is a violation of O.C.G.A. § 16-11-63.

30.

On June 20, 2012, at the direction of Defendants, Brindle came to work at the Rogers' residence equipped with the illegal spy camera.

31.

After Rogers' wife left the house, Brindle entered Rogers' bathroom, and began filming him as he shaved without clothes.

32.

Rogers asked Brindle to adjust his back, and Rogers laid down on the bed in his bedroom. Brindle positioned the illegal spy camera to capture the activity and continued recording. After Brindle adjusted Rogers' back, Brindle and Rogers engaged in a consensual sex act which was recorded by the illegal spy camera.

33.

Brindle provided Defendants with the illegal spy camera and the video recording.

34.

On June 29, 2012, Brindle left a resignation letter for Rogers resigning her position.

35.

By making the video recording without Rogers' knowledge and consent, Brindle and Defendants violated O.C.G.A. § 16-11-62.

36.

On information and belief, at Defendants' direction, without Rogers' knowledge or consent, Brindle took sensitive and confidential financial information from Rogers' residence so that Defendants could use such information as part of their scheme.

37.

On July 16, 2012, armed with the illegal video tape, Defendants delivered an extortion letter to Rogers signed by Cohen. Attached hereto as Exhibit A is a true and correct copy of the July 16, 2012 extortion letter.

38.

The July 16, 2012 extortion letter states as follows:

> This letter is written on behalf of my client Ms. Mye Brindle. The long history of unwelcome sexual demands and other sexual harassment and abuse toward Ms. Brindle as a condition of her employment is something for which you are well familiar. Thus, I do not intend to belabor those points. The fact that the actions were committed is undeniable and well documented by numerous audio and video recordings of the acts, as well as other evidence, including your seminal fluid and DNA. It is also clear that Ms. Brindle is not alone in having been subjected to your unlawful predatory sexual conduct during the years of her employment. Ms. Brindle is prepared to proceed with a lawsuit, including filing a Charge of Discrimination on the basis of sex

with the Atlanta Regional Office of the Equal Employment Opportunity Commission, due to the sexual abuse and emotional distress you have caused her to suffer over many years. Before going down that path we wanted to provide you with the opportunity to review the issues set forth herein and let us know if you would prefer to attempt to resolve the matter outside of litigation.

Additionally, the facts and circumstances here raise serious questions, at a minimum, as to your continued ability to serve in several public director positions. There is no light under which your actions, including years of adultery and sexual abuse of employees, could be considered appropriate for a public figure role model.

It is my experience that these sensitive type matters involving claims of a sexual nature are always best resolved early and outside of public litigation. I have been involved in numerous matters where defendants engaged in a scorched earth strategy of counteraccusations, denial, attempted delay, obfuscation and refusal to address the core issues promptly and properly. Never have I seen that strategy successful. Whether through their own arrogance or "filtered" information and poor advice of defense counsel who seemed more interested in billing and protracted litigation than the best interests of their clients and that of their clients' families, the results were ultimately the same.

In virtually all of those situations, the documents, facts, witnesses and other matters that came to light through protracted litigation and media attention drew other private litigation, shareholder derivative demands for the immediate removal of those individuals, intrusive governmental investigations, Department of Justice, Attorneys General or SEC involvement, as well as civil and criminal charges that resulted in disgorgement, forfeiture, lengthy incarceration periods in several instances, divorce and the destruction of families.

Ironically, all of those same defendants also eventually settled the civil cases we filed. On the other hand, I have not been involved in any matters where the same problems resulted to any defendants that promptly and fully addressed the issues prior to the initiation of litigation and public focus on the issues.

My point here is simply to attempt to convey my belief that it is in the best interest of all involved to avoid this type of protracted litigation, injurious publicity to all parties, etc.

In summary, I am writing to explore the possibility of scheduling a meeting within the next two weeks with you and/or your counsel to engage in early and substantive discussions focused on resolution of this matter, including a release of all potential claims, past and future. We would of course agree that

any meeting, including anything discussed thereat, be treated as confidential and inadmissible.

If you would like to discuss this matter before we proceed with litigation, please contact me by close of business on Monday July 23, 2012. If we do not hear from you or your counsel before then, we will move forward and assert all available claims for relief.

39.

After receiving the extortion letter, Rogers engaged Robert Ingram, Esq. ("Ingram") and Jeff Daxe, Esq. ("Daxe") with Moore Ingram Johnson & Steele, LLP to represent and advise him in relation to this matter.

40.

On August 2, 2012, after contacting Cohen, Ingram and Daxe met with Cohen, Butters and Dupree.

41.

During the August 2, 2012 meeting, Cohen represented to Ingram and Daxe that Defendants were in possession of multiple video tapes. During the meeting, Defendants showed Ingram and Daxe part of the video recording from the June 20, 2012 sexual encounter between Rogers and Brindle. The illegal video shown to Ingram and Daxe did not depict unwelcome or nonconsensual sexual activity. Ingram and Daxe requested to see the other video recordings which Defendants had represented existed. Defendants refused to show any other videos at that time, and Cohen claimed that the other videos were of poor quality.

42.

On September 14, 2012, in an effort to resolve the matter, Rogers and his counsel participated in mediation with Brindle and Defendants. However, at the mediation, consistent with their scheme, Brindle and Defendants demanded $12 million, and the mediation ended.

43.

After the mediation, litigation ensued between Brindle, who was represented by Defendants, and Rogers. Defendants' scheme continued, and their conduct during this on-going litigation is consistent with and confirms conclusively the nature of their scheme.

44.

Upon the ending of the mediation, Rogers filed an action in the Superior Court of Cobb County (Civil Action No. 12-1-8807-18 ("Cobb County Action")), seeking, among other things, to enjoin Brindle from distributing, disseminating, broadcasting, or otherwise using any recordings which had been made without Rogers' knowledge and consent, including the illegal June 20, 2012 video. After amending his Complaint in the Cobb County Action, Rogers filed a motion to seal the record in that action.

45.

Although Ingram, who represents Rogers in the Cobb County Action, told Defendants that any claims by Brindle would be compulsory counterclaims in the Cobb County Action, on September 19, 2012, Defendants, on behalf of Brindle, filed a Complaint in the State Court of Fulton County, (Civil Action No. 12-EV-015804 ("Fulton County Action")), wherein Defendants and Brindle disclosed in the public record her sexual relationship with Rogers and made frivolous claims related thereto.

46.

On September 24, 2012, the Court in the Cobb County Action heard Rogers' Motion to Seal Record. Thereafter, Brindle and Rogers negotiated a consent order which provided, in part, that the record would be sealed in the Cobb County Action and included a gag order precluding the parties and counsel from discussing the matter.

47.

On September 28, 2012, counsel for Brindle and Rogers submitted the consent order to the Cobb County court which entered it. However, unbeknownst to Rogers and his counsel, after the parties had agreed to the consent order but prior to its entry and on the night before it was submitted to the Court, Cohen took Brindle to the Atlanta Police Department. At approximately 12:15am on September 28, 2012 shortly after midnight, Brindle at the direction of Cohen and with his assistance made a false police report with the Atlanta Police Department wherein she recited almost verbatim the allegations from her Fulton County Complaint. Indeed, Cohen provided the Atlanta Police Department with an electronic file containing Brindle's false allegations so that it could be copied into the police report. Also at that time, the illegal video tape was shown to the Atlanta Police. Soon thereafter, the police report was leaked to members of the media.

48.

On October 5, 2012, Rogers filed a Motion to Seal the Record in the Fulton County Action. On October 8, 2012, the court in the Fulton County Action entered a Temporary Restraining Order limiting access to the record until an evidentiary hearing could be conducted. On October 9, 2012, the court in the Fulton County Action conducted an evidentiary hearing. At the evidentiary hearing, Cohen represented that he had multiple video tapes.

49.

On the record, at the conclusion of the evidentiary hearing in the Fulton County Action, the Fulton County Court granted Rogers' Motion to Seal.

50.

On October 11, 2012, Brindle voluntarily dismissed without prejudice the Fulton County Action.

51.

On October 16, 2012, the Court in the Fulton County Action entered a written Order confirming the oral ruling made on the record during the evidentiary hearing, finding that Rogers had a right to privacy in his bedroom and bathroom and finding that the video recording of Rogers violated criminal statute O.C.G.A. § 16-11-62.

52.

At or around the time that Brindle filed the Fulton County Action, Brindle's Complaint in that action was mailed to the Daily Report. On information and belief, as part of their scheme, Defendants caused Brindle's Fulton County Complaint to be mailed to the Daily Report.

53.

On October 29, 2012, in an effort to appeal the sealing of the record in the Fulton Court Action, Brindle and Defendants filed an Application for Appeal to the Georgia Supreme Court. In the Application, Defendants attached fourteen exhibits but did not file the Application or its exhibits under seal, thereby placing these documents in the public domain. The exhibits attached to the application had been sealed by order in the Fulton County Action, and one of the exhibits had also been sealed by order in the Cobb County Action. The exhibits included excerpts from the transcript of the October 9, 2012 hearing in the Fulton County Action which went into great detail concerning the subject matter at issue.

54.

On November 1, 2012, Rogers filed an Emergency Motion to Seal the case with the Supreme Court of Georgia, which granted the Motion that same day.

55.

Prior to the sealing of the case in the Georgia Supreme Court, the Georgia Supreme Court, however, e-mailed the file to a newspaper reporter for the Marietta Daily Journal. On information and belief, Defendants provided information to the newspaper reporter that the Application had been filed with the Supreme Court so the newspaper reporter could obtain the Application and publish a story about the sexual relationship between Rogers and Brindle and Brindle's related false accusations.

56.

On November 8, 2012, the Marietta Daily Journal published an article entitled "Acworth woman says CEO forced her into sex acts" containing the false allegations against Rogers which Brindle had made in her Complaint in the Fulton County Action and her Counterclaims in the Cobb County Action.

57.

As a result of the Marietta Daily Journal story, numerous news outlets published articles about Brindle's false allegations.

58.

Given that the false accusations had been widely disseminated in the media, Rogers requested the Cobb County Court unseal the case and lift the gag order so that he could respond to these accusations.

59.

On November 14, 2012, the Cobb County Court unsealed the action. After the filing of a motion for contempt, the Cobb County Court entered an Order ordering Brindle and her counsel to deposit into the registry of the Court under seal all original evidence in the form of audio and video recordings and the devices which were used to capture or create any video and audio files within their possession, custody, or control. Accordingly, the recordings are now held by the Cobb County Court under seal.

60.

Eventually, at Rogers' request, the Fulton County Court also unsealed the record in that case.

61.

As a result of Defendants' and Brindle's misconduct in the Fulton County Action, the Fulton County Court granted a motion for attorneys' fees and expenses of litigation filed by Rogers, and ordered that Brindle and Defendant Cohen pay attorney fees and litigation expenses to Rogers in the amount of $142,656.82.

62.

During the Cobb County Action, discovery disputes have arisen between the parties, necessitating the filing of a number of motions to compel by Rogers. In conjunction with Rogers' Third Motion to Compel in the Cobb County Action seeking information about the illegal recording that Defendants claim was privileged, the Court conducted a crime fraud hearing, and thereafter entered an Order granting Rogers' Motion. The Order granting Rogers' Third Motion to Compel in the Cobb County Action included findings that Brindle consented to the sexual activity reflected in the video, and that Brindle's claim that she was a victim of the

crime of sexual battery is extremely unpersuasive. The Cobb County Court further concluded that Rogers had made a *prima facia* showing that Butters' and Cohen's assistance was obtained in furtherance of the illegal activity and was closely related to it, *i.e.*, the crime fraud exception applied.

63.

In the Cobb County Action, Cohen filed an Affidavit sworn to on April 25, 2013 wherein he testifies that he was only aware of one video, the one impounded by the Court, and that he never stated that any other videos exist.

64.

Cohen's April 25, 2013 Affidavit is false.

65.

Although Defendants have repeatedly represented that there were multiple videos, they now claim that there is only one video reflecting sexual activity between Rogers and Brindle, *i.e.*, the June 20, 2012 video. Defendants have therefore knowingly made misrepresentations regarding the number of video recordings, or destroyed the other videos. Either case is further evidence of their wrongful scheme.

66.

There are currently appeals filed by Brindle in the Georgia Court of Appeals related to the Fulton County Courts' order awarding litigation expenses to Rogers, and the Cobb County Court's grant of Rogers' Third Motion to Compel.

67.

Through the design and execution of their scheme, Defendants have engaged in numerous wrongful and tortious acts and in rank bad faith.

68.

As a result of Defendants' wrongful conduct, Rogers has suffered and continues to suffer harm.

COUNT ONE:
INVASION OF PRIVACY – INTRUSION UPON SECLUSION, SOLITUDE AND PRIVATE AFFAIRS

69.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 68 of this Complaint as if fully set forth herein.

70.

Rogers has a constitutional, common law and statutory right to privacy.

71.

Rogers had a reasonable expectation of privacy in his home, and in particular, in his bathroom and bedroom.

72.

By working together and in concert to have Rogers filmed and recorded while engaging in sexual encounters in the privacy of his bedroom without his knowledge or consent, Defendants invaded Rogers' right to privacy.

73.

Defendants' secret and covert filming and recording of Rogers is offensive and objectionable to a reasonable person with ordinary sensibilities under the circumstances.

74.

By filming and recording Rogers in his home without his knowledge or consent, Defendants committed an illegal act by violating O.C.G.A. § 16-11-62. As a result of this criminal act, Defendants are liable *per se* for invasion of privacy.

75.

In invading Rogers' privacy and intruding upon his seclusion and solitude and into his private affairs, Defendants acted with a specific intent to cause harm.

76.

Defendants' invasion into Rogers' privacy and intrusion into his seclusion and solitude and into his private affairs has caused Rogers to suffer damages including mental suffering, emotional distress, and injury to his personal sensibilities and mental repose. Rogers is therefore entitled to recover compensatory damages from Defendants, including general damages, in an amount to be proven at trial.

77.

By engaging in the misconduct described above and invading Rogers' privacy, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT TWO:
INVASION OF PRIVACY – PUBLIC DISCLOSURE OF PRIVATE FACTS

78.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 77 of this Complaint as if fully set forth herein.

79.

Defendants made a public disclosure of private facts of Rogers by causing the disclosure to the public that he was having a sexual relationship with Brindle.

80.

Rogers' sexual relationship with Brindle was private, secluded, and secret.

81.

The public disclosure of the sexual relationship between Brindle and Rogers is objectionable and offensive to a reasonable person. Rogers is therefore entitled to recover compensatory damages, including general damages, in an amount to be proven at trial.

82.

By disclosing publicly private facts about Rogers, Defendants caused Rogers damages including mental suffering, emotional distress and injuries to his personal sensibility and mental repose.

83.

By engaging in the misconduct described above and invading Rogers' privacy, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT THREE:
CIVIL CONSPIRACY

84.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 83 of this Complaint as if fully set forth herein.

85.

Beginning at or around June 2012 and continuing thereafter, Defendants agreed, schemed, combined, and conspired to commit the acts described herein by unlawful means, including but not limited to violation of Title 16 of the Georgia Code, invasion of privacy, intentional infliction of emotional distress, breach of confidential relationship, and theft.

86.

In furtherance of the above described agreement, scheme, and conspiracy, Defendants committed unlawful and overt acts described herein.

87.

The above mentioned overt acts committed in furtherance of the above described agreement, scheme, and conspiracy caused injury and substantial harm to Rogers. Rogers is therefore entitled to recover compensatory damages, including special and general damages, in an amount to be proven at trial.

88.

By engaging in the misconduct described above and engaging in a civil conspiracy, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT FOUR:
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

89.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 88 of this Complaint as if fully set forth herein.

90.

Defendants' illegal videotaping of Rogers and other related wrongful conduct was intentional and reckless.

91.

Defendants' scheme, including their illegal videotaping of Rogers, their attempts to extort money from him, their threats of public disclosure of his private relationship, their causing to be disclosed to the public private information and other invasions of privacy, are extreme, outrageous, and shock the conscience.

92.

As a result of Defendants' wrongful conduct, Rogers has suffered emotional distress which has been severe.

93.

As a result of their wrongful conduct, Defendants are liable for intentional infliction of emotional distress. As a result of their intentional infliction of emotional distress, Rogers is entitled to recover compensatory damages, including general damages, in an amount to be proven at trial.

94.

By engaging in the misconduct described above and intentionally inflicting emotional distress, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT FIVE:
CONSPIRACY TO VIOLATE THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

95.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 94 of this Complaint as if fully set forth herein.

96.

The Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. §§ 16-14-1, *et seq.*, prohibits a conspiracy among persons employed by or associated with any enterprise to conduct or participate in such enterprise through a pattern of racketeering activity.

97.

The association in fact of Defendants for the purpose of illegally extorting money from Rogers is an enterprise.

98.

Defendants are and were associated with the above-described enterprise.

99.

Defendants conspired to conduct or participate, directly or indirectly, in the affairs of the above-described enterprise through a pattern of racketeering activity, including, but not limited to:

(a) Illegally filming Rogers in a private place without his knowledge and consent as part of an extortion scheme;

(b) Attempting to commit theft by extortion in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-16;

(c) Possessing and using an illegal eavesdropping device as part of an extortion scheme;

(d) Filing a false police report in violation of O.C.G.A. § 16-10-26;

(e) Making false statements in violation of O.C.G.A. § 16-10-20;

(f) Attempting extortion in violation of 18 U.S.C. § 1951;

(g) Attempting to commit theft by deception in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-3;

(h) Executing and filing a false Affidavit in violation of O.C.G.A. § 16-10-70 and O.C.G.A. § 16-10-71; and

(i) Committing and attempting to commit theft by taking in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-2.

100.

Defendants in conjunction with each other and individually, committed overt acts in furtherance of the above-described conspiracy.

101.

Rogers was injured and suffered substantial harm by Defendants' overt acts committed in furtherance of the above-described conspiracy.

102.

Rogers is entitled to recover actual and compensatory damages in an amount to be proven at trial and be trebled pursuant to O.C.G.A. § 16-14-6(c).

103.

By engaging in the misconduct described above, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the

specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

104.

As a result of Defendants' violation of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 *et seq.*, Rogers is entitled to recover his attorney's fees in prosecuting his claims.

105.

Rogers is entitled to an order prohibiting Defendants from engaging in the same type of enterprise.

106.

Rogers is entitled to an order dissolving the enterprise.

COUNT SIX:
VIOLATION OF THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

107.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 106 of this Complaint as if fully set forth herein.

108.

The Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. §§ 16-14-1, *et seq.*, prohibits persons employed by or associated with any enterprise to conduct or participate in such enterprise through a pattern of racketeering activity.

109.

The association in fact of Defendants for the purpose of illegally extorting money from Rogers is an enterprise.

110.

Defendants are and were associated with the above-described enterprise.

111.

Defendants conducted and participated, directly or indirectly, in the affairs of the above-described enterprise through a pattern of racketeering activity, including, but not limited to:

(a) Illegally filming Rogers in a private place without his knowledge and consent as part of an extortion scheme;

(b) Attempting to commit theft by extortion in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-16;

(c) Possessing and using an illegal eavesdropping device as part of an extortion scheme;

(d) Filing a false police report in violation of O.C.G.A. § 16-10-26;

(e) Making false statements in violation of O.C.G.A. § 16-10-20;

(f) Attempting extortion in violation of 18 U.S.C. § 1951;

(g) Attempting to commit theft by deception in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-3;

(h) Executing and filing a false Affidavit in violation of O.C.G.A. § 16-10-70 and O.C.G.A. § 16-10-71; and

(i) Committing and attempting to commit theft by taking in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-2.

112.

Rogers was injured and suffered substantial harm by Defendants' acts committed through a pattern of racketeering activity.

113.

Rogers is entitled to recover actual and compensatory damages in an amount to be proven at trial and be trebled pursuant to O.C.G.A. § 16-14-6(c).

114.

By engaging in the misconduct described above, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

115.

As a result of Defendants' violation of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 *et seq.*, Rogers is entitled to recover his attorney's fees in prosecuting his claims.

116.

Rogers is entitled to an order prohibiting Defendants from engaging in the same type of enterprise.

117.

Rogers is entitled to an order dissolving the enterprise.

COUNT SEVEN:
AIDING AND ABETTING BREACH OF CONFIDENTIAL RELATIONSHIP

118.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 117 of this Complaint as if fully set forth herein.

119.

By virtue of their relationship, a confidential relationship existed between Brindle and Rogers which required Brindle to act in the utmost good faith and imposed upon her certain duties including a duty to disclose material facts to Rogers.

120.

By recording Rogers without his knowledge and consent, Brindle breached their confidential relationship. By, among other things, devising and attempting to execute an extortion scheme with Brindle, assisting her in the making of an illegal recording, equipping her with an illegal spy camera, encouraging her to steal personal property, and sending the extortion letter, Defendants aided and abetted Brindle's breach of confidential relationship.

121.

As a result of Defendants' aiding and abetting the breach of confidential relationship, Rogers has suffered damages in an amount to be proven at trial.

122.

By engaging in the misconduct described above and aiding and abetting breaches of a confidential relationship, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct,

Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT EIGHT: NEGLIGENCE

123.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 122 of this Complaint as if fully set forth herein.

124.

Defendants had a duty imposed by law to respect the privacy rights of others, including Rogers, and not to violate such rights.

125.

Defendants had a duty imposed by law to others, including Rogers, to not use the threat of public disclosure of private facts in an attempt to obtain money from others.

126.

Defendants had a duty imposed by law to others, including Rogers, to not cause the making of false statements to law enforcement agencies and the filing of false police reports.

127.

Defendants should have known that videoing someone in a private place while engaged in sexual activity was illegal and violated the privacy rights of such a person.

128.

Defendants should have known that threatening to disclose publicly private facts about a person violates the law.

129.

Defendants should have known that Brindle did not have any basis to allege that criminal activity had taken place.

130.

By causing a video recording to be made of Rogers engaged in sexual activity in a private place, causing private facts about Rogers to be disclosed publicly, causing Brindle to make false statements to law enforcement agencies about Rogers, and causing the filing of a false police report against Rogers, Defendants breached their duty to Rogers.

131.

By threatening to disclose to the public private facts about Rogers, Defendants breached their duty to Rogers.

132.

By violating numerous Georgia statutes, Defendants were negligent *per se*.

133.

As a proximate result of Defendants' negligence, Rogers has been damaged and is entitled to recover compensatory damages, including general damages, in an amount to be proven at trial.

134.

By engaging in the negligent conduct described above, Defendants have acted with malice, oppression, recklessness and with a conscious indifference to consequences. Accordingly, to punish, penalize and deter Defendants for their misconduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT NINE:
LITIGATION EXPENSES

135.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 134 of this Complaint as if fully set forth herein.

136.

Defendants have acted in bad faith, been stubbornly litigious, and have put Rogers through unnecessary trouble and expense.

137.

By engaging in the wrongful conduct described above, Defendants have demonstrated the requisite bad faith for recovery of litigation expenses, including attorney's fees and costs.

138.

Because Defendants have acted in bad faith, been stubbornly litigious, and put Rogers through unnecessary trouble and expense, Rogers is entitled to all litigation expenses incurred in prosecuting this action including, but not limited to, attorney's fees and costs pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Rogers respectfully requests that judgment be entered in his favor against all Defendants, jointly and severally, including but not limited to a judgment granting actual damages, statutory damages, treble damages, punitive damages, exemplary damages, attorney's fees, costs of litigation, special damages, general damages, and all other damages provided by Georgia law and for such other further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands that all claims in this Complaint that are proper for presentation to a jury be tried to a jury.

This 30th day of May, 2014.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEPHEN CHRISTOPHER DIACO,

Respondent.

_____/

Supreme Court Case
No. SC14-1052

The Florida Bar File
No. 2013-10,735 (13F)

THE FLORIDA BAR,

Complainant,

v.

ROBERT D. ADAMS,

Respondent.

_____/

Supreme Court Case
No. SC14-1054

The Florida Bar File
No. 2013-10,736 (13F)

THE FLORIDA BAR,

Complainant,

v.

ADAM ROBERT FILTHAUT,

Respondent.

_____/

Supreme Court Case
No. SC14-1056

The Florida Bar File
No. 2013-10,737 (13F)

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On June 2, 2014, The Florida Bar filed separate Complaints against the Respondents, Stephen Christopher Diaco, Esq. ("DIACO"), Robert D. Adams, Esq. ("ADAMS"), and Adam Robert Filthaut, Esq. ("FILTHAUT"). On June 4, 2014, Amended Complaints were filed against Respondents ADAMS and FILTHAUT. The Honorable W. Douglas Baird was appointed as Referee in each matter pursuant to the Supreme Court of Florida's June 4, 2014 Order and the June 10, 2014 Order of the Honorable J. Thomas McGrady, Chief Judge of the Sixth Judicial Circuit. Because the cases against the Respondents arise out of the same facts, the cases were consolidated for the purpose of discovery on July 28, 2014, and subsequently consolidated for trial. Prior to trial, the Respondents filed motions for partial summary judgment, which were denied on May 11, 2015. The trial was bifurcated, with the guilt phase conducted between May 11, 2015, and May 21, 2015, and the sanctions phase conducted on August 6-7, 2015.

During the course of these proceedings, Respondent DIACO was represented by Gregory W. Kehoe, Esq., Danielle Kemp, Esq., and Joseph A. Corsmeier, Esq. Respondent ADAMS was represented by William F. Jung, Esq.

and Respondent FILTHAUT was represented by Mark J. O'Brien, Esq. The Florida Bar was represented by Jodi A. Thompson, Esq., Sheila Tuma, Esq., and Katrina Brown, Esq. All items properly filed, including pleadings, transcripts, exhibits, and this Report, constitute the record in this case and are being forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT: TFB No. 2013-10,735 (13F); No. 2013-10,736 (13F); No. 2013-10,737 (13F)

A. Jurisdictional Statement

Respondents are, and at all times mentioned during this Investigation were, members of The Florida Bar subject to the jurisdiction and Disciplinary Rules of the Supreme Court.

B. Narrative Summary – all cases

Narrative Summary Introduction

This matter involves three members of The Florida Bar who the Referee finds, individually and through a conspiracy among themselves and others, violated the Standards of Conduct and Rules of Professional Conduct of the Rules Regulating Members of The Florida Bar. The Referee believes that in order to more easily explain the factual circumstances that were proven by clear and convincing evidence at trial, a comprehensive narrative of each of the key findings will provide a more comprehensible format. Preceding that narrative, the major participants in the events that resulted in these proceedings are identified.

Respondent DIACO is an equity partner in the law firm of Adams & Diaco, P.A., whose offices are located in the Bank of America Building in downtown Tampa, Florida. He is the brother of Joseph A. Diaco, Jr., Esq., who is also an equity partner in Adams & Diaco, P.A. Throughout this proceeding, Respondent DIACO has refused to testify, either in deposition or at trial, based on his right against self-incrimination.

Respondent ADAMS is the third equity partner in Adams & Diaco, P.A., along with the Diacos. Throughout this proceeding, Respondent ADAMS refused to answer any questions in deposition, based on his right against self-incrimination. On the morning of trial, with all discovery completed and disclosed by The Florida Bar, he chose to testify.

Respondent FILTHAUT is a non-equity partner (also referred to as an "associate") in Adams & Diaco, P.A. Throughout this proceeding, Respondent FILTHAUT has refused to testify, either in deposition or at trial, based on his right against self-incrimination.

Melissa Personius is, and at all times pertinent to this matter was, a paralegal employed by Adams & Diaco, P.A. She worked primarily for Respondent ADAMS, but was subject to the direction or authority of all the partners, be they equity or non-equity. At the time of the material events, Ms. Personius lived in Brandon, a Tampa suburb, with Kristopher Personius, her ex-husband. Ms.

Personius refused to testify at trial based on her right against self-incrimination. She gave some testimony to the Pinellas County State Attorney's Office investigators and signed a short affidavit prior to these proceedings being brought, but she claimed to have no recollection of many significant portions of the events.

Sergeant Raymond Fernandez was, at all times material to these proceedings, a Sergeant with the City of Tampa, Florida Police Department. He had been with the Department for over 18 years, of which he spent the last 15 years on the Traffic Enforcement Unit. At the time of these events, he was the commander of the Traffic Enforcement Unit, otherwise known as the DUI Squad. Sergeant Fernandez was a close personal friend of Respondent FILTHAUT. Sergeant Fernandez refused to testify at trial based on his right against self-incrimination. Before these proceedings, however, he provided deposition testimony to investigators from the Pinellas County State Attorney's Office and testified at various administrative hearings regarding both the arrest of C. Philip Campbell, Jr., Esq., and his discharge from the Tampa Police Department.

Brian Motroni, Esq., was an associate attorney with the firm of Adams & Diaco, P.A. at all times material to this matter. Mr. Motroni provided some information when he spoke with an investigating attorney for the Thirteenth Judicial Circuit Grievance Committee. At trial, Mr. Motroni refused to testify based upon his right against self-incrimination.

Charles Philip Campbell, Jr., Esq., is a partner in the law firm of Shumaker, Loop, & Kendrick whose offices are also in the Bank of America Building in downtown Tampa. At the time of all relevant events, Mr. Campbell was lead counsel in the *Schnitt v. Clem* trial before Thirteenth Circuit Judge James D. Arnold, a high profile case between two radio "shock jock" personalities. Mr. Campbell represented Todd and Michele Schnitt while Adams & Diaco represented "Bubba the Love Sponge" Clem and Bubba Radio Network. Mr. Campbell testified at trial and the Referee found him to be a credible witness.

Jonathan J. Ellis, Esq., is also a partner in Shumaker, Loop, & Kendrick, and, at all times material to this matter, co-counsel with Mr. Campbell in the *Schnitt v. Clem* litigation.

I.

Respondents DIACO, ADAMS, and FILTHAUT, members of Adams & Diaco, PA, conspired among themselves and with others to deliberately and maliciously effect the arrest of Mr. Campbell, an opposing attorney.

THURSDAY, NOVEMBER 29, 2012 – FIRST ATTEMPTED ARREST

The major events that comprise this narrative occurred between the evening of January 23, 2013, and the afternoon of January 25, 2013. An earlier event, however, puts them in perspective and reveals a pattern of intentional conduct that resulted in these proceedings. The first effort to manipulate the arrest of Mr. Campbell by members of the Adams & Diaco law firm began approximately 60

days prior to January 23, 2013, and were revealed in a deposition of Sergeant Fernandez that was taken prior to the filing of these proceedings.

On the evening of November 29, 2012, Respondent FILTHAUT called his close friend Sergeant Fernandez and said: *"There's this guy that works in my building. He's an attorney. He gets drunk all the time. He goes to Malio's and drinks it up and then he drives home drunk."* Sergeant Fernandez was given the name *"Philip Campbell."* Respondent FILTHAUT did not tell Sergeant Fernandez that Mr. Campbell was the lead opposing attorney in a five-year-old high-profile civil action being defended by Adams & Diaco.

Sergeant Fernandez, based upon the information provided by Respondent FILTHAUT, ordered Officer Michael Lyon of the Tampa Police Department DUI Squad to stakeout Malio's Steakhouse in downtown Tampa, with specific instructions to look for Mr. Campbell. Officer Lyon was given Mr. Campbell's name and a vehicle description. Mr. Campbell was not observed driving that night and no arrest was made. After 45 minutes, the surveillance was discontinued. A compilation of recorded and preserved Tampa Police Mobile Data Terminal ("MDT") text communications between the officers of the DUI Squad on the evening of November 29, 2012, further confirms the effort to look for Mr. Campbell.

Respondent ADAMS admitted during trial that he learned of the November attempt to target Mr. Campbell shortly after it occurred. There was no evidence that he admonished Respondent FILTHAUT for those actions or made any effort to prohibit similar acts in the future.

WEDNESDAY, JANUARY 23, 2013 – THE SETUP AND ARREST

The evening's events played out over a five or six hour period beginning around 5:00 p.m. on January 23, 2013. Following a day in the *Schnitt v. Clem* trial, Mr. Campbell walked from his office to Malio's Steakhouse in downtown Tampa to meet his trial partner, Mr. Ellis, for dinner and drinks.

Ms. Personius had also decided to go to Malio's for drinks after work with her friend Vanessa Fykes. They arrived at Malio's around 5:00 p.m. and had a glass of wine. After a short while, they decided to drive to the Fly Bar, a few blocks away. As they were leaving Malio's, Ms. Personius noticed that Mr. Campbell was at the bar. When Ms. Personius arrived at the Fly Bar, she contacted Respondent ADAMS and informed him that Mr. Campbell was at Malio's. Respondent ADAMS, after notifying Respondent DIACO of the information received from Ms. Personius, called her back. Following the call from Respondent ADAMS, Ms. Personius returned to Malio's.

Although she refused to testify at trial, Ms. Personius previously admitted during the State Attorney's investigation: *"I offered—I believe I offered to just go*

back if they needed, you know, anything, any other–to see maybe if he's still there. I don't know. Whatever information the police or authorities needed." She also admitted knowing that*"[t]he Police have a contact."* Sergeant Fernandez, in earlier sworn testimony, admitted that the "contact" that night was his close friend, Respondent FILTHAUT.

While Ms. Personius was returning to Malio's, Respondent ADAMS, after discussions with Respondent DIACO, called Respondent FILTHAUT to alert him that Mr. Campbell was at Malio's. As he had done two months earlier, Respondent FILTHAUT called Sergeant Fernandez to again encourage him to stakeout Malio's with the intent of arresting Mr. Campbell for Driving under the Influence. Sergeant Fernandez testified that he asked Respondent FILTHAUT, *"Is that the guy you called me about before?"* Respondent FILTHAUT acknowledged that it was and told Sergeant Fernandez, *"Hey, the attorney that's in my building, he's out drinking again at night at Malio's."* He also told Sergeant Fernandez, *"He's going to drive home again tonight drunk."* Sergeant Fernandez told Respondent FILTHAUT, *"Well, we didn't get him last time. We'll sit on him again and see what he does."* Respondent FILTHAUT again failed to tell Sergeant Fernandez that Mr. Campbell was the opposing attorney in the much-publicized and ongoing *Schnitt v. Clem* trial.

Sergeant Fernandez assigned a member of his DUI Squad, Officer Joseph Sustek, to sit outside of Malio's and look for Mr. Campbell's black BMW. Shortly after 8:00 p.m. that night, Sergeant Fernandez and another member of the DUI Squad, Officer Tim McGinnis, took up the surveillance and relieved Officer Sustek. During the evening, Sergeant Fernandez received periodic updates about what Mr. Campbell was doing inside Malio's by text or voice call from Respondent FILTHAUT.

While Sergeant Fernandez was setting up his surveillance for Mr. Campbell, Ms. Personius and Ms. Fykes had returned to Malio's. Ms. Personius took a seat at the bar next to Mr. Campbell. From about 7:00 p.m. until about 9:45 p.m., she engaged in conversation with Mr. Campbell, Mr. Ellis, and attorney Michael Trentalange. She told them that she was a paralegal working for Nathan Carney, Esq., at the firm of Trenam Kemker. She openly and obviously flirted with Mr. Campbell, encouraged him to drink, and bought him drinks herself.

While the drinking and conversation were occurring that night, Ms. Personius managed to carry on a steady series of cell phone texts and calls with each of the Respondents. For example, between 6:30 p.m. and 9:30 p.m. that night Ms. Personius either sent or received approximately 19 separate communications with Respondent FILTHAUT. During that same period, she had approximately 17 communications with Respondent ADAMS, and approximately 11 with

Respondent DIACO. In the half hour between 9:30 p.m. and 10:00 p.m., the approximate time Sergeant Fernandez pulled Mr. Campbell and Ms. Personius over after they left Malio's, Ms. Personius had approximately another 12 communications with Respondent FILTHAUT, 7 with Respondent ADAMS, and 2 with Respondent DIACO. The Florida Bar's Exhibit 59 provides a minute-by-minute chart of the dozens of cell phone communications that were occurring between the Respondents and Ms. Personius, as well as those among the Respondents themselves. The actual substance of those text messages is not known. If the Respondents' phones still exist, they chose not to produce them. Ms. Personius disposed of her phone before these proceedings began, and Sergeant Fernandez previously testified that all his texts were erased when he put some new software on his phone. It was obvious, however, from the recorded and preserved Tampa Police MDT text messages between patrol vehicles that night that Ms. Personius was providing Respondent FILTHAUT with regular updates. He passed on those updates to Sergeant Fernandez, who in turn, communicated them to Officers Sustek and McGinnis. At one point, Officer Sustek sent a MDT text to Sergeant Fernandez asking if he was going to be informed when Mr. Campbell left Malio's. Sergeant Fernandez replied that he was. That exchange was around 8:17 p.m., long before Mr. Campbell had left. It confirmed not only that Sergeant

Fernandez was being updated, but also that whoever was doing the updating intended to remain at Malio's until Mr. Campbell decided to leave.

By 9:30 p.m. to 9:45 p.m., Ms. Fykes and Mr. Ellis had left Malio's. Mr. Trentalange was leaving to make a 9:45 p.m. dinner reservation. During the evening, Ms. Personius learned that Mr. Campbell had walked to Malio's, did not have a car there, and that he intended to also walk the few blocks home. That was not out of the ordinary for Mr. Campbell, as was confirmed by the testimony of bartender Denise DiPietro, restaurant manager Dina Kuchkuda, Mr. Ellis, and attorney Michael Trentalange, all of whom the Referee found credible. In fact, Mr. Trentalange had a specific conversation with Mr. Campbell that night about his plans for the evening. Mr. Campbell told Mr. Trentalange that he planned to go home and be in bed around 10:00 p.m. and get up at 2:00 a.m. to work on the next day's witness testimony for the ongoing jury trial, then in its second week. Mr. Trentalange had known Mr. Campbell professionally for a number of years and testified that this was a routine Mr. Campbell regularly followed during jury trials.

Some of the witnesses who observed Ms. Personius that evening testified that she appeared to be intoxicated. That was certainly the opinion of Ms. Fykes, who, before leaving, told her not to drive and to call a cab. Mr. Campbell also felt that she was intoxicated and, as they were leaving, offered to call her a cab. She told him that her car was in valet parking. Mr. Campbell said he would see if it

could be kept overnight in the parking garage. Ms. Personius then told Mr. Campbell that she needed to get to her car. Mr. Campbell took her valet ticket to the attendant and had the car brought up. Mr. Campbell confirmed with the attendant that the car could be left overnight.

At that point, Ms. Personius refused to leave her car and insisted that it needed to be in a secure public parking lot where she could have access to it. Mr. Campbell tried to convince her to leave the car, but she maintained that it had to be moved[1]. Out of frustration, Mr. Campbell agreed to move the car to a lot near his apartment building and to call her a cab from there. Mr. Campbell fully admitted that she never asked him directly to drive her car. He chose instead to run the risk of a two-minute drive as a favor to someone who appeared too impaired to drive safely. Mr. Campbell was unaware that the self-professed paralegal from Trenam Kemker was feigning being stranded and, at that point and throughout the evening, was plotting with the Respondents to have him arrested.

The video of the parking lot area, which Mr. Campbell narrated during his testimony, shows that these events occurred between approximately 9:40 p.m. and 9:57 p.m. The timing is noteworthy. Cell phone call and text records show that at

[1] In reality, Ms. Personius was easily able to get herself and her car home that evening without any assistance from Mr. Campbell. Later she was quickly able to arrange, through her constant contact with the Respondents, for Mr. Motroni to be dispatched for that purpose. The fact that this alternative was not exercised until after Mr. Campbell drove into the waiting police stakeout is further confirmation of their intent to effect his arrest.

9:28 p.m., Ms. Personius sent a text to Respondent DIACO. Immediately thereafter, Respondent DIACO made a phone call to Respondent FILTHAUT. Immediately following that, Respondent FILTHAUT sent a text to Sergeant Fernandez. One minute later, at 9:29 p.m., Sergeant Fernandez sent a MDT text message to Officer McGinnis, who was part of the stakeout, which read *"leaving bar now,"* referring to Mr. Campbell. Since Mr. Campbell had hardly walked out into the parking area before this whole exchange, it clearly demonstrates how diligently Ms. Personius was keeping the Respondents informed about what was happening. Her information was immediately relayed to the DUI Squad through Respondent FILTHAUT's communication with Sergeant Fernandez.

When Sergeant Fernandez informed Officer McGinnis that Mr. Campbell was leaving the bar at Malio's, both officers were under the impression that Mr. Campbell would be driving his black BMW. Officer McGinnis sent an MDT text to Sergeant Fernandez which read *"blk convertible?"* At 9:31 p.m., Sergeant Fernandez replied *"BMW_yes."* At the same time, Ms. Personius was having her own text exchanges. At 9:32 p.m., she received a text from Respondent FILTHAUT. At 9:35 p.m., she received a text from Respondent DIACO. At 9:36 p.m., she sent a text to Respondent FILTHAUT. At 9:37 p.m., she got a text back from Respondent FILTHAUT. At 9:39 p.m., she got another text from Respondent FILTHAUT. At 9:42 p.m., she got another text from Respondent FILTHAUT.

Immediately after, she made a 57 second phone call to Respondent FILTHAUT, which was followed by another text from Respondent FILTHAUT at 9:44 p.m. She immediately made another phone call to Respondent FILTHAUT, that one lasting 53 seconds. At 9:45 p.m., she sent a text to Respondent FILTHAUT. At 9:48 p.m., she got a text from Respondent ADAMS, which was immediately followed by a call to Respondent ADAMS at 9:49 p.m. that lasted 46 seconds. She then received a text from Respondent ADAMS at 9:52 p.m. At 9:53 p.m. and 9:54 p.m., she got texts from Respondent FILTHAUT. During that same minute, she got a text from Respondent DIACO and sent another to Respondent ADAMS. During these exchanges, Ms. Personius obviously informed Respondent FILTHAUT that Mr. Campbell did not plan to leave Malio's in his own vehicle, since he didn't have one there, and instead would be driving her Nissan. Some or all of this was passed on to Sergeant Fernandez who, at 9:51 p.m., sent another MDT text to Officer McGinnis that read *"dark Nissan...valet malios."* Sergeant Fernandez asked Officer McGinnis to drive by Malio's to *"see if you see it"* at 9:51 p.m. Officer McGinnis did so and reported back *"female driving"* at 9:54 p.m.

Officer McGinnis had been misled into believing a female would be driving because he had observed Ms. Personius near the driver's door of her car at Malio's valet stand. However, the Respondents knew that Mr. Campbell would be driving, because Ms. Personius had told them. It was therefore unnecessary to advise

Sergeant Fernandez about anything other than which car he was to target. As Mr. Campbell pulled out of Malio's parking lot at approximately 9:57 p.m. that night, the Respondents and their employee, Ms. Personius, knew that the trap was set.

Almost immediately after the Nissan left Malio's, Sergeant Fernandez, who was off duty and driving an unmarked car, pulled Mr. Campbell over for a traffic stop. He claimed that Mr. Campbell had made an illegal right turn from a through lane on Ashley Street across a right turn lane and into an intersecting street. No one else observed this driving. Officer McGinnis arrived immediately thereafter, and Sergeant Fernandez turned Mr. Campbell over to him for what became a typical DUI investigation. Mr. Campbell was arrested, handcuffed, and taken to the County Jail.

Although the law provides that vehicles used in a DUI be impounded, Sergeant Fernandez, as leader of the unit, was authorized to waive that requirement if a sober driver was available. He did so after more text messages with Respondent FILTHAUT. Sergeant Fernandez had already communicated to Respondent FILTHAUT that he could not release the car to Ms. Personius because her driver's license was suspended. Phone records show that Ms. Personius, after several conversations with Respondent ADAMS, called associate Mr. Motroni, who was dropped off at the scene.

Mr. Motroni drove Ms. Personius and her car to her home in Brandon. Waiting for her there, and caring for their two children, was her ex-husband and then current roommate Kristopher Personius. The Personius's marriage had been dissolved for seven years, but their relationship continued. At trial, Mr. Personius testified to the following: when Ms. Personius arrived home she admitted to him in an excited state that she had participated in setting up Mr. Campbell at the direction of her employers, specifically Respondent ADAMS and Respondent DIACO. She told him that the Respondents were looking to set Mr. Campbell up, that she had been directed to go to Malio's to spy on him and *"get him to stay longer and drink more,"* and that Respondent DIACO and Respondent ADAMS were *"going to Adam Filthaut, too, to get the cop in place."* Ms. Personius also said that she had made Mr. Campbell drive and told her ex-husband that she *"got him"* and *"made him drive my car."* Mr. Personius further testified that Ms. Personius stated that Respondent DIACO had told her that she would receive a big bonus and would be his best-paid paralegal. All of these admissions occurred in the presence of not only Mr. Personius, but also Mr. Motroni who, after driving her car home, was waiting for a cab. Mr. Motroni refused to testify at trial on Fifth Amendment grounds.

Credible support for Mr. Personius's account of the evening's events came from another witness at trial, Lyann Goudie, Esq. Ms. Goudie is a former

prosecutor and experienced criminal defense attorney in Tampa. After the arrest of Mr. Campbell and the intense media attention that followed, Mr. and Ms. Personius were still living together in Brandon when the FBI arrived on the morning of May 23, 2013, with a search warrant. Several days later, Mr. Personius was contacted by an FBI representative who wanted to discuss the events of January 23, 2013. Mr. Personius told his ex-wife about the call, and she told him not to talk to them. Immediately thereafter, Ms. Personius's attorney, Todd Foster, who was being paid by Adams & Diaco, arranged for Mr. Personius to consult with Ms. Goudie. Adams & Diaco also paid Ms. Goudie $2,500 for her representation of Mr. Personius. Mr. Personius's knowledge of events was important enough to Adams & Diaco that they paid for an attorney to represent him before the FBI. Yet, each Respondent failed to disclose Mr. Personius as a person with knowledge of the events of January 23, 2013, in response to The Florida Bar's interrogatories during discovery in this matter.

At trial, Ms. Goudie testified that Mr. Personius had waived the attorney/client privilege regarding her representation of him, and she was free to answer any questions about their privileged discussions. She then described how Mr. Personius had come to her in early June 2013, because the FBI wanted to talk with him. He told her that the publicity regarding his ex-wife's role in the Campbell matter had hurt his teenage daughters because their unusual last name

was so recognizable, and he didn't want to get drawn in further. Ms. Goudie further testified that Mr. Personius related to her the events that occurred when Mr. Motroni brought Ms. Personius home after Mr. Campbell's arrest on January 23, 2013. Her recounting of his description of the events of that night was consistent with the testimony Mr. Personius gave at trial.

During Ms. Goudie's consultation with Mr. Personius, he voiced no animosity toward his ex-wife or her employer. Essentially, he wanted to avoid any involvement and be left alone. Further, during that consultation, Mr. Personius also advised Ms. Goudie that he had recorded a video that night on his cell phone that included his wife's admissions regarding the plan to set up and arrest Mr. Campbell. Ms. Goudie told him that the recording might be considered illegal if it was done without the consent of his ex-wife, and that if he was going to share it with anyone, it should be the FBI. According to allegations contained in motions filed prior to trial, the recording that Mr. Personius made of his ex-wife on the night of January 23, 2013, is now in the possession of the FBI. It was not offered into evidence at the trial and its contents are unknown to the Referee. But the testimony that Mr. Personius gave at trial, regarding the admissions of his ex-wife on the night of Mr. Campbell's arrest, is credible not only because it was not recently fabricated, but also because it was supported by the other credible evidence and testimony in the case.

Ms. Personius's active participation in the events surrounding the set up and arrest of Mr. Campbell essentially ended when Mr. Motroni drove her home that night in her car. However, before moving on to subsequent events, there are additional facts regarding her participation that require some comment. The first fact concerns the state of Ms. Personius's sobriety that night. It was previously noted that several people commented that she appeared intoxicated during the evening. That was the impression Mr. Campbell testified he had at the time he decided to leave Malio's. Regardless of the amount of alcohol she consumed that night, the evidence clearly shows that Ms. Personius was capably providing the Respondents with a constant stream of texts and voice calls from the time she first noticed Mr. Campbell at Malio's through the events that led to his arrest and thereafter. Ms. Personius was also alert enough regarding what she had said and done that night to attempt to cover her tracks. Early the next morning, she texted Nate Carney: *"if someone calls looking for me tell them you don't know me or don't tell them who I am."* Mr. Carney, who testified at trial, was the attorney at Trenam Kemker that Ms. Personius falsely told Mr. Campbell and Mr. Ellis she worked for. The Referee found Mr. Carney's testimony to be credible. Two days later, Ms. Personius also called and left a message on Vanessa Fykes phone to let her know that an investigator for Adams & Diaco would be calling her to "prep" her regarding any questions about the evening's events that she might subsequently

be asked. Ms. Fykes, after seeing news reports the morning following the arrest, cut off any further communication with Ms. Personius. Ms. Fykes also refused to return numerous calls from the Adams & Diaco investigator and those of Respondent DIACO himself. The Referee also found her testimony regarding these events to be credible.

When called to testify at trial, Ms. Personius refused to answer every question that she was asked after giving her name. She claimed her right to remain silent under the Fifth Amendment. She had also made the same assertion of rights before Judge Arnold when she was asked about the events of the night of January 23 during the hearing on the Motion for Mistrial in the *Schnitt v. Clem* case. In doing so, she subjected herself and the Respondents to the adverse inferences that are appropriate to impose, given the nature of all the other evidence in this case. *Coquina Investments v. TD Bank, N.A.,* 760 F.3d 1300 (11th Cir. 2014); *Atlas v. Atlas,* 708 So. 2d 296, 299 (Fla. 4th DCA 1998).

Prior to this matter being filed, when Ms. Personius was interviewed by the Pinellas County State Attorney's Office regarding Mr. Campbell's DUI charge (it had been transferred from Hillsborough), she admitted her involvement. When she was questioned regarding her many phone calls and text messages with the Respondents that evening, however, she consistently denied any recollection. Given the sheer volume of texts and phone calls and the significance of the night,

that was simply not credible. In addition, the fact that she continues working for the Respondents' firm, that she received a $9,000 bonus for 2013, a $6,500 raise, and a credit card paid for by Adams & Diaco all support the conclusion that her conduct on the night of January 23, 2013, was known and approved by the Respondents.

The active participation of all of the Respondents in the effort to effect the arrest of Mr. Campbell is beyond dispute. Respondent DIACO directed Respondent ADAMS to call Respondent FILTHAUT when he first learned that Mr. Campbell was at Malio's that evening. Respondent DIACO was aware that Respondent FILTHAUT's close relationship with Sergeant Fernandez would result in the Tampa Police Department's DUI Squad making another special effort to target Mr. Campbell, as it had attempted in November. Respondent DIACO was aware that Ms. Personius was drinking with Mr. Campbell at Malio's and that she was passing on updates regarding their activities to him and the other Respondents. He was aware that her information was being shared with Sergeant Fernandez on a regular basis through Respondent FILTHAUT. He was aware that Mr. Campbell would be driving Ms. Personius's car from Malio's and that the vehicle information had been provided to Sergeant Fernandez. He maintained constant contact with the other Respondents throughout the evening as the plan progressed, and did nothing to discontinue the effort directed at Mr. Campbell's arrest.

Respondent DIACO was an attorney with supervisory authority over Respondent FILTHAUT, associate Mr. Motroni, and nonlawyer employee Ms. Personius. Respondent DIACO failed or refused to properly supervise Respondent FILTHAUT, associate attorney Mr. Motroni, and nonlawyer employee Ms. Personius that evening and thereafter.

Respondent DIACO refused to testify for a deposition and at trial on Fifth Amendment grounds. When questioned by Judge Arnold regarding the evening of January 23 during the *Schnitt v. Clem* case, he either invoked his right to the Fifth Amendment, claimed he could not recall conversations or events that occurred less than 48 hours earlier, or denied any active participation. Respondent DIACO's memory had improved by the time he filed an affidavit on March 4, 2013, in opposition to a Motion for New Trial in *Schnitt v. Clem.* Respondent DIACO swore that his involvement in the events of the night of Mr. Campbell's arrest consisted of "*respond[ing] to requests for information made by the Tampa Police Department.*" That statement is so misleading and so far from the truth regarding the known events of that night that it amounts to a deliberate falsehood. The Referee infers from Respondent DIACO's silence at trial that truthful responses

would have further demonstrated his complicity in the conspiracy proven by clear and convincing evidence to exist. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).[2]

Respondent ADAMS was also a major participant in the conspiracy to effect the arrest of Mr. Campbell. The clear and convincing evidence establishes that he was aware of the November 29, 2012 attempt to arrest Mr. Campbell. He did not advise Respondent FILTHAUT against using his friendship with Sergeant Fernandez to effect the arrest of Mr. Campbell. Instead, he called Respondent FILTHAUT early on the evening of January 23, 2013, at the request of Respondent DIACO, to accomplish a DUI Squad stakeout of Malio's with the specific intent of seeking Mr. Campbell's arrest. He was aware that Ms. Personius was drinking with Mr. Campbell at Malio's and that she was passing on updates regarding their activities to him and the other Respondents. He was aware that her information was being shared with Sergeant Fernandez on a regular basis through Respondent FILTHAUT. He was aware that Mr. Campbell would be driving Ms. Personius's car from Malio's and that the vehicle information had been provided to Sergeant Fernandez. He maintained constant contact with the other Respondents throughout the evening as the plan progressed and did nothing to discontinue the effort to

[2] The Florida Bar has also cited *The Florida Bar v. Garcia*, 31 So. 3d 782 (Fla. 2010) to support the proposition that the Referee may impose an adverse inference against the Respondents as a result of their refusal to testify on Fifth Amendment grounds. *Garcia* is an unreported case and the Referee has no access to an opinion or the record to confirm The Florida Bar's assertion.

arrest Mr. Campbell. Respondent ADAMS was an attorney with supervisory authority over Respondent FILTHAUT and nonlawyer employee Ms. Personius. Respondent ADAMS failed or refused to properly supervise Respondent FILTHAUT and nonlawyer employee Ms. Personius on that evening or thereafter.

Respondent ADAMS also twice refused to answer any questions regarding his conduct at depositions scheduled by The Florida Bar during these proceedings. His counsel maintained, until the morning of trial, that Respondent ADAMS and the other Respondents would not testify based upon their Fifth Amendment rights against self-incrimination. On the first day of trial, after Respondent DIACO had so refused, Respondent ADAMS took the witness stand and indicated that he would testify. The Florida Bar was unprepared to proceed regarding Respondent ADAMS, since he had twice before declined to answer any questions in discovery. The Referee allowed a short recess of the trial for the purpose of permitting The Florida Bar to depose Respondent ADAMS before he testified.

When he again took the witness stand, Respondent ADAM's testimony was crafted to admit those facts that he knew from discovery he could not deny and to present a set of circumstances that put him in the most favorable light possible. Much of his testimony concerned the content of text messages and phone communications during January 23-24, 2013, between himself, the other Respondents, and Ms. Personius — all of which Respondent ADAMS admitted he

had deleted. His testimony about this unverifiable content defied common sense and was inconsistent with the other evidence presented at trial. Thus, while Respondent ADAMS avoided the adverse inference that could be properly imposed for his refusal to testify, his less-than-credible testimony given at the eleventh hour did nothing to aid in his defense.

Respondent FILTHAUT's close personal relationship with Sergeant Raymond Fernandez was the single most important factor that allowed the Respondents to plot the arrest of Mr. Campbell. Without the trust and long years of friendship that existed between Respondent FILTHAUT and Sergeant Fernandez, it seems doubtful that the Tampa Police Department would have devoted the resources to spend the better part of three hours staking out a bar for one potentially impaired driver on the unverified "tip" of one citizen. The fact that the DUI Squad did this, not once, but on two separate occasions is a testament to the influence Respondent FILTHAUT was able to exert. To accomplish that, Respondent FILTHAUT betrayed the trust of Sergeant Fernandez by lying to him regarding Mr. Campbell's habit of drinking and driving. The Respondents produced no evidence at trial regarding Mr. Campbell's drinking habits. Nothing was offered to suggest, as Respondent FILTHAUT had assured his friend, that Mr. Campbell *"gets drunk all the time. He goes to Malio's and drinks it up and then he drives home drunk."* The evidence at trial was just the opposite. Both the bartender

and the manager at Malio's testified that Mr. Campbell would come in one or two times a week, have one or two drinks, and walk home to his apartment. Respondents made no attempt to prove otherwise.

The most important information that Respondent FILTHAUT knew about Mr. Campbell and the events taking place at Malio's was withheld from his friend. Sergeant Fernandez was never told that Mr. Campbell was the opposing attorney in a multi-million dollar lawsuit that Adams & Diaco, P.A. were defending. Nor was Sergeant Fernandez told that the person inside Malio's who was providing the information about Mr. Campbell's status was an Adams & Diaco employee who was buying him drinks while she passed on information to the Respondents. He learned of Mr. Campbell's position as an opposing attorney the next morning when the arrest became headline news. Sergeant Fernandez confronted his friend about failing to share that important fact. Respondent FILTHAUT responded, *"Well, Ray, what's the big deal?"* Sergeant Fernandez was later discharged from the Tampa Police Department as a result.

Respondent FILTHAUT, in addition to misleading his friend in furtherance of the conspiracy, played an active role in orchestrating the events of January 23, 2013. He maintained regular contact with the other Respondents, Ms. Personius, and Sergeant Fernandez throughout the evening as the plan progressed, and did nothing to discontinue the effort directed at Mr. Campbell's arrest. Respondent

FILTHAUT's immediate and direct connection to the commander of the Tampa Police DUI Squad allowed him to coordinate the arrest by passing on exactly where Mr. Campbell was, what he was doing, when he was doing it, and what car to target when the time came.

Respondent FILTHAUT also twice refused to be deposed regarding the events surrounding these proceedings and refused to answer any questions at trial, based upon his right against self-incrimination under the Fifth Amendment. He specifically refused at trial to respond to a question confirming that he had erased, secreted, or otherwise destroyed the actual cell phone messages that would constitute direct evidence of the nature of his communications that night. The Referee has indulged all the adverse inferences that may permissibly be imposed as a result. *Martino v. Wal-Mart Stores Inc.*, 835 So. 2d 1251 (Fla. 4th DCA 2003); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Atlas v. Atlas,* 708 So. 2d 296, 299 (Fla. 4th DCA 1998); *Fraser v. Security and Investment Corporation*, 615 So. 2d 841 (Fla. 4th DCA 1993); *New Hampshire Ins. Co., v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990). In addition, the wealth of testimony provided by Sergeant Fernandez in various forums before these proceedings were commenced further confirmed that Respondent FILTHAUT's active participation is beyond dispute.

Respondent FILTHAUT, through his counsel's opening statement and his arguments regarding the "guilt phase" and the "sanctions phase" of the trial, suggested that he was only an associate at Adams & Diaco and that his participation in the setup and arrest conspiracy was solely the result of following the orders of his superiors, presumably Respondents DIACO and ADAMS. That variation of the Nuremburg Defense is only available when the conduct ordered is *"in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."* Rule 4-5.2. The Referee finds that using a nonlawyer employee to set up the opposing attorney for arrest in a multi-million dollar, high profile jury trial doesn't conceivably fall within that exception.

II.

Respondent DIACO, following an 8:30 a.m. hearing on January 24, 2013, during which all parties agreed to a brief continuance of the ongoing jury trial, made public statements to the news media criticizing the conduct of Mr. Campbell and falsely claiming that Respondent did not agree with the recess of the trial. Respondent DIACO's comments failed to disclose his own active participation in the events that resulted in the recess or the participation of Respondents ADAMS, FILTHAUT, and others.

On the morning of January 24, 2013, Mr. Ellis, Mr. Campbell's co-counsel, asked Judge Arnold for a recess in the *Schnitt v. Clem* trial. He proposed giving the jury the day off and working on jury instructions instead. Mr. Campbell's trial bag containing all of his notes and witness preparation for that morning's testimony had been left in the back seat of Ms. Personius's car when the arrest occurred.

Judge Arnold had previously planned to recess after the morning session, even before Mr. Campbell's arrest. In light of the disruption caused by the arrest and Mr. Campbell's inability to locate his trial bag, counsel for all parties agreed to the recess as a professional courtesy. It was decided that testimony would resume the next day. While Mr. Campbell and his partner continued their search for the missing trial bag, Respondent DIACO appeared outside the courthouse and gave interviews to the media about the case. These are examples of some of the statements Respondent DIACO made that appeared later that day as sound bites on various local television news programs:

> *"Well, you know, I'm shocked that the case was continued. I feel horrible for this jury that has been sequestered and pulled from the jobs, their lives, their families. And so now we have to wait."*

> *"Well, you know, I don't know exactly what the jury has been told, and, you know, they are supposed to be sequestered and not watching the news or hearing the reports, but this is front page news now."*

> *"And this is his second time. So it's just –you know, the whole thing makes me embarrassed to be an attorney, and I'm ashamed of all this whole process has continued to be a mockery of the system. But we believe in the system. We believe in the jury, and we're going to let Bubba's peers decide this case."*

> *"We were prepared for today. We were working last night in preparation for the trial. And so now we have to wait. The jury has to wait, and we have to see how this plays out. I don't understand why his other partners who have been in there every single day of the trial, can't continue this case."*

"I hope he gets help. My partner and Greg Hearing were working on this trial last night. Phil didn't seem to be doing the same. And now we're being penalized."

"Shocked, shocked, disappointed, sad, sad for the jury having to be taken out of their lives another day that this is continued. Two other partners have been trying this case every single day. I don't understand why it was continued."

"To his advantage, now he gets a good night's sleep. Now he gets to prepare his witnesses."

"His last DUI was almost twice the legal limit. He didn't learn his lesson."

At the time those statements and others of a similar nature were made, Respondent DIACO knew that his firm and all other counsel had agreed to the short recess. He also knew, or should have reasonably anticipated, that his statements would receive a great deal of public exposure in the media. They did. The next day, partially as a result of those statements, Mr. Ellis moved for a mistrial in *Schnitt v. Clem*. Judge Arnold felt compelled to question each of the jurors to determine if they had seen or heard anything regarding Mr. Campbell's arrest. One juror had learned of Mr. Campbell's arrest, but Judge Arnold was satisfied that the trial could go forward. Respondent DIACO offered no evidence at trial to explain why he made false statements to the news media about the short stipulated recess of the trial, and there was no explanation for his public "piling on" of Mr. Campbell. Nor was there evidence presented at trial to justify Respondent DIACO's efforts to publically criticize and humiliate Mr. Campbell in

the media when Respondent had full knowledge of the part he and the other members of his firm played in the arrest. The Referee infers, from Respondent DIACO's refusal to testify regarding these issues, that his purpose in making those public statements was to potentially influence any jurors that might have heard them and to otherwise gain an advantage in the ongoing trial.

III.

On January 24, 2013, Respondents DIACO and ADAMS became aware that the trial bag belonging to Mr. Campbell had been left in the car of Adams & Diaco, P.A.'s paralegal Ms. Personius. Neither Respondent DIACO, Respondent ADAMS, nor Brian Motroni, another member of the firm who also learned this fact, made any effort to immediately return Mr. Campbell's property to him or to advise him that it was in their possession.

On the morning of January 24, 2013, testimony in the *Schnitt v. Clem* trial was scheduled to resume at 9:00 a.m. After his release from jail at approximately 6:30 a.m., Mr. Campbell and Mr. Ellis began their search for Mr. Campbell's missing trial bag. Initially, it was presumed that this would simply involve contacting Trenam Kemker and retrieving the bag from the car of their paralegal. Upon inquiring, they learned that there was no paralegal named "Melissa" at Trenam Kemker. The trial bag was still not located when Mr. Campbell and Mr. Ellis entered the courtroom for the continuation of the trial. Judge Arnold considered the circumstances of Mr. Campbell's arrest and was amenable to Mr. Ellis's Motion for Recess, delaying testimony until the next day. All counsel

agreed, out of professional courtesy to Mr. Campbell, to give the jury the day off. Counsel were to remain for a jury instruction conference that morning. After the morning session, Mr. Campbell and Mr. Ellis went back to their office to continue the search for the missing trial bag.

Between 10:00 p.m. on January 23, 2013, and approximately 5:00 p.m. on January 24, 2013, Mr. Campbell's trial bag containing his notes and witness preparation material was out of his possession. Mr. Ellis and Mr. Campbell did not discover who had possession of the bag until around 4:00 p.m. on January 24. During that 19-hour period, the bag was in the sole possession of members of the Adams & Diaco firm or their employees.

The evidence regarding who possessed the bag, for how long, and what was done with it was derived almost exclusively from four sources. First, there was testimony from Respondent DIACO, Ms. Personius, and associate Mr. Motroni at a hearing on a Motion for Mistrial before Judge Arnold on the afternoon of January 25, 2013. Secondly, there was testimony from Ms. Personius given on May 23, 2013, during the DUI investigation. Thirdly, there were statements made by Mr. Motroni before Richard Martin, Esq., the investigating member to the Thirteenth Circuit Grievance Committee on April 30, 2014. Finally, though Respondent DIACO, Ms. Personius, and Mr. Motroni each refused to testify at trial regarding this matter on Fifth Amendment grounds, there was the trial testimony of

Respondent ADAMS. His testimony, however, was given after twice refusing to answer questions at scheduled depositions and after all other discovery was completed and disclosed. In the testimony prior to trial and at the trial itself (in regard to Respondent ADAMS only), the account of the possession and activity surrounding Mr. Campbell's trial bag was consistent. Mr. Personius also confirmed some aspects of the saga involving the discovery of the bag and its eventual return, although it is difficult to ascertain whether his knowledge was first hand or as a result of what Ms. Personius told him. The following is their account, pieced together from the various sources in the record and at trial.

The morning after Mr. Campbell's arrest, Ms. Personius was told not to come into the office. Around noon, Ms. Personius claimed she discovered Mr. Campbell's briefcase on the back seat of her car and called Respondent ADAMS to tell him. Respondent ADAMS saying he was too busy to deal with it, told Respondent DIACO about it. Respondent DIACO told him that he would take care of it, and tasked Mr. Motroni with retrieving the briefcase. The pass card records for the garage indicated that Mr. Motroni's car left the Bank of America building at 1:46 p.m.

Mr. Motroni claimed that upon arriving at the Personius home, he discovered that the briefcase was a large trial bag. Mr. Motroni called Respondent DIACO at 2:07 p.m. and was instructed to bring the trial bag to the Adams &

Diaco offices. The pass card records indicate that he re-entered the building's parking garage at 2:19 p.m. The bag remained at the Bank of America building from then until Mr. Motroni and Respondent DIACO left with the bag at 3:23 p.m. There was never a logical explanation given why Respondent DIACO, or Mr. Motroni, or some other member of the firm had not simply walked the trial bag to the Shumaker, Loop & Kendrick's offices in the same building. Nor was it ever explained why Mr. Campbell, or anyone at Shumaker, Loop & Kendrick, was not notified that his trial bag was in the building and that he could come and get it. Instead, Respondent DIACO, along with Mr. Motroni, drove the bag back to Ms. Personius's residence and left it with her to return. Respondent DIACO's said he took the bag back to her residence to question her about whether she had looked in the bag. Why he could not have just questioned her over the phone was never explained. Once Respondent DIACO and Mr. Motroni had driven the bag back to Ms. Personius's home, she was instructed to transport the bag back to the Bank of America building by cab and to see that it was delivered to a security officer in the lobby. The obvious intent was to have the bag returned anonymously. The evidence suggests that Respondent DIACO believed that Mr. Campbell would not discover the true identity of Ms. Personius and, therefore, never connect Adams & Diaco to his arrest. In fact, Respondent DIACO left a telephone message for Mr. Ellis that afternoon proposing a meeting of counsel, including Mr. Campbell, to

discuss settlement. Mr. Ellis returned the call while Respondent DIACO and Mr. Motroni were driving the trial bag back to Ms. Personius's home. Respondent DIACO made no mention of his possession of the trial bag during that telephone conversation.

After leaving the trial bag with Ms. Personius, Mr. Motroni and Respondent DIACO returned to their office in the Bank of America building, re-entering the parking garage at 4:21 p.m. Shortly before that time, Ms. Personius's true identity had been discovered. While driving back to the office, Respondent DIACO received another phone call from Mr. Ellis. Mr. Ellis confronted Respondent DIACO with the information that the identity of Ms. Personius was known and that she had possession of Mr. Campbell's trial bag. Respondent DIACO then told Mr. Ellis that the trial bag would be returned to the Bank of America building lobby. Mr. Ellis insisted that it be returned directly to the offices of Shumaker, Loop & Kendrick.

Sometime later, Ms. Personius took a taxi back to the Bank of America building, brought the bag into the lobby, and had the cab driver deliver it to Shumaker, Loop & Kendrick at about 5:15 p.m. By their own account, Respondents ADAMS and DIACO were in possession of Mr. Campbell's trial bag or knew that one of their employees had possession of it for over four hours.

Neither of them made any effort to contact Mr. Campbell or his firm to advise them of that fact. It was not returned until Mr. Ellis demanded it.

IV.

The actions of the Respondents, as set out above, and subsequent efforts to cover up or otherwise destroy evidence of those actions, were intended to disrupt, unfairly influence, and/or otherwise prejudice the tribunal, the administration of justice, opposing attorney Mr. Campbell and/or opposing parties in ongoing litigation in which the Respondents' law firm was engaged.

Even before Respondents became aware that the identity of Ms. Personius had been discovered, they began to withhold, destroy, or otherwise secrete the direct evidence of their involvement in Mr. Campbell's arrest. The first indication of the Respondents' efforts to hide their participation was their refusal to notify Mr. Campbell that they were in possession of his trial bag on the day following the arrest. Another example occurred later that afternoon, when Mr. Ellis's process server was locked out of the Adams & Diaco offices, even though there were obviously people working inside. Mr. Ellis, Mr. Campbell's partner, was attempting to subpoena Respondent DIACO for a hearing before Judge Arnold the next morning, January 25, 2013. The hearing concerned Shumaker, Loop & Kendrick's motion for mistrial of the *Schnitt v. Clem* case. The motion was based upon the Respondent's possession and retention of Mr. Campbell's trial bag and the false and inflammatory comments made by Respondent DIACO to the media

the morning after Mr. Campbell's arrest. The subpoena also demanded that Respondent DIACO produce his cell phone at the hearing.

Although the process server was locked out of the Adams & Diaco offices the day before, he was able to serve the Respondent through his wife early the next morning, January 25, 2013. Regardless, Respondent DIACO failed to appear at the morning hearing on that date. He had already hired counsel to appear on his behalf and move for a protective order. Judge Arnold commented at trial that his immediate concern was the exposure the jury may have had to all the publicity surrounding Mr. Campbell's arrest, rather than Respondent DIACO's disregard of the subpoena. The Judge did, however, insist that Respondent DIACO appear for a continuation of the Motion for Mistrial in the afternoon. Respondent DIACO appeared, but without his cell phone. When questioned about whether he had any conversations with Ms. Personius or Respondent FILTHAUT on the evening of Mr. Campbell's arrest, less than 48 hours earlier, Respondent DIACO replied that he couldn't remember. When asked who his cell phone carrier was, he said he didn't know. Respondent DIACO's obvious lies to Judge Arnold demonstrate the lengths to which he was willing to go to avoid discovery of evidence of his participation in the plot, which could have led to a mistrial of *Schnitt v. Clem.* Ms. Personius appeared at the same hearing and testified regarding the trial bag saga, but when questioned about whether she had been asked to meet and buy drinks for

Mr. Campbell, she too refused to testify on Fifth Amendment grounds. By that afternoon, Ms. Personius also had her own counsel, paid for by Adams & Diaco, and Respondent DIACO was represented by two attorneys, one for civil and apparently one for criminal liability. In order to complete the trial, Judge Arnold put a moratorium on discovery regarding the Motion for Mistrial which remained in effect until February 5, 2013. As a result, Mr. Campbell and Shumaker, Loop & Kendrick were unable to take steps to obtain the cell phone records or message transcripts from the phones of all the Respondents, their employees, or Sergeant Fernandez. All the Respondents had been provided with notices to preserve that data. Since then, all of the participants in the conspiracy to arrest Mr. Campbell have destroyed or secreted the cell phones and/or the important objective evidence they contained. Respondent ADAMS, Ms. Personius, and Sergeant Fernandez have all admitted erasure or destruction directly. Respondent ADAMS admitted that all the Respondents and Ms. Personius had turned their phones over to attorney Lee Gunn, but Respondent ADAMS refused to say why, claiming attorney-client privilege. At trial, both Respondent DIACO and Respondent FILTHAUT refused to answer any questions about the destruction of their cell phone messages and are subject to the adverse inference that they too have deliberately destroyed them. The cell phone messages on the Respondents' phones from the night of Mr. Campbell's arrest are the only objective evidence that could speak to their incrimination or

exculpation. The fact that they were erased, destroyed, or that the Respondents failed to produce them, strongly infers that they did not contain anything exculpatory.

Finally, the Respondents failed to offer any credible justification for their two-month effort to have Mr. Campbell arrested. Respondents' counsel suggested that the Respondents were motivated by a strong desire to keep intoxicated drivers off the streets. Although unsupported by evidence, such motivation would seem more plausible if it had not knowingly been the Respondents' own employee buying Mr. Campbell drinks and presenting him with the automobile to drive. It would also have appeared more believable if that employee had not been funneling information about Mr. Campbell directly through Respondents to waiting police surveillance. The Referee was presented with no competent evidence that would support any credible motive, except that the Respondents sought to gain some advantage in the ongoing civil case brought by Mr. Campbell's client. Respondent DIACO's affirmative efforts to propose settlement discussions with Mr. Ellis and Mr. Campbell before the identity of Ms. Personius was discovered further supports this finding.

Another argument suggested that Respondents should not be responsible for Mr. Campbell's decision to drink and drive that night. The argument's logic being that Mr. Campbell's decision to drive was an intervening independent event that

broke the chain of causation leading from their actions to his arrest. The argument has no merit. The acts of the Respondents on January 23 were not unethical because they ultimately resulted in Mr. Campbell's arrest. They were unethical because they were prohibited acts, and the Respondents willingly committed them. Ethical violations are not necessarily dependent upon the existence of harm or injury. Damage is not an indispensable element, as it might be in a civil case. If Mr. Campbell had walked away from Malio's valet that night and left Ms. Personius to her own devices, the Respondents' actions would have been just as unethical and egregious. The unsuccessful effort to target Mr. Campbell for arrest on November 29, 2012, was just as much a violation of Rules Governing The Florida Bar as the successful effort was on January 23, 2013.

Ultimately, the Referee was presented with nothing to suggest that Respondents' intent was anything other than what the clear and convincing evidence demonstrates. It was a deliberate and malicious effort to place a heavy finger on the scale of justice for the sole benefit of the Respondents and their client. For the Respondents, the harm inflicted on Mr. Campbell, his clients' cause, Sergeant Fernandez, the legal system, the profession, and the public's confidence in justice was simply collateral damage.

Subsequent Events

The DUI arrest of Mr. Campbell was investigated by the State Attorney's Office for the Sixth Judicial Circuit, after the State Attorney for the Thirteenth Judicial Circuit recused his office from the case. On July 29, 2013, a *nolle prosequi* was filed. Mr. Campbell's arrest was subsequently expunged. Although evidence of the basis for refusing to prosecute was not adduced at trial, it appears that all of the statutory elements of a valid entrapment defense existed. Fla. Stat. §777.201.

Following the events of January 23-25, 2013, the *Schnitt v. Clem* jury trial was completed. There was a defense verdict. Following the trial, the Plaintiff's Motion for Mistrial was converted into a Motion for New Trial, and the restriction on discovery was lifted. Before an evidentiary hearing was held on the alleged misconduct of Defendant's counsel, the parties entered into mediation and agreed to a settlement.

After the settlement, the Schnitts discharged Mr. Campbell and the firm of Shumaker, Loop, & Kendrick from further representation. As of the date of trial, there was ongoing litigation between Shumaker, Loop, & Kendrick and their former clients regarding the payment of fees.

The Tampa Police Department, after an administrative personnel hearing, discharged Sergeant Raymond Fernandez from the force. Officer Tim McGinnis was removed from the DUI Squad.

Several witnesses at trial, as well as Respondent DIACO's counsel, have asserted that the United States Attorney for the Middle District of Florida is conducting a Federal grand jury investigation that is continuing. As of this date, no Federal criminal charges have been filed against the Respondents or others regarding the events described above.

III. RECOMMENDATIONS AS TO GUILT

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c); Rule 4-3.6(a); Rule 4-4.4(a); Rule 4-5.1(c); Rule 4-5.3(b);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

   The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy contrary to honesty and justice.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence or other material)**

   The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately obstructed access to or concealed the trial bag of C. Philip Campbell, Esq.; destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding; and refused to produce his cell phone or information about his cell phone provider at the January 25, 2013 hearing, which

he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing litigation.

4. **Violation: Rule 4-3.5(c) (conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

2**Violation: Rule 4-3.6(a) (prejudicial extrajudicial statements**

5. **Violation: Rule 4-3.6(a) (prejudicial extrajudicial statements prohibited)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** made statements to the media on January 24, 2013, regarding: his disagreement with the Court granting a stipulated trial recess; the arrest of C. Philip Campbell, Esq.; and the work ethic and prior history of Mr. Campbell. All statements were made with the knowledge that there was a substantial likelihood of materially prejudicing the ongoing jury trial.

6. **Violation: Rule 4-4.4(a) (means that have no substantial purpose other than to embarrass, delay, or burden)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately failed to immediately return the trial bag of C. Philip Campbell, Esq. or notify him or his firm of the bag's location in order to delay or burden Mr. Campbell in an ongoing trial.

7. **Violation: Rule 4-5.1(c) (Responsibilities of partners, Managers and Supervisory Lawyers)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately conspired with or otherwise ordered or ratified the conduct of Respondents ADAMS and FILTHAUT regarding their actions taken to improperly effect the arrest of C. Philip Campbell, Esq. and/or failed to take remedial action to avoid or mitigate the foreseeable potential results of those wrongful actions. Further Respondent DIACO ordered or ratified the conduct of associate Brian Motroni in concealing the trial bag of Mr. Campbell. As an attorney with managerial authority, Respondent DIACO was responsible for the conduct of Respondent FILTHAUT and attorney Brian Motroni.

8. **Violation: Rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with, ordered and/or ratified the conduct of his nonlawyer employee, Melissa Personius, to improperly effect the arrest of C. Philip Campbell, Esq. and conceal his trial bag; failed to take appropriate remedial action when he knew that the consequences of her conduct could be avoided; and failed to make reasonable efforts to ensure that her conduct was compatible with Respondent's professional obligations. As an attorney with managerial authority, Respondent DIACO was responsible for the conduct of Melissa Personius.

9. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, nonlawyer employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and covered up or otherwise destroyed evidence of his participation in that conspiracy. Respondent DIACO further engaged in fraudulent, dishonest, or

deceitful conduct by lying to Judge Arnold on January 25, 2013, regarding his knowledge of his cell phone provider and his recollection of discussions or communications with Melissa Personius and Respondent FILTHAUT on the evening of January 23, 2013. He further engaged in misleading and deceitful conduct by making public statements to the news media that were intended to embarrass and humiliate opposing counsel in regard to his arrest for DUI on the previous evening without disclosing his own active role in those events or the role played by the other Respondents, his employee Melissa Personius, and that of Sergeant Raymond Fernandez. In addition, this conduct delayed the ongoing litigation and required Judge Arnold to interview the jurors regarding this trial publicity.

B. Robert D. Adams - No. 2013-10,736 (13F)

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c); Rule 4-4.4(a); Rule 4-5.1(c); Rule 4-5.3(b);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

   The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence)**

   The clear and convincing evidence is that **ROBERT D. ADAMS** deliberately concealed the trial bag of C. Philip Campbell, Esq. and destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing civil litigation.

4. **Violation: Rule 4-3.5(c) (conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

5. **Violation: Rule 4-4.4(a) (means that have no substantial purpose other than to embarrass, delay, or burden)**

The clear and convincing evidence is that **ROBERT D. ADAMS** failed to immediately return the trial bag of C. Philip Campbell, Esq. or notify him or his firm of the bag's location in order to delay or burden Mr. Campbell in an ongoing trial.

6. **Violation: Rule 4-5.1(c) (Responsibilities of Partners, Managers, and Supervisory Lawyers)**

The clear and convincing evidence is that **ROBERT D. ADAMS** deliberately conspired with or otherwise ordered or ratified the conduct of Respondents DIACO and FILTHAUT regarding their actions taken to improperly effect the arrest of C. Philip Campbell, Esq., and/or failed to take remedial action to avoid or mitigate the foreseeable potential results of those wrongful actions. Respondent ADAMS ordered Respondent FILTHAUT to contact Sergeant Raymond Fernandez of the Tampa Police Department in furtherance of the effort to effect Mr. Campbell's arrest; Respondent ADAMS was aware of Respondent FILTHAUT's prior improper conduct and ratified it. As an attorney with managerial authority, Respondent ADAMS was responsible for the conduct of Respondent FILTHAUT.

7. **Violation: Rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with, ordered and/or ratified the conduct of his nonlawyer employee, Melissa Personius, to improperly effect the arrest of C. Philip Campbell, Esq.; failed to take appropriate remedial action when he knew that the consequences of her conduct could be avoided; and failed to make reasonable efforts to ensure that her conduct was compatible with Respondent's professional obligations. As an attorney with managerial authority, Respondent ADAMS was responsible for the conduct of Melissa Personius.

8. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to effect the arrest of C. Philip Campbell, Esq., and then covered up or otherwise destroyed evidence of his participation in that conspiracy. In addition, this conduct delayed or otherwise disrupted the ongoing litigation and required Judge Arnold to interview the jurors regarding trial publicity produced as a result of the conspiracy.

C. <u>Adam Robert Filthaut - No. 2013-10,737 (13F)</u>

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing civil litigation.

4. **Violation: Rule 4-3.5(c) (Conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

5. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then covered up or otherwise destroyed evidence of his participation in that conspiracy. Respondent FILTHAUT further engaged in dishonesty, deceit and/or misrepresentation when he failed to disclose to Sergeant Fernandez that Mr. Campbell was the opposing attorney in a high profile civil action that was then currently being defended by the Adams & Diaco law firm. In addition, this conduct delayed the ongoing litigation and required Judge Arnold to interview the jurors regarding trial publicity produced as a result of the conspiracy.

IV. CASE LAW

Before arriving at a recommendation as to the disciplinary measures to be applied the Referee considered the following case law:

Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001); *Florida Bar v. Rotstein*, 835 So. 2d 241 (Fla. 2002); *Florida Bar v. Korones*, 752 So. 2d (Fla. 2000); *Florida Bar v. Bern,* 425 So. 2d 526 (Fla. 1982); *Florida Bar v. Swann*, 116 So. 3d 1225 (Fla. 2013); *Florida Bar v. Doherty*, 94 So. 3d 443 (Fla. 2012); *Florida Bar v. Klein*, 774 So. 2d 685 (Fla. 2000); *Florida Bar v. Gardiner*, No. SC11-2311, 2014 WL 2516419 (Fla. June 5, 2014); *Florida Bar v. Glueck*, 985 So. 2d 1052 (Fla. 2008); *Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007); *Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997); *Florida Bar v. Riggs*, 944 So. 2d 167 (Fla. 2006); *Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010).

V. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

I recommend that Respondent **STEPHEN CHRISTOPHER DIACO** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

B. Robert D. Adams - No. 2013-10,736 (13F)

I recommend that Respondent **ROBERT D. ADAMS** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

C. Adam Robert Filthaut - No. 2013-10,737 (13F)

I recommend that Respondent **ADAM ROBERT FILTHAUT** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

VI. PERSONAL HISTORY, PAST DISCIPLINARY RECORD, AND AGGRAVATING AND MITIGATING FACTORS

In recommending sanctions after finding misconduct, the Referee considered the following factors as to each Respondent:

a) the duty violated;
b) the lawyer's mental state;
c) the potential or actual injury caused by the lawyer's misconduct; and
d) the existence of aggravating or mitigating factors.

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent

a. Date of Birth - 1968
b. Date Admitted to the Bar – April 25, 1994[3]

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to Section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

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[3] Subsequent to the sanctions hearing, the Referee requested biographical information from each respondent, including education and employment information. Counsel for Respondents ADAMS and FILTHAUT responded with the information. Referee received no response from counsel for Respondent DIACO, but did obtain his year of birth and date admitted to the Bar from The Florida Bar.

a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. The Potential or Actual Injury Caused By the Respondents Misconduct

a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.;
b. Public humiliation of Mr. Campbell and damage to his professional reputation;
c. Disruption of ongoing jury trial and tainting of jury;
d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department;
e. Removal of Officer Tim McGinnis from DUI Squad;
f. Dismissal of significant number of pending DUI cases[4];
g. Public loss of confidence in lawyers and legal system; and
h. Public loss of confidence in law enforcement.

[4] Although The Florida Bar did not adduce any testimony or produce any documentation regarding the dismissals, a number of the news articles in the compilation submitted by The Bar during the penalty phase hearing contained quotations from Tampa Police officials confirming this fact.

4. The Existence of Aggravating or Mitigating Circumstances

a. Aggravation

The Referee finds the following aggravating factors pursuant to 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
d. Multiple offenses;
f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following as to mitigating factors pursuant to 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

During the two days of testimony regarding the sanctions to be recommended, there was ample testimony from multiple witnesses regarding the generosity of Respondent DIACO, his charitable efforts, public service, and loyalty to friends and employees. Virtually all of the witnesses professed to have little or no knowledge regarding the allegations of Respondent's conduct that resulted in this proceeding.

At the conclusion of the hearing, Respondent's counsel sought to introduce an affidavit from the Respondent, presumably expressing remorse and seeking to take responsibility for the events that led to this proceeding. The Referee refused to admit the affidavit, although counsel was allowed to proffer it for the record. It was not read or considered. Respondent DIACO, throughout this proceeding, has refused to testify under oath regarding anything connected to the events surrounding these proceedings. He may not shield himself from cross-examination by invocation of the Fifth Amendment while at the same time seeking to submit sworn statements supporting mitigation.

Respondent DIACO is an experienced, apparently competent attorney with 20 years in the profession. He and his firm have multiple offices and employ numerous associates and paralegal staff. Adams & Diaco have major clients and are, by all appearances, professionally and financially successful.

Against this backdrop, it is all the more disturbing that Respondent DIACO, one of the firm's managing partners, engaged in actions against a fellow attorney that were inexplicably egregious, spiteful, and malicious. While Mr. Campbell and his firm were reeling from the fallout of the Respondents' conspiracy, Respondent DIACO attempted to leverage the moment to his advantage by proposing to discuss settlement. There was no evidence presented at trial to support the suggestion that Mr. Campbell intended to drink and drive on the night of his arrest,

or that he had a habit of drinking and driving. The clear and convincing evidence was that Respondent DIACO's intent was to target Mr. Campbell for arrest because he was opposing counsel in a high-profile case and that it would benefit his firm and his client.

Respondent DIACO's efforts to exploit the situation did not cease until the identity of Ms. Personius was ultimately discovered. The inevitable attempted cover up followed these multiple offenses, including the bizarre travels of Mr. Campbell's trial briefcase. The cover up effort included false testimony before Judge Arnold, a false affidavit filed in *Schnitt v. Clem*, obstruction of service of process, destruction or secreting of known relevant evidence, and the deliberate failure to disclose a key witness, Kristopher Personius, during discovery in this proceeding.

If the cover up had succeeded, Mr. Campbell would have been the attorney answering charges from The Florida Bar, as well as the State of Florida. This malicious tampering with another person's personal life and career was not only unprofessional, it was inexcusable.

Respondent DIACO's many admittedly generous and unselfish acts do not atone for the multiple aggravated violations he committed. It is the Referee's recommendation that he be permanently disbarred.

B. Robert D. Adams - No. 2013-10,736 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent Robert D Adams:

a. Date of Birth – May 27, 1969
b. Education – University of Florida, B.A. w/Honors, 1991
Stetson College of Law, J.D. w/Honors, 1996
c. Employment – Associate, Harris, Barrett, Mann & Dew, 1996 – 1998; Shareholder Adams & Diaco, 1998 to present.
d. Date Admitted to the Bar – September 26, 1996

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

> a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
> b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. **The Potential or Actual Injury Caused By the Respondents Misconduct**

   a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.
   b. Public humiliation of Mr. Campbell and damage to his professional reputation
   c. Disruption of ongoing jury trial and tainting of jury
   d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department
   e. Removal of Officer Tim McGinnis from DUI Squad
   f. Dismissal of significant number of pending DUI cases
   g. Public loss of confidence in lawyers and legal system
   h. Public loss of confidence in law enforcement

4. **The Existence of Aggravating or Mitigating Circumstances**

   a. Aggravation

The Referee finds the following aggravating factors pursuant to 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
c. A pattern of misconduct;
d. Multiple offenses;
f. submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following mitigating factors pursuant to 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

During the hearing regarding sanctions, several witnesses testified on behalf of Respondent ADAMS. Affidavits were also introduced on his behalf. All were supportive of him as a loyal friend, a worthy mentor to young lawyers, and a generous and competent professional. The Florida Bar conceded that the Respondent had no prior disciplinary record. None of the Respondent's witnesses were aware of any specific information about the Respondent's conduct that resulted in their being called as a character witness.

The Bar did produce one witness to testify in support of an additional aggravation factor for this Respondent.

Dr. Robert Frankl, D.C. is a chiropractor from Miami Shores. During the latter part of 2009 through the first few months of 2010, Dr. Frankl was involved in litigation regarding the collection of fees against Progressive Insurance Company, represented by Respondent ADAMS. The issue in the case was the reasonableness of the doctor's fees for treatment that had been billed to Progressive.

Dr. Frankl testified that a few days prior to trial in the case, two young women appeared at his office for a consultation appointment. Both women gave what were later found to be false names, and when asked, each were unable to provide any identification. Both women claimed to have been injured and in need of chiropractic treatment. Each woman inquired whether Dr. Frankl would be willing to discount his normal rate since they each claimed a lack of applicable insurance coverage. He told them he would not reduce his fees, but was willing to accept payment over time. Dr. Frankl arranged an appointment for both women the following week. Neither woman appeared for their respective appointments and Dr. Frankl never heard from them again.

The week following the consultation with the two women, Dr. Frankl was surprised to see some blown up photographs of his office in the courtroom during the Progressive Insurance Company trial. He could not recall anyone coming in to take the photographs, although they seemed recent since they included a new freezer that had been purchased a few weeks before the trial. After the trial, Dr. Frankl remembered the two strange women who appeared at his office without identification. Using the phone number log on his phone from the women's initial call for an appointment and the internet, Dr. Frankl was able to locate a picture of one of the women and learn that she was a paralegal in the Miami office of Adams & Diaco. He believed that their purpose for visiting him was to lure him into

committing "insurance fraud" or to otherwise obtain admissions from him regarding his fee policy that might be used against him in the upcoming trial.

Dr. Frankl has a history of litigating for his fees, as he freely admitted. He also admitted that he regularly files complaints about attorneys with The Florida Bar. He did so in this instance, and got a response letter back from a Bar representative a few days later. He was advised that it was not a proper Bar matter, and that it would have to be resolved by a civil action. Dr. Frankl was not easily dissuaded. He then filed a complaint with the Division of Consumer Services of the Florida Department of Financial Services regarding the actions of Progressive Insurance Company's counsel and paralegals. In response, Dr. Frankl received a copy of a response letter from a Progressive representative that was sent to the Department responding to the complaint. The letter alleged that Respondent ADAMS did not direct his employees to *"present false information in order to secure evidence against Dr. Frankl at trial; however, it does appear that two non-attorney employees of Adams and Diaco did go to Dr. Frankl's office in order to obtain pictures of Dr. Frankl's office."*

The Division took no further action regarding Dr. Frankl's complaint. A few years later, Dr. Frankl read a newspaper account of the Campbell DUI case and recognized the Adams & Diaco law firm as the subject of one of his numerous ethics complaints. He contacted Mr. Campbell and related his experience regarding

Respondent ADAMS's paralegals that, he was convinced, had attempted to set him up. His story was picked up by a newspaper reporter and thereafter came to the attention of The Florida Bar in this matter.

Dr. Frankl's bias was admitted and his credibility regarding the 2010 incident would be suspect, were it not for the admission by Progressive that two Adams & Diaco employees did appear at his office as he testified. Respondent ADAMS, who testified at the guilt phase of this proceeding, offered no rebuttal to Dr. Frankl's serious accusations during the sanctions phase hearing. If, as the Progressive letter suggests, the only purpose of the two Adams & Diaco employees visit was to obtain photographs of Dr. Frankl's office interior, then there are provisions under the rules that provide for it. At the very least, the incident reflects a willingness to use surreptitious methods to accomplish goals that should have been addressed through an above-board discovery process.

This incident occurred a little over two years before the events that are the subject of this proceeding. No other evidence or testimony regarding it was produced except for copies of the correspondence from Progressive, the letter from The Florida Bar, and some copies of Dr. Frankl's internet search results. In the absence of some reasonable explanation, which was not forthcoming during the sanctions hearing, Dr. Frankl's experience with Respondent ADAM's unorthodox discovery methods cannot be ignored. His counsel in this matter has argued that

Respondent's actions in the events that resulted in this proceeding were "aberrant" or "atypical." Dr. Frankl's unrebutted testimony, confirmed through the correspondence, suggests otherwise. The incident displays willingness to engage in a pattern of conduct employing non-lawyer personnel to deliberately misrepresent their identity to accomplish purposes beyond normal discovery.

The Referee will not reiterate the comments regarding Respondent ADAMS that were previously set out in the narrative of the events of January 23 – 25, 2013. Respondent ADAMS' involvement in those events, as demonstrated by the cell phone call and text records, was extensive. Respondent ADAMS was the first person Ms. Personius called when she spotted Mr. Campbell at Malio's that night, and Respondent ADAMS was the last person she spoke to immediately preceding getting into her car with Mr. Campbell, less than ten minutes before his arrest. She received a text from Respondent ADAMS less than seven minutes before his arrest and sent a text back to Respondent ADAMS two minutes later.

Respondent ADAMS, like his co-Respondents, is an experienced, competent attorney and litigator. His counsel has argued that Respondent suffered a 3-½ hour "lapse in judgment" and that his "mistakes were spontaneous" and "unplanned." The record reflects otherwise. The evidence was clear and convincing that Respondent ADAM's participation in the effort to effect the arrest of Mr. Campbell was calculated and had no other purpose than to gain some advantage in

the ongoing *Schnitt v. Clem* jury trial. Respondent ADAMS had weeks to contemplate the failed attempt to arrest Mr. Campbell on November 29, 2012, and the legal, ethical, and moral implications of that attempt. He had weeks to discuss that effort with the co-Respondents and to exercise his experienced judgment regarding the propriety and advisability of any similar future efforts. When the next opportunity arrived, he didn't caution, he didn't object, he didn't "mentor," and he didn't hesitate.

The next day, Respondent ADAMS was again the first person Ms. Personius called when she discovered Mr. Campbell's trial briefcase in her car. Respondent claimed he was "too busy" to deal with it. When the opportunity came to again exercise some ethical and moral judgment, he declined and passed it off to Respondent DIACO.

The cover up followed. He erased his cell phone text messages and for months refused to testify under oath regarding the events. He too failed to list Kristopher Personius as a person with knowledge of the events of that night in response to The Florida Bar's interrogatories. On the morning of trial, he claimed to have finally realized that his license to practice law might be in jeopardy and chose to testify.

The Referee recommends that Respondent ADAMS be permanently disbarred.

C. Adam Robert Filthaut - No. 2013-10,737 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent Adam Robert Filthaut

a. Date of Birth – June 16, 1974
b. Education – University of Detroit, B.S., 1996
Thomas M. Cooley Law School, J.D., 2000
c. Employment – Hillsborough County Public Defender's Office, 2001 – 2003; Adams & Diaco, P.A., 2003 to present.
d. Date Admitted to the Bar – September 14, 2000

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

> a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
> b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. The Potential or Actual Injury Caused By the Respondents Misconduct

a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.
b. Public humiliation of Mr. Campbell and damage to his professional reputation
c. Disruption of ongoing jury trial and tainting of jury
d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department
e. Removal of Officer Tim McGinnis from DUI Squad
f. Dismissal of significant number of pending DUI cases
g. Public loss of confidence in lawyers and legal system
h. Public loss of confidence in law enforcement

4. The Existence of Aggravating or Mitigating Circumstances

a. Aggravation

The Referee finds the following aggravating factors pursuant to section 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
c. A pattern of misconduct;
d. Multiple offenses;
f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following as to mitigating factors pursuant to section 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

Several witnesses testified on behalf of Respondent FILTHAUT during the sanctions hearing. He was described as a competent professional and a loyal friend. Respondent has no prior disciplinary record and his character and reputation were considered excellent.

Respondent's counsel, in his written argument following the hearing on penalties, argues a number of mitigation factors, but the Referee may not find that they exist based only upon counsel's argument.

The record does not support the remaining mitigating factors urged by Respondent's counsel. There was nothing to suggest the absence of a dishonest or selfish motive. There was no evidence of personal or emotional problems. Negotiating with The Florida Bar for an agreed-upon sanction did not constitute a display of a cooperative attitude toward these proceedings, especially in light of the Respondent's refusal to testify and his failure to retain or produce his cell phone text messages. He certainly has a right to rely on the Fifth Amendment, but doing so did not amount to cooperation. Likewise, the failure to disclose Kristopher

Personius as a person with knowledge of the events that led to these proceedings in response to The Florida Bar interrogatory certainly constitutes the opposite of cooperation.

As the Referee previously indicated in the narrative of the events of January 23 – 25, 2013, the entire two-month effort to accomplish the arrest of C. Philip Campbell, Jr., Esq. was dependent upon the unique relationship of trust and friendship that Respondent FILTHAUT enjoyed with Sergeant Raymond Fernandez. Without Respondent FILTHAUT's participation, which is amply confirmed by the record, the plot had virtually no chance of success. His relationship with Sergeant Fernandez gave him instant access to the efforts of the entire Tampa Police Department DUI Squad. Respondent FILTHAUT acted as the conduit for Sergeant Fernandez regarding the updating of events happening inside Malio's. Respondent FILTHAUT, through his communication with Ms. Personius, became the eyes and ears of the Tampa DUI Squad. He kept the officers immediately informed of what was happening inside Malio's, when Mr. Campbell was leaving, where he was before he left, and what kind of car he would be driving. For over 3 ½ hours, Respondent FILTHAUT essentially presided over a police stakeout of his own creation that was totally dependent upon the information he provided them. That information did not include the fact that Mr. Campbell was an opposing attorney in the *Schnitt v. Clem* case, or that an Adams & Diaco

paralegal, operating under a false identity, was buying him drinks and getting him to drive when he otherwise would not have.

Respondent's willingness to betray a 15-year friendship and sacrifice the career and personal freedom of a fellow attorney for the sake of some potential advantage in an ongoing trial remains stunning. Yet the clear and convincing evidence leaves no doubt that Mr. Campbell was deliberately targeted solely to gain that advantage.

Respondent FILTHAUT also had many weeks to contemplate the professional and ethical propriety of his actions following his first attempt to have Mr. Campbell arrested on November 29, 2012. He was an experienced lawyer with 13 years in the practice. During any stage of the 3 ½ hours that the Respondents remained engaged in the effort to improperly effect Mr. Campbell's arrest, any one of them, including particularly Respondent FILTHAUT, could have called a halt to it.

As was previously suggested in the narrative, following orders is not a legal or ethical basis for avoiding personal and professional responsibility for the many serious violations that the Referee found by clear and convincing evidence were committed.

The Referee recommends that Respondent FILTHAUT be permanently disbarred.

VII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

The following costs regarding Respondent DIACO were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,108.18
3. Bar Counsel Expenses..... $620.27
4. Investigative Costs $819.47
5. Copy Costs $1,350.75
6. Witness Expenses..... $1,029.61

Total $14,178.28

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

B. Robert D. Adams - No. 2013-10,736 (13F)

The following costs regarding were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,488.56

3. Bar Counsel Expenses.....$620.27
4. Investigative Costs.....$819.47
5. Copy Costs.....$1,350.75
6. Witness Expenses.....$1,029.61

Total $14,558.66

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

C. <u>Adam Robert Filthaut - No. 2013-10,737 (13F)</u>

The following costs regarding Respondent FILTHAUT were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,108.18
3. Bar Counsel Expenses.....$620.27
4. Investigative Costs.....$819.47
5. Copy Costs.....$1,350.75
6. Witness Expenses.....$1,029.61

Total $14,178.28

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

/s/ W. Douglas Baird
Honorable W. Douglas Baird, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been sent by U.S. Mail to THE HONORABLE JOHN A. TOMASINO, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and sent by email to: THE HONORABLE JOHN A. TOMASINO, Clerk, Supreme Court of Florida, e-file@flcourts.org; Gregory W. Kehoe, Esq., kehoeg@gtlaw.com, attorney for Respondent Diaco; Joseph A. Corsmeier, Esq., jcorsmeier@jac-law.com, attorney for Respondent Diaco; Mark J. O'Brien, Esq., mjo@markjobrien.com, attorney for Respondent Filthaut; William F. Jung, Esq., wjung@jungandsisco.com, attorney for Respondent Adams; and Jodi Anderson Thompson, Esq., JThompso@flabar.org, Bar Counsel, The Florida Bar, this 27th day of August, 2015.

/s/ W. Douglas Baird
Honorable W. Douglas Baird, Referee

Supreme Court of Florida

THURSDAY, JANUARY 28, 2016

CASE NO.: SC14-1052
Lower Tribunal No(s).:
2013-10,735(13F)

THE FLORIDA BAR	vs.	STEPHEN CHRISTOPHER DIACO
Complainant		Respondent

Respondent's "Notice of Voluntary Dismissal" of his "Notice of Intent to Seek Review of Report of Referee" is granted. The notice of intent to seek review is hereby dismissed.

The uncontested report of referee is approved and respondent is permanently disbarred. Respondent is currently suspended; therefore, the permanent disbarment is effective, nunc pro tunc, January 22, 2016. See Fla. Bar v. Diaco, SC14-1052 (Jan. 25, 2016). Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h).

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Stephen Christopher Diaco in the amount of $14,178.28, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed,

determined. The filing of a motion for rehearing shall not alter the effective date of this permanent disbarment.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

dd
Served:

JODI ANDERSON THOMPSON
SHEILA MARIE TUMA
KATRINA S. BROWN
JOSEPH ARNOLD CORSMEIER
GREGORY W. KEHOE
JULISSA RODRIGUEZ
STEPHANIE LAUREN VARELA
ELLIOT H. SCHERKER
DANIELLE SUSAN KEMP
ADRIA E. QUINTELA
WILLIAM FREDERIC JUNG
MARK JON O'BRIEN
HON. WILLIAM DOUGLAS BAIRD, JUDGE

Supreme Court of Florida

No. SC14-1054

THE FLORIDA BAR,
Complainant,

vs.

ROBERT D. ADAMS,
Respondent.

No. SC14-1056

THE FLORIDA BAR,
Complainant,

vs.

ADAM ROBERT FILTHAUT,
Respondent.

[August 25, 2016]

PER CURIAM.

We have for review a referee's report recommending that Robert D. Adams and Adam Robert Filthaut be found guilty of professional misconduct and permanently disbarred. We have jurisdiction. See art. V, § 15, Fla. Const. As

more fully explained below, we approve the referee's factual findings, recommendations as to guilt, and recommendations as to discipline in their entirety.[1]

FACTS

The Respondents in these two cases, Adam Robert Filthaut and Robert D. Adams, were members of a law firm, Adams & Diaco, P.A., in Tampa, Florida. Stephen Christopher Diaco was also a member of this firm and also took part in the events that are the subject of these proceedings. As a result of disciplinary action against Diaco and the withdrawal of his petition seeking review of the referee's report, which jointly addressed Adams, Filthaut, and Diaco, Diaco has been permanently disbarred. See Fla. Bar v. Diaco, No. SC14-1052 (Fla. Jan 28, 2016).

The misconduct giving rise to the disciplinary actions against these three attorneys is among the most shocking, unethical, and unprofessional as has ever been brought before this Court. A brief summary of the facts, as found by the referee in his report, is as follows, and the full referee's report is attached to this opinion.[2] In January 2014, Adams & Diaco, P.A. was defending a radio network

1. The referee's report addressed both Adams and Filthaut, as well as a third respondent, Stephen Diaco. Diaco's case has been disposed of separately, and we have consolidated these remaining two cases.

2. The referee's very detailed and thorough report is incorporated herein as a part of this Court's opinion. We commend the referee, the Honorable William

and one of its disc jockeys, "Bubba the Love Sponge" Clem, in a civil suit. Opposing counsel included attorney Phillip Campbell, who represented another disc jockey named Todd Schnitt. Schnitt brought the action against Clem. The lawsuit was hotly contested for over five years and received substantial media coverage in the Tampa area. On the evening of January 23, 2013, while the trial was in recess for the night, Campbell and his cocounsel, Johnathan Ellis, walked to a nearby restaurant, Malio's Steakhouse, for dinner and a drink. Unbeknownst to Campbell, a paralegal who worked for Respondents happened to be at Malio's with a friend. Campbell did not know the paralegal, Melissa Personius, but she recognized Campbell as she was leaving the bar.

Personius contacted Adams after she left Malio's to inform him she had seen Campbell at the bar. Adams then notified Diaco and called Personius back. After this call from Adams, Personius returned to Malio's. Filthaut called his friend Sergeant Raymond Fernandez of the Tampa Police Department, informing him that Campbell was at Malio's drinking and might drive while intoxicated. Filthaut did not inform Fernandez that Campbell was opposing counsel in the Schnitt versus Clem litigation.

Douglas Baird, for his dedication and careful consideration of these three difficult attorney disciplinary cases.

Upon returning to Malio's, Personius and her friend took a seat next to Campbell at the bar. Personius told Campbell, Ellis, and another attorney present that she was a paralegal but lied about where she was employed. Personius openly and obviously flirted with Campbell, encouraged him to drink, and bought him drinks. All the while, without Campbell's knowledge, communications continued among Respondents, Personius, and Fernandez. Personius kept Respondents informed about what was transpiring with Campbell inside Malio's. Fernandez assigned another officer to stake out Malio's to see if Campbell would drive while intoxicated.

By 9:30 or 9:45 p.m., Personius' friend and the other attorneys with Campbell had left Malio's. Personius also had learned during the evening that Campbell had walked to Malio's and intended to walk home—he lived a few blocks away. Witnesses who observed Personius that evening testified that she appeared to be intoxicated. Campbell observed the same, and he offered to call her a cab. She told him her car was in valet parking. He offered to see if it could be kept overnight. She told him that she needed to get to her car. He took her valet ticket, had the car brought up, and confirmed with the valet that it could be left overnight. She then refused to leave her car and insisted that it needed to be moved to a secure public parking lot where she could have access to it. He tried to convince her to leave the car, but she insisted that it had to be moved. Out of

frustration, he agreed to move the car to a lot near his apartment building and call her a cab from there.

Shortly after leaving Malio's driving Personius' car, Campbell was pulled over by Fernandez and subsequently arrested for DUI and taken to jail. Additionally, Campbell inadvertently left his trial bag in Personius' car. Personius and her car were later driven to her home by an associate attorney in Respondents' firm.

The next day, Stephen Diaco made several statements to the media about the DUI of his opposing counsel Campbell, how the arrest caused the trial to be continued, and how Campbell's behavior was a mockery of the judicial system and an embarrassment to Diaco as an attorney. Additionally, the Respondents were in possession of Campbell's trial bag for several hours and made no attempt to inform him or return the bag until after Personius' identity was discovered and Campbell's cocounsel, Ellis, demanded return of the bag.

The referee's report recommended permanent disbarment for Diaco, Adams, and Filthaut. The report sets forth the extensive communications among the three Respondents, Personius, and Fernandez on the night at issue. The referee found that Respondents engaged in numerous acts of misconduct, including a previous attempt to have Campbell arrested for DUI by Filthaut and his friend Sergeant Fernandez.

Respondents Adams and Filthaut seek review of the referee's report and recommendations. Neither Adams nor Filthaut challenges the referee's factual findings. Filthaut challenges the referee's denial of a motion to disqualify, the denial of a motion for summary judgment, the referee's alleged reliance on facts not in evidence, and the referee's recommendation that he be found guilty of violating Rule Regulating the Florida Bar 3-4.3. Filthaut also challenges the referee's recommendation of permanent disbarment, arguing for the lesser sanction of a rehabilitative suspension up to disbarment. Adams challenges only the recommendation of permanent disbarment and advocates instead for disbarment. As discussed below, we approve the referee's recommendations in full.

ANALYSIS

First, we reject without further discussion Filthaut's claim that the referee improperly failed to disqualify himself, as the grounds alleged were legally insufficient. Regarding his claim that the referee improperly relied upon facts not in evidence, we also reject this claim as meritless.

As to Filthaut's claim that a partial summary judgment should have been granted in his favor on various rule violations, this is also without merit. The complaint and evidence produced at the final hearing clearly showed that Filthaut actively participated with Adams and Diaco in a scheme to improperly cause the arrest of opposing counsel during the midst of an ongoing high-profile civil trial.

The arrest was designed to and had the effect of disrupting the proceedings, including a postponement of the witness testimony and the necessity of juror interviews regarding the publicity surrounding the arrest. Thus, this claim is without merit.

Tied to Filthaut's argument pertaining to the denial of summary judgment is his argument that he should not have been found guilty of violating rule 3-4.3. Rule 3-4.3 provides, in pertinent part, that the "commission by a lawyer of any act that is unlawful or contrary to honesty and justice . . . may constitute a cause for discipline." Filthaut appears to argue that the referee's recommendation that he be found guilty of violating this rule should be disapproved because there was no direct evidence that he destroyed or consented to the destruction of the cell phone that he used during the events at issue in this case. This argument is meritless, and ignores the referee's detailed findings that Filthaut violated rule 3-4.3 by actively conspiring with Diaco, Adams, Personius, and Fernandez to improperly effect Campbell's DUI arrest. In addition, the referee found that Filthaut specifically refused to respond to questions confirming that he had erased, secreted, or otherwise destroyed cell phone communications that would constitute direct evidence of the nature of his communications that night. The referee "indulged all the adverse inferences that may permissibly be imposed as a result." Filthaut does not dispute that the referee appropriately indulged such adverse inferences, and he

provides insufficient support for his argument that such cannot serve as a basis for the referee's findings that he too erased or destroyed the cell phone communications that would have further implicated him in the scheme to have Campbell arrested. Accordingly, we approve the referee's recommendation that Filthaut be found guilty of violating rule 3-4.3.

As for Adams' and Filthaut's challenges to the referee's recommendation that they be permanently disbarred, the standard of review for a referee's recommendation as to discipline is as follows:

> 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 Fla. Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989); see also art. V, §15, Fla. Const. However, generally speaking, this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the [Florida] Standards for Imposing Lawyer Sanctions. See Fla. Bar v. Temmer, 753 So. 2d 555, 558 (Fla. 1999).

Fla. Bar v. Ratiner, 46 So. 3d 35, 39 (Fla. 2010).

Neither Filthaut nor Adams seriously contests the referee's recommendation that they be disbarred, and their co-respondent, Stephen Diaco, has already agreed to and been permanently disbarred. Filthaut and Adams simply contend that their misconduct is not so severe as to warrant permanent disbarment. The most persuasive argument in Respondents' favor is that in imposing permanent disbarment, this Court has usually addressed patterns of continuing egregious and

unrepentant misconduct demonstrating that the respondent attorney is not amenable to rehabilitation and is beyond redemption. For example, in Florida Bar v. Norkin, 183 So. 3d 1018, 1023 (Fla. 2015), the Court permanently disbarred an attorney who had been previously suspended from the practice of law for two years for relentless unprofessional behavior towards judges and opposing counsel and who had been ordered to appear before the Court for a public reprimand.[3] Following his suspension, Norkin failed to fully comply with the suspension order, continued to engage in the practice of law, sent unprofessional and threatening e-mails to Bar counsel, and during the public reprimand administered by the Court "intentionally smirked and stared down each Justice one by one." Id. The Court addressed Norkin's discipline as follows:

> Moreover, given Norkin's continuation of his egregious behavior following his suspension and during the administration of the public reprimand, we conclude that he will not change his pattern of misconduct. Indeed, his filings in the instant case continue to demonstrate his disregard for this Court, his unrepentant attitude, and his intent to continue his defiant and contemptuous conduct that is demeaning to this Court, the Court's processes, and the profession of attorneys as a whole. Such misconduct cannot and will not be

3. In the previous disciplinary case, the Court found that despite repeated warnings from judges, Norkin continually engaged in rude, antagonistic, and extremely unprofessional behavior, including making false accusations against a senior judge, disrupting multiple court proceedings by yelling at judges and exhibiting disrespectful conduct, and relentless, unethical, and denigrating behavior toward opposing counsel. Fla. Bar v. Norkin, 132 So. 3d 77, 89-92 (Fla. 2013). Norkin also had previously been publicly reprimanded and required to attend ethics school for similar misbehavior. Id. at 91.

> tolerated as it sullies the dignity of judicial proceedings and debases the constitutional republic we serve. We conclude that Norkin is not amenable to rehabilitation, and as argued by the Bar, is deserving of permanent disbarment.

Id. Similarly, in Florida Bar v. Behm, 41 So. 3d 136 (Fla. 2010), the Court permanently disbarred an attorney who was guilty of trust account violations and knowing failure to file or pay federal income taxes for the entire time he was admitted to practice law. The attorney had previously been publicly reprimanded as a result of misconduct in connection with a probate matter and had been previously suspended for ninety-one days for misconduct in a guardianship matter "that raised serious issues concerning his fitness to practice law." Id. at 151. In addition, at oral argument before this Court he declared his intention "to persist in refusing to file income tax returns '[u]nless the law changes or unless someone can show [him] a law that makes [him] clearly liable for income tax, for federal income tax.' " Id. The Court concluded that the "only appropriate sanction under these circumstances—cumulative misconduct and a persistent course of unrepentant misconduct—is permanent disbarment from the practice of law." Id.

Here, as to both Adams and Filthaut, the referee found as mitigating factors the absence of a prior disciplinary record and good character and reputation. Both have enjoyed relatively lengthy unblemished careers—Adams had been a member of the Florida Bar for approximately 17 years and Filthaut had been a member approximately 13 years at the time the misconduct occurred. And, both were able

to present multiple character witnesses on their behalf. On the other hand, in recommending permanent disbarment, the referee made factual findings linking Adams to a prior incident of unethical behavior involving paralegals for his firm surreptitiously photographing the office of a chiropractor who was a plaintiff in a case in which Adams was counsel for the defendant, and Filthaut had orchestrated (and Adams knew about) a prior attempt to have Campbell arrested.

On balance, we conclude that if the misconduct involved in this case is not comparable to that committed in the cases above, this is in part because the misconduct in this case is unique and essentially unprecedented, at least as documented in this Court's prior case law. The Respondents' actions constituted a deliberate and malicious effort to place a heavy finger on the scales of justice for the sole benefit of themselves and their client. The personal and professional harm inflicted upon Campbell (a fellow attorney) and his clients' case, upon Sergeant Fernandez (a personal friend of Filthaut and officer of the law), and upon the legal system, the legal profession, and the public's confidence in both, was simply collateral damage from the Respondents' point of view. The Respondents' willingness to inflict and indifference to causing such harm is, in the words of the referee, quite "stunning." The referee did not find remorse as a mitigating factor for either Respondent, and neither of them challenges this.

Given all of these circumstances, we conclude that the referee's recommendation of permanent disbarment is warranted and appropriately serves the three-pronged purpose of attorney discipline: (1) it is fair to society; (2) it is fair to the Respondents; and (3) it is severe enough to deter other attorneys from similar misconduct. See Fla. Bar v. Lawless, 640 So. 2d 1098, 1100 (Fla. 1994). We can only hope that our unanimous decision to approve the referee's recommendation to permanently disbar these attorneys, a sanction not contested by and already imposed upon the third attorney involved, Stephen Diaco, will serve to warn other attorneys of the high standards of professional conduct we demand of all attorneys. And we hope in some small way, it will send a message to the public that this Court will not tolerate such outrageous misconduct on the part of attorneys admitted to practice law in Florida.

CONCLUSION

Accordingly, Robert D. Adams and Adam Robert Filthaut are hereby permanently disbarred from the practice of law in the State of Florida. Because the Respondents are currently suspended, the permanent disbarment is effective immediately. Respondents shall fully comply with Rule Regulating the Florida Bar 3-5.1(g).

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Robert D. Adams in

the amount of $14,558.66, and from Adam Robert Filthaut in the amount of $14,178.28, for which sum let execution issue.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARMENT.

Original Proceeding – The Florida Bar

John F. Harkness, Jr., Executive Director, Tallahassee, Florida; Jodi Anderson Thompson and Katrina S. Brown, Bar Counsel, Tampa, Florida; and Adria E. Quintela, Staff Counsel, Sunrise, Florida,

for Complainant The Florida Bar

William Frederic Jung of Jung & Sisco, P.A., Tampa, Florida,

for Respondent Robert D. Adams

Mark Jon O'Brien, Tampa, Florida,

for Respondent Adam Robert Filthaut

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEPHEN CHRISTOPHER DIACO,

Respondent.

_____/

Supreme Court Case
No. SC14-1052

The Florida Bar File
No. 2013-10,735 (13F)

THE FLORIDA BAR,

Complainant,

v.

ROBERT D. ADAMS,

Respondent.

_____/

Supreme Court Case
No. SC14-1054

The Florida Bar File
No. 2013-10,736 (13F)

THE FLORIDA BAR,

Complainant,

v.

ADAM ROBERT FILTHAUT,

Respondent.

_____/

Supreme Court Case
No. SC14-1056

The Florida Bar File
No. 2013-10,737 (13F)

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On June 2, 2014, The Florida Bar filed separate Complaints against the Respondents, Stephen Christopher Diaco, Esq. ("DIACO"), Robert D. Adams, Esq. ("ADAMS"), and Adam Robert Filthaut, Esq. ("FILTHAUT"). On June 4, 2014, Amended Complaints were filed against Respondents ADAMS and FILTHAUT. The Honorable W. Douglas Baird was appointed as Referee in each matter pursuant to the Supreme Court of Florida's June 4, 2014 Order and the June 10, 2014 Order of the Honorable J. Thomas McGrady, Chief Judge of the Sixth Judicial Circuit. Because the cases against the Respondents arise out of the same facts, the cases were consolidated for the purpose of discovery on July 28, 2014, and subsequently consolidated for trial. Prior to trial, the Respondents filed motions for partial summary judgment, which were denied on May 11, 2015. The trial was bifurcated, with the guilt phase conducted between May 11, 2015, and May 21, 2015, and the sanctions phase conducted on August 6-7, 2015.

During the course of these proceedings, Respondent DIACO was represented by Gregory W. Kehoe, Esq., Danielle Kemp, Esq., and Joseph A. Corsmeier, Esq. Respondent ADAMS was represented by William F. Jung, Esq.

and Respondent FILTHAUT was represented by Mark J. O'Brien, Esq. The Florida Bar was represented by Jodi A. Thompson, Esq., Sheila Tuma, Esq., and Katrina Brown, Esq. All items properly filed, including pleadings, transcripts, exhibits, and this Report, constitute the record in this case and are being forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT: TFB No. 2013-10,735 (13F); No. 2013-10,736 (13F); No. 2013-10,737 (13F)

A. Jurisdictional Statement

Respondents are, and at all times mentioned during this Investigation were, members of The Florida Bar subject to the jurisdiction and Disciplinary Rules of the Supreme Court.

B. Narrative Summary – all cases

Narrative Summary Introduction

This matter involves three members of The Florida Bar who the Referee finds, individually and through a conspiracy among themselves and others, violated the Standards of Conduct and Rules of Professional Conduct of the Rules Regulating Members of The Florida Bar. The Referee believes that in order to more easily explain the factual circumstances that were proven by clear and convincing evidence at trial, a comprehensive narrative of each of the key findings will provide a more comprehensible format. Preceding that narrative, the major participants in the events that resulted in these proceedings are identified.

Respondent DIACO is an equity partner in the law firm of Adams & Diaco, P.A., whose offices are located in the Bank of America Building in downtown Tampa, Florida. He is the brother of Joseph A. Diaco, Jr., Esq., who is also an equity partner in Adams & Diaco, P.A. Throughout this proceeding, Respondent DIACO has refused to testify, either in deposition or at trial, based on his right against self-incrimination.

Respondent ADAMS is the third equity partner in Adams & Diaco, P.A., along with the Diacos. Throughout this proceeding, Respondent ADAMS refused to answer any questions in deposition, based on his right against self-incrimination. On the morning of trial, with all discovery completed and disclosed by The Florida Bar, he chose to testify.

Respondent FILTHAUT is a non-equity partner (also referred to as an "associate") in Adams & Diaco, P.A. Throughout this proceeding, Respondent FILTHAUT has refused to testify, either in deposition or at trial, based on his right against self-incrimination.

Melissa Personius is, and at all times pertinent to this matter was, a paralegal employed by Adams & Diaco, P.A. She worked primarily for Respondent ADAMS, but was subject to the direction or authority of all the partners, be they equity or non-equity. At the time of the material events, Ms. Personius lived in Brandon, a Tampa suburb, with Kristopher Personius, her ex-husband. Ms.

Personius refused to testify at trial based on her right against self-incrimination. She gave some testimony to the Pinellas County State Attorney's Office investigators and signed a short affidavit prior to these proceedings being brought, but she claimed to have no recollection of many significant portions of the events.

Sergeant Raymond Fernandez was, at all times material to these proceedings, a Sergeant with the City of Tampa, Florida Police Department. He had been with the Department for over 18 years, of which he spent the last 15 years on the Traffic Enforcement Unit. At the time of these events, he was the commander of the Traffic Enforcement Unit, otherwise known as the DUI Squad. Sergeant Fernandez was a close personal friend of Respondent FILTHAUT. Sergeant Fernandez refused to testify at trial based on his right against self-incrimination. Before these proceedings, however, he provided deposition testimony to investigators from the Pinellas County State Attorney's Office and testified at various administrative hearings regarding both the arrest of C. Philip Campbell, Jr., Esq., and his discharge from the Tampa Police Department.

Brian Motroni, Esq., was an associate attorney with the firm of Adams & Diaco, P.A. at all times material to this matter. Mr. Motroni provided some information when he spoke with an investigating attorney for the Thirteenth Judicial Circuit Grievance Committee. At trial, Mr. Motroni refused to testify based upon his right against self-incrimination.

Charles Philip Campbell, Jr., Esq., is a partner in the law firm of Shumaker, Loop, & Kendrick whose offices are also in the Bank of America Building in downtown Tampa. At the time of all relevant events, Mr. Campbell was lead counsel in the *Schnitt v. Clem* trial before Thirteenth Circuit Judge James D. Arnold, a high profile case between two radio "shock jock" personalities. Mr. Campbell represented Todd and Michele Schnitt while Adams & Diaco represented "Bubba the Love Sponge" Clem and Bubba Radio Network. Mr. Campbell testified at trial and the Referee found him to be a credible witness.

Jonathan J. Ellis, Esq., is also a partner in Shumaker, Loop, & Kendrick, and, at all times material to this matter, co-counsel with Mr. Campbell in the *Schnitt v. Clem* litigation.

I.

Respondents DIACO, ADAMS, and FILTHAUT, members of Adams & Diaco, PA, conspired among themselves and with others to deliberately and maliciously effect the arrest of Mr. Campbell, an opposing attorney.

THURSDAY, NOVEMBER 29, 2012 – FIRST ATTEMPTED ARREST

The major events that comprise this narrative occurred between the evening of January 23, 2013, and the afternoon of January 25, 2013. An earlier event, however, puts them in perspective and reveals a pattern of intentional conduct that resulted in these proceedings. The first effort to manipulate the arrest of Mr. Campbell by members of the Adams & Diaco law firm began approximately 60

days prior to January 23, 2013, and were revealed in a deposition of Sergeant Fernandez that was taken prior to the filing of these proceedings.

On the evening of November 29, 2012, Respondent FILTHAUT called his close friend Sergeant Fernandez and said: *"There's this guy that works in my building. He's an attorney. He gets drunk all the time. He goes to Malio's and drinks it up and then he drives home drunk."* Sergeant Fernandez was given the name *"Philip Campbell."* Respondent FILTHAUT did not tell Sergeant Fernandez that Mr. Campbell was the lead opposing attorney in a five-year-old high-profile civil action being defended by Adams & Diaco.

Sergeant Fernandez, based upon the information provided by Respondent FILTHAUT, ordered Officer Michael Lyon of the Tampa Police Department DUI Squad to stakeout Malio's Steakhouse in downtown Tampa, with specific instructions to look for Mr. Campbell. Officer Lyon was given Mr. Campbell's name and a vehicle description. Mr. Campbell was not observed driving that night and no arrest was made. After 45 minutes, the surveillance was discontinued. A compilation of recorded and preserved Tampa Police Mobile Data Terminal ("MDT") text communications between the officers of the DUI Squad on the evening of November 29, 2012, further confirms the effort to look for Mr. Campbell.

Respondent ADAMS admitted during trial that he learned of the November attempt to target Mr. Campbell shortly after it occurred. There was no evidence that he admonished Respondent FILTHAUT for those actions or made any effort to prohibit similar acts in the future.

WEDNESDAY, JANUARY 23, 2013 – THE SETUP AND ARREST

The evening's events played out over a five or six hour period beginning around 5:00 p.m. on January 23, 2013. Following a day in the *Schnitt v. Clem* trial, Mr. Campbell walked from his office to Malio's Steakhouse in downtown Tampa to meet his trial partner, Mr. Ellis, for dinner and drinks.

Ms. Personius had also decided to go to Malio's for drinks after work with her friend Vanessa Fykes. They arrived at Malio's around 5:00 p.m. and had a glass of wine. After a short while, they decided to drive to the Fly Bar, a few blocks away. As they were leaving Malio's, Ms. Personius noticed that Mr. Campbell was at the bar. When Ms. Personius arrived at the Fly Bar, she contacted Respondent ADAMS and informed him that Mr. Campbell was at Malio's. Respondent ADAMS, after notifying Respondent DIACO of the information received from Ms. Personius, called her back. Following the call from Respondent ADAMS, Ms. Personius returned to Malio's.

Although she refused to testify at trial, Ms. Personius previously admitted during the State Attorney's investigation: *"I offered—I believe I offered to just go*

back if they needed, you know, anything, any other–to see maybe if he's still there. I don't know. Whatever information the police or authorities needed." She also admitted knowing that*"[t]he Police have a contact."* Sergeant Fernandez, in earlier sworn testimony, admitted that the "contact" that night was his close friend, Respondent FILTHAUT.

While Ms. Personius was returning to Malio's, Respondent ADAMS, after discussions with Respondent DIACO, called Respondent FILTHAUT to alert him that Mr. Campbell was at Malio's. As he had done two months earlier, Respondent FILTHAUT called Sergeant Fernandez to again encourage him to stakeout Malio's with the intent of arresting Mr. Campbell for Driving under the Influence. Sergeant Fernandez testified that he asked Respondent FILTHAUT, *"Is that the guy you called me about before?"* Respondent FILTHAUT acknowledged that it was and told Sergeant Fernandez, *"Hey, the attorney that's in my building, he's out drinking again at night at Malio's."* He also told Sergeant Fernandez, *"He's going to drive home again tonight drunk."* Sergeant Fernandez told Respondent FILTHAUT, *"Well, we didn't get him last time. We'll sit on him again and see what he does."* Respondent FILTHAUT again failed to tell Sergeant Fernandez that Mr. Campbell was the opposing attorney in the much-publicized and ongoing *Schnitt v. Clem* trial.

Sergeant Fernandez assigned a member of his DUI Squad, Officer Joseph Sustek, to sit outside of Malio's and look for Mr. Campbell's black BMW. Shortly after 8:00 p.m. that night, Sergeant Fernandez and another member of the DUI Squad, Officer Tim McGinnis, took up the surveillance and relieved Officer Sustek. During the evening, Sergeant Fernandez received periodic updates about what Mr. Campbell was doing inside Malio's by text or voice call from Respondent FILTHAUT.

While Sergeant Fernandez was setting up his surveillance for Mr. Campbell, Ms. Personius and Ms. Fykes had returned to Malio's. Ms. Personius took a seat at the bar next to Mr. Campbell. From about 7:00 p.m. until about 9:45 p.m., she engaged in conversation with Mr. Campbell, Mr. Ellis, and attorney Michael Trentalange. She told them that she was a paralegal working for Nathan Carney, Esq., at the firm of Trenam Kemker. She openly and obviously flirted with Mr. Campbell, encouraged him to drink, and bought him drinks herself.

While the drinking and conversation were occurring that night, Ms. Personius managed to carry on a steady series of cell phone texts and calls with each of the Respondents. For example, between 6:30 p.m. and 9:30 p.m. that night Ms. Personius either sent or received approximately 19 separate communications with Respondent FILTHAUT. During that same period, she had approximately 17 communications with Respondent ADAMS, and approximately 11 with

Respondent DIACO. In the half hour between 9:30 p.m. and 10:00 p.m., the approximate time Sergeant Fernandez pulled Mr. Campbell and Ms. Personius over after they left Malio's, Ms. Personius had approximately another 12 communications with Respondent FILTHAUT, 7 with Respondent ADAMS, and 2 with Respondent DIACO. The Florida Bar's Exhibit 59 provides a minute-by-minute chart of the dozens of cell phone communications that were occurring between the Respondents and Ms. Personius, as well as those among the Respondents themselves. The actual substance of those text messages is not known. If the Respondents' phones still exist, they chose not to produce them. Ms. Personius disposed of her phone before these proceedings began, and Sergeant Fernandez previously testified that all his texts were erased when he put some new software on his phone. It was obvious, however, from the recorded and preserved Tampa Police MDT text messages between patrol vehicles that night that Ms. Personius was providing Respondent FILTHAUT with regular updates. He passed on those updates to Sergeant Fernandez, who in turn, communicated them to Officers Sustek and McGinnis. At one point, Officer Sustek sent a MDT text to Sergeant Fernandez asking if he was going to be informed when Mr. Campbell left Malio's. Sergeant Fernandez replied that he was. That exchange was around 8:17 p.m., long before Mr. Campbell had left. It confirmed not only that Sergeant

Fernandez was being updated, but also that whoever was doing the updating intended to remain at Malio's until Mr. Campbell decided to leave.

By 9:30 p.m. to 9:45 p.m., Ms. Fykes and Mr. Ellis had left Malio's. Mr. Trentalange was leaving to make a 9:45 p.m. dinner reservation. During the evening, Ms. Personius learned that Mr. Campbell had walked to Malio's, did not have a car there, and that he intended to also walk the few blocks home. That was not out of the ordinary for Mr. Campbell, as was confirmed by the testimony of bartender Denise DiPietro, restaurant manager Dina Kuchkuda, Mr. Ellis, and attorney Michael Trentalange, all of whom the Referee found credible. In fact, Mr. Trentalange had a specific conversation with Mr. Campbell that night about his plans for the evening. Mr. Campbell told Mr. Trentalange that he planned to go home and be in bed around 10:00 p.m. and get up at 2:00 a.m. to work on the next day's witness testimony for the ongoing jury trial, then in its second week. Mr. Trentalange had known Mr. Campbell professionally for a number of years and testified that this was a routine Mr. Campbell regularly followed during jury trials.

Some of the witnesses who observed Ms. Personius that evening testified that she appeared to be intoxicated. That was certainly the opinion of Ms. Fykes, who, before leaving, told her not to drive and to call a cab. Mr. Campbell also felt that she was intoxicated and, as they were leaving, offered to call her a cab. She told him that her car was in valet parking. Mr. Campbell said he would see if it

could be kept overnight in the parking garage. Ms. Personius then told Mr. Campbell that she needed to get to her car. Mr. Campbell took her valet ticket to the attendant and had the car brought up. Mr. Campbell confirmed with the attendant that the car could be left overnight.

At that point, Ms. Personius refused to leave her car and insisted that it needed to be in a secure public parking lot where she could have access to it. Mr. Campbell tried to convince her to leave the car, but she maintained that it had to be moved[1]. Out of frustration, Mr. Campbell agreed to move the car to a lot near his apartment building and to call her a cab from there. Mr. Campbell fully admitted that she never asked him directly to drive her car. He chose instead to run the risk of a two-minute drive as a favor to someone who appeared too impaired to drive safely. Mr. Campbell was unaware that the self-professed paralegal from Trenam Kemker was feigning being stranded and, at that point and throughout the evening, was plotting with the Respondents to have him arrested.

The video of the parking lot area, which Mr. Campbell narrated during his testimony, shows that these events occurred between approximately 9:40 p.m. and 9:57 p.m. The timing is noteworthy. Cell phone call and text records show that at

[1] In reality, Ms. Personius was easily able to get herself and her car home that evening without any assistance from Mr. Campbell. Later she was quickly able to arrange, through her constant contact with the Respondents, for Mr. Motroni to be dispatched for that purpose. The fact that this alternative was not exercised until after Mr. Campbell drove into the waiting police stakeout is further confirmation of their intent to effect his arrest.

9:28 p.m., Ms. Personius sent a text to Respondent DIACO. Immediately thereafter, Respondent DIACO made a phone call to Respondent FILTHAUT. Immediately following that, Respondent FILTHAUT sent a text to Sergeant Fernandez. One minute later, at 9:29 p.m., Sergeant Fernandez sent a MDT text message to Officer McGinnis, who was part of the stakeout, which read *"leaving bar now,"* referring to Mr. Campbell. Since Mr. Campbell had hardly walked out into the parking area before this whole exchange, it clearly demonstrates how diligently Ms. Personius was keeping the Respondents informed about what was happening. Her information was immediately relayed to the DUI Squad through Respondent FILTHAUT's communication with Sergeant Fernandez.

When Sergeant Fernandez informed Officer McGinnis that Mr. Campbell was leaving the bar at Malio's, both officers were under the impression that Mr. Campbell would be driving his black BMW. Officer McGinnis sent an MDT text to Sergeant Fernandez which read *"blk convertible?"* At 9:31 p.m., Sergeant Fernandez replied *"BMW_yes."* At the same time, Ms. Personius was having her own text exchanges. At 9:32 p.m., she received a text from Respondent FILTHAUT. At 9:35 p.m., she received a text from Respondent DIACO. At 9:36 p.m., she sent a text to Respondent FILTHAUT. At 9:37 p.m., she got a text back from Respondent FILTHAUT. At 9:39 p.m., she got another text from Respondent FILTHAUT. At 9:42 p.m., she got another text from Respondent FILTHAUT.

Immediately after, she made a 57 second phone call to Respondent FILTHAUT, which was followed by another text from Respondent FILTHAUT at 9:44 p.m. She immediately made another phone call to Respondent FILTHAUT, that one lasting 53 seconds. At 9:45 p.m., she sent a text to Respondent FILTHAUT. At 9:48 p.m., she got a text from Respondent ADAMS, which was immediately followed by a call to Respondent ADAMS at 9:49 p.m. that lasted 46 seconds. She then received a text from Respondent ADAMS at 9:52 p.m. At 9:53 p.m. and 9:54 p.m., she got texts from Respondent FILTHAUT. During that same minute, she got a text from Respondent DIACO and sent another to Respondent ADAMS. During these exchanges, Ms. Personius obviously informed Respondent FILTHAUT that Mr. Campbell did not plan to leave Malio's in his own vehicle, since he didn't have one there, and instead would be driving her Nissan. Some or all of this was passed on to Sergeant Fernandez who, at 9:51 p.m., sent another MDT text to Officer McGinnis that read *"dark Nissan...valet malios."* Sergeant Fernandez asked Officer McGinnis to drive by Malio's to *"see if you see it"* at 9:51 p.m. Officer McGinnis did so and reported back *"female driving"* at 9:54 p.m.

Officer McGinnis had been misled into believing a female would be driving because he had observed Ms. Personius near the driver's door of her car at Malio's valet stand. However, the Respondents knew that Mr. Campbell would be driving, because Ms. Personius had told them. It was therefore unnecessary to advise

Sergeant Fernandez about anything other than which car he was to target. As Mr. Campbell pulled out of Malio's parking lot at approximately 9:57 p.m. that night, the Respondents and their employee, Ms. Personius, knew that the trap was set.

Almost immediately after the Nissan left Malio's, Sergeant Fernandez, who was off duty and driving an unmarked car, pulled Mr. Campbell over for a traffic stop. He claimed that Mr. Campbell had made an illegal right turn from a through lane on Ashley Street across a right turn lane and into an intersecting street. No one else observed this driving. Officer McGinnis arrived immediately thereafter, and Sergeant Fernandez turned Mr. Campbell over to him for what became a typical DUI investigation. Mr. Campbell was arrested, handcuffed, and taken to the County Jail.

Although the law provides that vehicles used in a DUI be impounded, Sergeant Fernandez, as leader of the unit, was authorized to waive that requirement if a sober driver was available. He did so after more text messages with Respondent FILTHAUT. Sergeant Fernandez had already communicated to Respondent FILTHAUT that he could not release the car to Ms. Personius because her driver's license was suspended. Phone records show that Ms. Personius, after several conversations with Respondent ADAMS, called associate Mr. Motroni, who was dropped off at the scene.

Mr. Motroni drove Ms. Personius and her car to her home in Brandon. Waiting for her there, and caring for their two children, was her ex-husband and then current roommate Kristopher Personius. The Personius's marriage had been dissolved for seven years, but their relationship continued. At trial, Mr. Personius testified to the following: when Ms. Personius arrived home she admitted to him in an excited state that she had participated in setting up Mr. Campbell at the direction of her employers, specifically Respondent ADAMS and Respondent DIACO. She told him that the Respondents were looking to set Mr. Campbell up, that she had been directed to go to Malio's to spy on him and *"get him to stay longer and drink more,"* and that Respondent DIACO and Respondent ADAMS were *"going to Adam Filthaut, too, to get the cop in place."* Ms. Personius also said that she had made Mr. Campbell drive and told her ex-husband that she *"got him"* and *"made him drive my car."* Mr. Personius further testified that Ms. Personius stated that Respondent DIACO had told her that she would receive a big bonus and would be his best-paid paralegal. All of these admissions occurred in the presence of not only Mr. Personius, but also Mr. Motroni who, after driving her car home, was waiting for a cab. Mr. Motroni refused to testify at trial on Fifth Amendment grounds.

Credible support for Mr. Personius's account of the evening's events came from another witness at trial, Lyann Goudie, Esq. Ms. Goudie is a former

prosecutor and experienced criminal defense attorney in Tampa. After the arrest of Mr. Campbell and the intense media attention that followed, Mr. and Ms. Personius were still living together in Brandon when the FBI arrived on the morning of May 23, 2013, with a search warrant. Several days later, Mr. Personius was contacted by an FBI representative who wanted to discuss the events of January 23, 2013. Mr. Personius told his ex-wife about the call, and she told him not to talk to them. Immediately thereafter, Ms. Personius's attorney, Todd Foster, who was being paid by Adams & Diaco, arranged for Mr. Personius to consult with Ms. Goudie. Adams & Diaco also paid Ms. Goudie $2,500 for her representation of Mr. Personius. Mr. Personius's knowledge of events was important enough to Adams & Diaco that they paid for an attorney to represent him before the FBI. Yet, each Respondent failed to disclose Mr. Personius as a person with knowledge of the events of January 23, 2013, in response to The Florida Bar's interrogatories during discovery in this matter.

At trial, Ms. Goudie testified that Mr. Personius had waived the attorney/client privilege regarding her representation of him, and she was free to answer any questions about their privileged discussions. She then described how Mr. Personius had come to her in early June 2013, because the FBI wanted to talk with him. He told her that the publicity regarding his ex-wife's role in the Campbell matter had hurt his teenage daughters because their unusual last name

was so recognizable, and he didn't want to get drawn in further. Ms. Goudie further testified that Mr. Personius related to her the events that occurred when Mr. Motroni brought Ms. Personius home after Mr. Campbell's arrest on January 23, 2013. Her recounting of his description of the events of that night was consistent with the testimony Mr. Personius gave at trial.

During Ms. Goudie's consultation with Mr. Personius, he voiced no animosity toward his ex-wife or her employer. Essentially, he wanted to avoid any involvement and be left alone. Further, during that consultation, Mr. Personius also advised Ms. Goudie that he had recorded a video that night on his cell phone that included his wife's admissions regarding the plan to set up and arrest Mr. Campbell. Ms. Goudie told him that the recording might be considered illegal if it was done without the consent of his ex-wife, and that if he was going to share it with anyone, it should be the FBI. According to allegations contained in motions filed prior to trial, the recording that Mr. Personius made of his ex-wife on the night of January 23, 2013, is now in the possession of the FBI. It was not offered into evidence at the trial and its contents are unknown to the Referee. But the testimony that Mr. Personius gave at trial, regarding the admissions of his ex-wife on the night of Mr. Campbell's arrest, is credible not only because it was not recently fabricated, but also because it was supported by the other credible evidence and testimony in the case.

Ms. Personius's active participation in the events surrounding the set up and arrest of Mr. Campbell essentially ended when Mr. Motroni drove her home that night in her car. However, before moving on to subsequent events, there are additional facts regarding her participation that require some comment. The first fact concerns the state of Ms. Personius's sobriety that night. It was previously noted that several people commented that she appeared intoxicated during the evening. That was the impression Mr. Campbell testified he had at the time he decided to leave Malio's. Regardless of the amount of alcohol she consumed that night, the evidence clearly shows that Ms. Personius was capably providing the Respondents with a constant stream of texts and voice calls from the time she first noticed Mr. Campbell at Malio's through the events that led to his arrest and thereafter. Ms. Personius was also alert enough regarding what she had said and done that night to attempt to cover her tracks. Early the next morning, she texted Nate Carney: *"if someone calls looking for me tell them you don't know me or don't tell them who I am."* Mr. Carney, who testified at trial, was the attorney at Trenam Kemker that Ms. Personius falsely told Mr. Campbell and Mr. Ellis she worked for. The Referee found Mr. Carney's testimony to be credible. Two days later, Ms. Personius also called and left a message on Vanessa Fykes phone to let her know that an investigator for Adams & Diaco would be calling her to "prep" her regarding any questions about the evening's events that she might subsequently

be asked. Ms. Fykes, after seeing news reports the morning following the arrest, cut off any further communication with Ms. Personius. Ms. Fykes also refused to return numerous calls from the Adams & Diaco investigator and those of Respondent DIACO himself. The Referee also found her testimony regarding these events to be credible.

When called to testify at trial, Ms. Personius refused to answer every question that she was asked after giving her name. She claimed her right to remain silent under the Fifth Amendment. She had also made the same assertion of rights before Judge Arnold when she was asked about the events of the night of January 23 during the hearing on the Motion for Mistrial in the *Schnitt v. Clem* case. In doing so, she subjected herself and the Respondents to the adverse inferences that are appropriate to impose, given the nature of all the other evidence in this case. *Coquina Investments v. TD Bank, N.A.,* 760 F.3d 1300 (11th Cir. 2014); *Atlas v. Atlas,* 708 So. 2d 296, 299 (Fla. 4th DCA 1998).

Prior to this matter being filed, when Ms. Personius was interviewed by the Pinellas County State Attorney's Office regarding Mr. Campbell's DUI charge (it had been transferred from Hillsborough), she admitted her involvement. When she was questioned regarding her many phone calls and text messages with the Respondents that evening, however, she consistently denied any recollection. Given the sheer volume of texts and phone calls and the significance of the night,

that was simply not credible. In addition, the fact that she continues working for the Respondents' firm, that she received a $9,000 bonus for 2013, a $6,500 raise, and a credit card paid for by Adams & Diaco all support the conclusion that her conduct on the night of January 23, 2013, was known and approved by the Respondents.

The active participation of all of the Respondents in the effort to effect the arrest of Mr. Campbell is beyond dispute. Respondent DIACO directed Respondent ADAMS to call Respondent FILTHAUT when he first learned that Mr. Campbell was at Malio's that evening. Respondent DIACO was aware that Respondent FILTHAUT's close relationship with Sergeant Fernandez would result in the Tampa Police Department's DUI Squad making another special effort to target Mr. Campbell, as it had attempted in November. Respondent DIACO was aware that Ms. Personius was drinking with Mr. Campbell at Malio's and that she was passing on updates regarding their activities to him and the other Respondents. He was aware that her information was being shared with Sergeant Fernandez on a regular basis through Respondent FILTHAUT. He was aware that Mr. Campbell would be driving Ms. Personius's car from Malio's and that the vehicle information had been provided to Sergeant Fernandez. He maintained constant contact with the other Respondents throughout the evening as the plan progressed, and did nothing to discontinue the effort directed at Mr. Campbell's arrest.

Respondent DIACO was an attorney with supervisory authority over Respondent FILTHAUT, associate Mr. Motroni, and nonlawyer employee Ms. Personius. Respondent DIACO failed or refused to properly supervise Respondent FILTHAUT, associate attorney Mr. Motroni, and nonlawyer employee Ms. Personius that evening and thereafter.

Respondent DIACO refused to testify for a deposition and at trial on Fifth Amendment grounds. When questioned by Judge Arnold regarding the evening of January 23 during the *Schnitt v. Clem* case, he either invoked his right to the Fifth Amendment, claimed he could not recall conversations or events that occurred less than 48 hours earlier, or denied any active participation. Respondent DIACO's memory had improved by the time he filed an affidavit on March 4, 2013, in opposition to a Motion for New Trial in *Schnitt v. Clem.* Respondent DIACO swore that his involvement in the events of the night of Mr. Campbell's arrest consisted of "*respond[ing] to requests for information made by the Tampa Police Department.*" That statement is so misleading and so far from the truth regarding the known events of that night that it amounts to a deliberate falsehood. The Referee infers from Respondent DIACO's silence at trial that truthful responses

would have further demonstrated his complicity in the conspiracy proven by clear and convincing evidence to exist. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).[2]

Respondent ADAMS was also a major participant in the conspiracy to effect the arrest of Mr. Campbell. The clear and convincing evidence establishes that he was aware of the November 29, 2012 attempt to arrest Mr. Campbell. He did not advise Respondent FILTHAUT against using his friendship with Sergeant Fernandez to effect the arrest of Mr. Campbell. Instead, he called Respondent FILTHAUT early on the evening of January 23, 2013, at the request of Respondent DIACO, to accomplish a DUI Squad stakeout of Malio's with the specific intent of seeking Mr. Campbell's arrest. He was aware that Ms. Personius was drinking with Mr. Campbell at Malio's and that she was passing on updates regarding their activities to him and the other Respondents. He was aware that her information was being shared with Sergeant Fernandez on a regular basis through Respondent FILTHAUT. He was aware that Mr. Campbell would be driving Ms. Personius's car from Malio's and that the vehicle information had been provided to Sergeant Fernandez. He maintained constant contact with the other Respondents throughout the evening as the plan progressed and did nothing to discontinue the effort to

[2] The Florida Bar has also cited *The Florida Bar v. Garcia*, 31 So. 3d 782 (Fla. 2010) to support the proposition that the Referee may impose an adverse inference against the Respondents as a result of their refusal to testify on Fifth Amendment grounds. *Garcia* is an unreported case and the Referee has no access to an opinion or the record to confirm The Florida Bar's assertion.

arrest Mr. Campbell. Respondent ADAMS was an attorney with supervisory authority over Respondent FILTHAUT and nonlawyer employee Ms. Personius. Respondent ADAMS failed or refused to properly supervise Respondent FILTHAUT and nonlawyer employee Ms. Personius on that evening or thereafter.

Respondent ADAMS also twice refused to answer any questions regarding his conduct at depositions scheduled by The Florida Bar during these proceedings. His counsel maintained, until the morning of trial, that Respondent ADAMS and the other Respondents would not testify based upon their Fifth Amendment rights against self-incrimination. On the first day of trial, after Respondent DIACO had so refused, Respondent ADAMS took the witness stand and indicated that he would testify. The Florida Bar was unprepared to proceed regarding Respondent ADAMS, since he had twice before declined to answer any questions in discovery. The Referee allowed a short recess of the trial for the purpose of permitting The Florida Bar to depose Respondent ADAMS before he testified.

When he again took the witness stand, Respondent ADAM's testimony was crafted to admit those facts that he knew from discovery he could not deny and to present a set of circumstances that put him in the most favorable light possible. Much of his testimony concerned the content of text messages and phone communications during January 23-24, 2013, between himself, the other Respondents, and Ms. Personius — all of which Respondent ADAMS admitted he

had deleted. His testimony about this unverifiable content defied common sense and was inconsistent with the other evidence presented at trial. Thus, while Respondent ADAMS avoided the adverse inference that could be properly imposed for his refusal to testify, his less-than-credible testimony given at the eleventh hour did nothing to aid in his defense.

Respondent FILTHAUT's close personal relationship with Sergeant Raymond Fernandez was the single most important factor that allowed the Respondents to plot the arrest of Mr. Campbell. Without the trust and long years of friendship that existed between Respondent FILTHAUT and Sergeant Fernandez, it seems doubtful that the Tampa Police Department would have devoted the resources to spend the better part of three hours staking out a bar for one potentially impaired driver on the unverified "tip" of one citizen. The fact that the DUI Squad did this, not once, but on two separate occasions is a testament to the influence Respondent FILTHAUT was able to exert. To accomplish that, Respondent FILTHAUT betrayed the trust of Sergeant Fernandez by lying to him regarding Mr. Campbell's habit of drinking and driving. The Respondents produced no evidence at trial regarding Mr. Campbell's drinking habits. Nothing was offered to suggest, as Respondent FILTHAUT had assured his friend, that Mr. Campbell *"gets drunk all the time. He goes to Malio's and drinks it up and then he drives home drunk."* The evidence at trial was just the opposite. Both the bartender

and the manager at Malio's testified that Mr. Campbell would come in one or two times a week, have one or two drinks, and walk home to his apartment. Respondents made no attempt to prove otherwise.

The most important information that Respondent FILTHAUT knew about Mr. Campbell and the events taking place at Malio's was withheld from his friend. Sergeant Fernandez was never told that Mr. Campbell was the opposing attorney in a multi-million dollar lawsuit that Adams & Diaco, P.A. were defending. Nor was Sergeant Fernandez told that the person inside Malio's who was providing the information about Mr. Campbell's status was an Adams & Diaco employee who was buying him drinks while she passed on information to the Respondents. He learned of Mr. Campbell's position as an opposing attorney the next morning when the arrest became headline news. Sergeant Fernandez confronted his friend about failing to share that important fact. Respondent FILTHAUT responded, *"Well, Ray, what's the big deal?"* Sergeant Fernandez was later discharged from the Tampa Police Department as a result.

Respondent FILTHAUT, in addition to misleading his friend in furtherance of the conspiracy, played an active role in orchestrating the events of January 23, 2013. He maintained regular contact with the other Respondents, Ms. Personius, and Sergeant Fernandez throughout the evening as the plan progressed, and did nothing to discontinue the effort directed at Mr. Campbell's arrest. Respondent

FILTHAUT's immediate and direct connection to the commander of the Tampa Police DUI Squad allowed him to coordinate the arrest by passing on exactly where Mr. Campbell was, what he was doing, when he was doing it, and what car to target when the time came.

Respondent FILTHAUT also twice refused to be deposed regarding the events surrounding these proceedings and refused to answer any questions at trial, based upon his right against self-incrimination under the Fifth Amendment. He specifically refused at trial to respond to a question confirming that he had erased, secreted, or otherwise destroyed the actual cell phone messages that would constitute direct evidence of the nature of his communications that night. The Referee has indulged all the adverse inferences that may permissibly be imposed as a result. *Martino v. Wal-Mart Stores Inc.*, 835 So. 2d 1251 (Fla. 4th DCA 2003); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Atlas v. Atlas,* 708 So. 2d 296, 299 (Fla. 4th DCA 1998); *Fraser v. Security and Investment Corporation*, 615 So. 2d 841 (Fla. 4th DCA 1993); *New Hampshire Ins. Co., v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990). In addition, the wealth of testimony provided by Sergeant Fernandez in various forums before these proceedings were commenced further confirmed that Respondent FILTHAUT's active participation is beyond dispute.

Respondent FILTHAUT, through his counsel's opening statement and his arguments regarding the "guilt phase" and the "sanctions phase" of the trial, suggested that he was only an associate at Adams & Diaco and that his participation in the setup and arrest conspiracy was solely the result of following the orders of his superiors, presumably Respondents DIACO and ADAMS. That variation of the Nuremburg Defense is only available when the conduct ordered is *"in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."* Rule 4-5.2. The Referee finds that using a nonlawyer employee to set up the opposing attorney for arrest in a multi-million dollar, high profile jury trial doesn't conceivably fall within that exception.

II.

Respondent DIACO, following an 8:30 a.m. hearing on January 24, 2013, during which all parties agreed to a brief continuance of the ongoing jury trial, made public statements to the news media criticizing the conduct of Mr. Campbell and falsely claiming that Respondent did not agree with the recess of the trial. Respondent DIACO's comments failed to disclose his own active participation in the events that resulted in the recess or the participation of Respondents ADAMS, FILTHAUT, and others.

On the morning of January 24, 2013, Mr. Ellis, Mr. Campbell's co-counsel, asked Judge Arnold for a recess in the *Schnitt v. Clem* trial. He proposed giving the jury the day off and working on jury instructions instead. Mr. Campbell's trial bag containing all of his notes and witness preparation for that morning's testimony had been left in the back seat of Ms. Personius's car when the arrest occurred.

Judge Arnold had previously planned to recess after the morning session, even before Mr. Campbell's arrest. In light of the disruption caused by the arrest and Mr. Campbell's inability to locate his trial bag, counsel for all parties agreed to the recess as a professional courtesy. It was decided that testimony would resume the next day. While Mr. Campbell and his partner continued their search for the missing trial bag, Respondent DIACO appeared outside the courthouse and gave interviews to the media about the case. These are examples of some of the statements Respondent DIACO made that appeared later that day as sound bites on various local television news programs:

> *"Well, you know, I'm shocked that the case was continued. I feel horrible for this jury that has been sequestered and pulled from the jobs, their lives, their families. And so now we have to wait."*

> *"Well, you know, I don't know exactly what the jury has been told, and, you know, they are supposed to be sequestered and not watching the news or hearing the reports, but this is front page news now."*

> *"And this is his second time. So it's just –you know, the whole thing makes me embarrassed to be an attorney, and I'm ashamed of all this whole process has continued to be a mockery of the system. But we believe in the system. We believe in the jury, and we're going to let Bubba's peers decide this case."*

> *"We were prepared for today. We were working last night in preparation for the trial. And so now we have to wait. The jury has to wait, and we have to see how this plays out. I don't understand why his other partners who have been in there every single day of the trial, can't continue this case."*

"I hope he gets help. My partner and Greg Hearing were working on this trial last night. Phil didn't seem to be doing the same. And now we're being penalized."

"Shocked, shocked, disappointed, sad, sad for the jury having to be taken out of their lives another day that this is continued. Two other partners have been trying this case every single day. I don't understand why it was continued."

"To his advantage, now he gets a good night's sleep. Now he gets to prepare his witnesses."

"His last DUI was almost twice the legal limit. He didn't learn his lesson."

At the time those statements and others of a similar nature were made, Respondent DIACO knew that his firm and all other counsel had agreed to the short recess. He also knew, or should have reasonably anticipated, that his statements would receive a great deal of public exposure in the media. They did. The next day, partially as a result of those statements, Mr. Ellis moved for a mistrial in *Schnitt v. Clem*. Judge Arnold felt compelled to question each of the jurors to determine if they had seen or heard anything regarding Mr. Campbell's arrest. One juror had learned of Mr. Campbell's arrest, but Judge Arnold was satisfied that the trial could go forward. Respondent DIACO offered no evidence at trial to explain why he made false statements to the news media about the short stipulated recess of the trial, and there was no explanation for his public "piling on" of Mr. Campbell. Nor was there evidence presented at trial to justify Respondent DIACO's efforts to publically criticize and humiliate Mr. Campbell in

the media when Respondent had full knowledge of the part he and the other members of his firm played in the arrest. The Referee infers, from Respondent DIACO's refusal to testify regarding these issues, that his purpose in making those public statements was to potentially influence any jurors that might have heard them and to otherwise gain an advantage in the ongoing trial.

III.

On January 24, 2013, Respondents DIACO and ADAMS became aware that the trial bag belonging to Mr. Campbell had been left in the car of Adams & Diaco, P.A.'s paralegal Ms. Personius. Neither Respondent DIACO, Respondent ADAMS, nor Brian Motroni, another member of the firm who also learned this fact, made any effort to immediately return Mr. Campbell's property to him or to advise him that it was in their possession.

On the morning of January 24, 2013, testimony in the *Schnitt v. Clem* trial was scheduled to resume at 9:00 a.m. After his release from jail at approximately 6:30 a.m., Mr. Campbell and Mr. Ellis began their search for Mr. Campbell's missing trial bag. Initially, it was presumed that this would simply involve contacting Trenam Kemker and retrieving the bag from the car of their paralegal. Upon inquiring, they learned that there was no paralegal named "Melissa" at Trenam Kemker. The trial bag was still not located when Mr. Campbell and Mr. Ellis entered the courtroom for the continuation of the trial. Judge Arnold considered the circumstances of Mr. Campbell's arrest and was amenable to Mr. Ellis's Motion for Recess, delaying testimony until the next day. All counsel

agreed, out of professional courtesy to Mr. Campbell, to give the jury the day off. Counsel were to remain for a jury instruction conference that morning. After the morning session, Mr. Campbell and Mr. Ellis went back to their office to continue the search for the missing trial bag.

Between 10:00 p.m. on January 23, 2013, and approximately 5:00 p.m. on January 24, 2013, Mr. Campbell's trial bag containing his notes and witness preparation material was out of his possession. Mr. Ellis and Mr. Campbell did not discover who had possession of the bag until around 4:00 p.m. on January 24. During that 19-hour period, the bag was in the sole possession of members of the Adams & Diaco firm or their employees.

The evidence regarding who possessed the bag, for how long, and what was done with it was derived almost exclusively from four sources. First, there was testimony from Respondent DIACO, Ms. Personius, and associate Mr. Motroni at a hearing on a Motion for Mistrial before Judge Arnold on the afternoon of January 25, 2013. Secondly, there was testimony from Ms. Personius given on May 23, 2013, during the DUI investigation. Thirdly, there were statements made by Mr. Motroni before Richard Martin, Esq., the investigating member to the Thirteenth Circuit Grievance Committee on April 30, 2014. Finally, though Respondent DIACO, Ms. Personius, and Mr. Motroni each refused to testify at trial regarding this matter on Fifth Amendment grounds, there was the trial testimony of

Respondent ADAMS. His testimony, however, was given after twice refusing to answer questions at scheduled depositions and after all other discovery was completed and disclosed. In the testimony prior to trial and at the trial itself (in regard to Respondent ADAMS only), the account of the possession and activity surrounding Mr. Campbell's trial bag was consistent. Mr. Personius also confirmed some aspects of the saga involving the discovery of the bag and its eventual return, although it is difficult to ascertain whether his knowledge was first hand or as a result of what Ms. Personius told him. The following is their account, pieced together from the various sources in the record and at trial.

The morning after Mr. Campbell's arrest, Ms. Personius was told not to come into the office. Around noon, Ms. Personius claimed she discovered Mr. Campbell's briefcase on the back seat of her car and called Respondent ADAMS to tell him. Respondent ADAMS saying he was too busy to deal with it, told Respondent DIACO about it. Respondent DIACO told him that he would take care of it, and tasked Mr. Motroni with retrieving the briefcase. The pass card records for the garage indicated that Mr. Motroni's car left the Bank of America building at 1:46 p.m.

Mr. Motroni claimed that upon arriving at the Personius home, he discovered that the briefcase was a large trial bag. Mr. Motroni called Respondent DIACO at 2:07 p.m. and was instructed to bring the trial bag to the Adams &

Diaco offices. The pass card records indicate that he re-entered the building's parking garage at 2:19 p.m. The bag remained at the Bank of America building from then until Mr. Motroni and Respondent DIACO left with the bag at 3:23 p.m. There was never a logical explanation given why Respondent DIACO, or Mr. Motroni, or some other member of the firm had not simply walked the trial bag to the Shumaker, Loop & Kendrick's offices in the same building. Nor was it ever explained why Mr. Campbell, or anyone at Shumaker, Loop & Kendrick, was not notified that his trial bag was in the building and that he could come and get it. Instead, Respondent DIACO, along with Mr. Motroni, drove the bag back to Ms. Personius's residence and left it with her to return. Respondent DIACO's said he took the bag back to her residence to question her about whether she had looked in the bag. Why he could not have just questioned her over the phone was never explained. Once Respondent DIACO and Mr. Motroni had driven the bag back to Ms. Personius's home, she was instructed to transport the bag back to the Bank of America building by cab and to see that it was delivered to a security officer in the lobby. The obvious intent was to have the bag returned anonymously. The evidence suggests that Respondent DIACO believed that Mr. Campbell would not discover the true identity of Ms. Personius and, therefore, never connect Adams & Diaco to his arrest. In fact, Respondent DIACO left a telephone message for Mr. Ellis that afternoon proposing a meeting of counsel, including Mr. Campbell, to

discuss settlement. Mr. Ellis returned the call while Respondent DIACO and Mr. Motroni were driving the trial bag back to Ms. Personius's home. Respondent DIACO made no mention of his possession of the trial bag during that telephone conversation.

After leaving the trial bag with Ms. Personius, Mr. Motroni and Respondent DIACO returned to their office in the Bank of America building, re-entering the parking garage at 4:21 p.m. Shortly before that time, Ms. Personius's true identity had been discovered. While driving back to the office, Respondent DIACO received another phone call from Mr. Ellis. Mr. Ellis confronted Respondent DIACO with the information that the identity of Ms. Personius was known and that she had possession of Mr. Campbell's trial bag. Respondent DIACO then told Mr. Ellis that the trial bag would be returned to the Bank of America building lobby. Mr. Ellis insisted that it be returned directly to the offices of Shumaker, Loop & Kendrick.

Sometime later, Ms. Personius took a taxi back to the Bank of America building, brought the bag into the lobby, and had the cab driver deliver it to Shumaker, Loop & Kendrick at about 5:15 p.m. By their own account, Respondents ADAMS and DIACO were in possession of Mr. Campbell's trial bag or knew that one of their employees had possession of it for over four hours.

Neither of them made any effort to contact Mr. Campbell or his firm to advise them of that fact. It was not returned until Mr. Ellis demanded it.

IV.

The actions of the Respondents, as set out above, and subsequent efforts to cover up or otherwise destroy evidence of those actions, were intended to disrupt, unfairly influence, and/or otherwise prejudice the tribunal, the administration of justice, opposing attorney Mr. Campbell and/or opposing parties in ongoing litigation in which the Respondents' law firm was engaged.

Even before Respondents became aware that the identity of Ms. Personius had been discovered, they began to withhold, destroy, or otherwise secrete the direct evidence of their involvement in Mr. Campbell's arrest. The first indication of the Respondents' efforts to hide their participation was their refusal to notify Mr. Campbell that they were in possession of his trial bag on the day following the arrest. Another example occurred later that afternoon, when Mr. Ellis's process server was locked out of the Adams & Diaco offices, even though there were obviously people working inside. Mr. Ellis, Mr. Campbell's partner, was attempting to subpoena Respondent DIACO for a hearing before Judge Arnold the next morning, January 25, 2013. The hearing concerned Shumaker, Loop & Kendrick's motion for mistrial of the *Schnitt v. Clem* case. The motion was based upon the Respondent's possession and retention of Mr. Campbell's trial bag and the false and inflammatory comments made by Respondent DIACO to the media

the morning after Mr. Campbell's arrest. The subpoena also demanded that Respondent DIACO produce his cell phone at the hearing.

Although the process server was locked out of the Adams & Diaco offices the day before, he was able to serve the Respondent through his wife early the next morning, January 25, 2013. Regardless, Respondent DIACO failed to appear at the morning hearing on that date. He had already hired counsel to appear on his behalf and move for a protective order. Judge Arnold commented at trial that his immediate concern was the exposure the jury may have had to all the publicity surrounding Mr. Campbell's arrest, rather than Respondent DIACO's disregard of the subpoena. The Judge did, however, insist that Respondent DIACO appear for a continuation of the Motion for Mistrial in the afternoon. Respondent DIACO appeared, but without his cell phone. When questioned about whether he had any conversations with Ms. Personius or Respondent FILTHAUT on the evening of Mr. Campbell's arrest, less than 48 hours earlier, Respondent DIACO replied that he couldn't remember. When asked who his cell phone carrier was, he said he didn't know. Respondent DIACO's obvious lies to Judge Arnold demonstrate the lengths to which he was willing to go to avoid discovery of evidence of his participation in the plot, which could have led to a mistrial of *Schnitt v. Clem.* Ms. Personius appeared at the same hearing and testified regarding the trial bag saga, but when questioned about whether she had been asked to meet and buy drinks for

Mr. Campbell, she too refused to testify on Fifth Amendment grounds. By that afternoon, Ms. Personius also had her own counsel, paid for by Adams & Diaco, and Respondent DIACO was represented by two attorneys, one for civil and apparently one for criminal liability. In order to complete the trial, Judge Arnold put a moratorium on discovery regarding the Motion for Mistrial which remained in effect until February 5, 2013. As a result, Mr. Campbell and Shumaker, Loop & Kendrick were unable to take steps to obtain the cell phone records or message transcripts from the phones of all the Respondents, their employees, or Sergeant Fernandez. All the Respondents had been provided with notices to preserve that data. Since then, all of the participants in the conspiracy to arrest Mr. Campbell have destroyed or secreted the cell phones and/or the important objective evidence they contained. Respondent ADAMS, Ms. Personius, and Sergeant Fernandez have all admitted erasure or destruction directly. Respondent ADAMS admitted that all the Respondents and Ms. Personius had turned their phones over to attorney Lee Gunn, but Respondent ADAMS refused to say why, claiming attorney-client privilege. At trial, both Respondent DIACO and Respondent FILTHAUT refused to answer any questions about the destruction of their cell phone messages and are subject to the adverse inference that they too have deliberately destroyed them. The cell phone messages on the Respondents' phones from the night of Mr. Campbell's arrest are the only objective evidence that could speak to their incrimination or

exculpation. The fact that they were erased, destroyed, or that the Respondents failed to produce them, strongly infers that they did not contain anything exculpatory.

Finally, the Respondents failed to offer any credible justification for their two-month effort to have Mr. Campbell arrested. Respondents' counsel suggested that the Respondents were motivated by a strong desire to keep intoxicated drivers off the streets. Although unsupported by evidence, such motivation would seem more plausible if it had not knowingly been the Respondents' own employee buying Mr. Campbell drinks and presenting him with the automobile to drive. It would also have appeared more believable if that employee had not been funneling information about Mr. Campbell directly through Respondents to waiting police surveillance. The Referee was presented with no competent evidence that would support any credible motive, except that the Respondents sought to gain some advantage in the ongoing civil case brought by Mr. Campbell's client. Respondent DIACO's affirmative efforts to propose settlement discussions with Mr. Ellis and Mr. Campbell before the identity of Ms. Personius was discovered further supports this finding.

Another argument suggested that Respondents should not be responsible for Mr. Campbell's decision to drink and drive that night. The argument's logic being that Mr. Campbell's decision to drive was an intervening independent event that

broke the chain of causation leading from their actions to his arrest. The argument has no merit. The acts of the Respondents on January 23 were not unethical because they ultimately resulted in Mr. Campbell's arrest. They were unethical because they were prohibited acts, and the Respondents willingly committed them. Ethical violations are not necessarily dependent upon the existence of harm or injury. Damage is not an indispensable element, as it might be in a civil case. If Mr. Campbell had walked away from Malio's valet that night and left Ms. Personius to her own devices, the Respondents' actions would have been just as unethical and egregious. The unsuccessful effort to target Mr. Campbell for arrest on November 29, 2012, was just as much a violation of Rules Governing The Florida Bar as the successful effort was on January 23, 2013.

Ultimately, the Referee was presented with nothing to suggest that Respondents' intent was anything other than what the clear and convincing evidence demonstrates. It was a deliberate and malicious effort to place a heavy finger on the scale of justice for the sole benefit of the Respondents and their client. For the Respondents, the harm inflicted on Mr. Campbell, his clients' cause, Sergeant Fernandez, the legal system, the profession, and the public's confidence in justice was simply collateral damage.

Subsequent Events

The DUI arrest of Mr. Campbell was investigated by the State Attorney's Office for the Sixth Judicial Circuit, after the State Attorney for the Thirteenth Judicial Circuit recused his office from the case. On July 29, 2013, a *nolle prosequi* was filed. Mr. Campbell's arrest was subsequently expunged. Although evidence of the basis for refusing to prosecute was not adduced at trial, it appears that all of the statutory elements of a valid entrapment defense existed. Fla. Stat. §777.201.

Following the events of January 23-25, 2013, the *Schnitt v. Clem* jury trial was completed. There was a defense verdict. Following the trial, the Plaintiff's Motion for Mistrial was converted into a Motion for New Trial, and the restriction on discovery was lifted. Before an evidentiary hearing was held on the alleged misconduct of Defendant's counsel, the parties entered into mediation and agreed to a settlement.

After the settlement, the Schnitts discharged Mr. Campbell and the firm of Shumaker, Loop, & Kendrick from further representation. As of the date of trial, there was ongoing litigation between Shumaker, Loop, & Kendrick and their former clients regarding the payment of fees.

The Tampa Police Department, after an administrative personnel hearing, discharged Sergeant Raymond Fernandez from the force. Officer Tim McGinnis was removed from the DUI Squad.

Several witnesses at trial, as well as Respondent DIACO's counsel, have asserted that the United States Attorney for the Middle District of Florida is conducting a Federal grand jury investigation that is continuing. As of this date, no Federal criminal charges have been filed against the Respondents or others regarding the events described above.

III. RECOMMENDATIONS AS TO GUILT

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c); Rule 4-3.6(a); Rule 4-4.4(a); Rule 4-5.1(c); Rule 4-5.3(b);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

   The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy contrary to honesty and justice.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence or other material)**

   The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately obstructed access to or concealed the trial bag of C. Philip Campbell, Esq.; destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding; and refused to produce his cell phone or information about his cell phone provider at the January 25, 2013 hearing, which

he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing litigation.

4. **Violation: Rule 4-3.5(c) (conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

2**Violation: Rule 4-3.6(a) (prejudicial extrajudicial statements**

5. **Violation: Rule 4-3.6(a) (prejudicial extrajudicial statements prohibited)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** made statements to the media on January 24, 2013, regarding: his disagreement with the Court granting a stipulated trial recess; the arrest of C. Philip Campbell, Esq.; and the work ethic and prior history of Mr. Campbell. All statements were made with the knowledge that there was a substantial likelihood of materially prejudicing the ongoing jury trial.

6. **Violation: Rule 4-4.4(a) (means that have no substantial purpose other than to embarrass, delay, or burden)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately failed to immediately return the trial bag of C. Philip Campbell, Esq. or notify him or his firm of the bag's location in order to delay or burden Mr. Campbell in an ongoing trial.

7. **Violation: Rule 4-5.1(c) (Responsibilities of partners, Managers and Supervisory Lawyers)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately conspired with or otherwise ordered or ratified the conduct of Respondents ADAMS and FILTHAUT regarding their actions taken to improperly effect the arrest of C. Philip Campbell, Esq. and/or failed to take remedial action to avoid or mitigate the foreseeable potential results of those wrongful actions. Further Respondent DIACO ordered or ratified the conduct of associate Brian Motroni in concealing the trial bag of Mr. Campbell. As an attorney with managerial authority, Respondent DIACO was responsible for the conduct of Respondent FILTHAUT and attorney Brian Motroni.

8. **Violation: Rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with, ordered and/or ratified the conduct of his nonlawyer employee, Melissa Personius, to improperly effect the arrest of C. Philip Campbell, Esq. and conceal his trial bag; failed to take appropriate remedial action when he knew that the consequences of her conduct could be avoided; and failed to make reasonable efforts to ensure that her conduct was compatible with Respondent's professional obligations. As an attorney with managerial authority, Respondent DIACO was responsible for the conduct of Melissa Personius.

9. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, nonlawyer employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and covered up or otherwise destroyed evidence of his participation in that conspiracy. Respondent DIACO further engaged in fraudulent, dishonest, or

deceitful conduct by lying to Judge Arnold on January 25, 2013, regarding his knowledge of his cell phone provider and his recollection of discussions or communications with Melissa Personius and Respondent FILTHAUT on the evening of January 23, 2013. He further engaged in misleading and deceitful conduct by making public statements to the news media that were intended to embarrass and humiliate opposing counsel in regard to his arrest for DUI on the previous evening without disclosing his own active role in those events or the role played by the other Respondents, his employee Melissa Personius, and that of Sergeant Raymond Fernandez. In addition, this conduct delayed the ongoing litigation and required Judge Arnold to interview the jurors regarding this trial publicity.

B. Robert D. Adams - No. 2013-10,736 (13F)

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c); Rule 4-4.4(a); Rule 4-5.1(c); Rule 4-5.3(b);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

   The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence)**

   The clear and convincing evidence is that **ROBERT D. ADAMS** deliberately concealed the trial bag of C. Philip Campbell, Esq. and destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing civil litigation.

4. **Violation: Rule 4-3.5(c) (conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

5. **Violation: Rule 4-4.4(a) (means that have no substantial purpose other than to embarrass, delay, or burden)**

The clear and convincing evidence is that **ROBERT D. ADAMS** failed to immediately return the trial bag of C. Philip Campbell, Esq. or notify him or his firm of the bag's location in order to delay or burden Mr. Campbell in an ongoing trial.

6. **Violation: Rule 4-5.1(c) (Responsibilities of Partners, Managers, and Supervisory Lawyers)**

The clear and convincing evidence is that **ROBERT D. ADAMS** deliberately conspired with or otherwise ordered or ratified the conduct of Respondents DIACO and FILTHAUT regarding their actions taken to improperly effect the arrest of C. Philip Campbell, Esq., and/or failed to take remedial action to avoid or mitigate the foreseeable potential results of those wrongful actions. Respondent ADAMS ordered Respondent FILTHAUT to contact Sergeant Raymond Fernandez of the Tampa Police Department in furtherance of the effort to effect Mr. Campbell's arrest; Respondent ADAMS was aware of Respondent FILTHAUT's prior improper conduct and ratified it. As an attorney with managerial authority, Respondent ADAMS was responsible for the conduct of Respondent FILTHAUT.

7. **Violation: Rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with, ordered and/or ratified the conduct of his nonlawyer employee, Melissa Personius, to improperly effect the arrest of C. Philip Campbell, Esq.; failed to take appropriate remedial action when he knew that the consequences of her conduct could be avoided; and failed to make reasonable efforts to ensure that her conduct was compatible with Respondent's professional obligations. As an attorney with managerial authority, Respondent ADAMS was responsible for the conduct of Melissa Personius.

8. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to effect the arrest of C. Philip Campbell, Esq., and then covered up or otherwise destroyed evidence of his participation in that conspiracy. In addition, this conduct delayed or otherwise disrupted the ongoing litigation and required Judge Arnold to interview the jurors regarding trial publicity produced as a result of the conspiracy.

C. <u>Adam Robert Filthaut - No. 2013-10,737 (13F)</u>

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing civil litigation.

4. **Violation: Rule 4-3.5(c) (Conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

5. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then covered up or otherwise destroyed evidence of his participation in that conspiracy. Respondent FILTHAUT further engaged in dishonesty, deceit and/or misrepresentation when he failed to disclose to Sergeant Fernandez that Mr. Campbell was the opposing attorney in a high profile civil action that was then currently being defended by the Adams & Diaco law firm. In addition, this conduct delayed the ongoing litigation and required Judge Arnold to interview the jurors regarding trial publicity produced as a result of the conspiracy.

IV. CASE LAW

Before arriving at a recommendation as to the disciplinary measures to be applied the Referee considered the following case law:

Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001); *Florida Bar v. Rotstein*, 835 So. 2d 241 (Fla. 2002); *Florida Bar v. Korones*, 752 So. 2d (Fla. 2000); *Florida Bar v. Bern,* 425 So. 2d 526 (Fla. 1982); *Florida Bar v. Swann*, 116 So. 3d 1225 (Fla. 2013); *Florida Bar v. Doherty*, 94 So. 3d 443 (Fla. 2012); *Florida Bar v. Klein*, 774 So. 2d 685 (Fla. 2000); *Florida Bar v. Gardiner*, No. SC11-2311, 2014 WL 2516419 (Fla. June 5, 2014); *Florida Bar v. Glueck*, 985 So. 2d 1052 (Fla. 2008); *Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007); *Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997); *Florida Bar v. Riggs*, 944 So. 2d 167 (Fla. 2006); *Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010).

V. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

I recommend that Respondent **STEPHEN CHRISTOPHER DIACO** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

B. Robert D. Adams - No. 2013-10,736 (13F)

I recommend that Respondent **ROBERT D. ADAMS** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

C. Adam Robert Filthaut - No. 2013-10,737 (13F)

I recommend that Respondent **ADAM ROBERT FILTHAUT** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

VI. PERSONAL HISTORY, PAST DISCIPLINARY RECORD, AND AGGRAVATING AND MITIGATING FACTORS

In recommending sanctions after finding misconduct, the Referee considered the following factors as to each Respondent:

a) the duty violated;
b) the lawyer's mental state;
c) the potential or actual injury caused by the lawyer's misconduct; and
d) the existence of aggravating or mitigating factors.

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent

a. Date of Birth - 1968
b. Date Admitted to the Bar – April 25, 1994[3]

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to Section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

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[3] Subsequent to the sanctions hearing, the Referee requested biographical information from each respondent, including education and employment information. Counsel for Respondents ADAMS and FILTHAUT responded with the information. Referee received no response from counsel for Respondent DIACO, but did obtain his year of birth and date admitted to the Bar from The Florida Bar.

a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. The Potential or Actual Injury Caused By the Respondents Misconduct

a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.;
b. Public humiliation of Mr. Campbell and damage to his professional reputation;
c. Disruption of ongoing jury trial and tainting of jury;
d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department;
e. Removal of Officer Tim McGinnis from DUI Squad;
f. Dismissal of significant number of pending DUI cases[4];
g. Public loss of confidence in lawyers and legal system; and
h. Public loss of confidence in law enforcement.

[4] Although The Florida Bar did not adduce any testimony or produce any documentation regarding the dismissals, a number of the news articles in the compilation submitted by The Bar during the penalty phase hearing contained quotations from Tampa Police officials confirming this fact.

4. The Existence of Aggravating or Mitigating Circumstances

a. Aggravation

The Referee finds the following aggravating factors pursuant to 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
d. Multiple offenses;
f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following as to mitigating factors pursuant to 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

During the two days of testimony regarding the sanctions to be recommended, there was ample testimony from multiple witnesses regarding the generosity of Respondent DIACO, his charitable efforts, public service, and loyalty to friends and employees. Virtually all of the witnesses professed to have little or no knowledge regarding the allegations of Respondent's conduct that resulted in this proceeding.

At the conclusion of the hearing, Respondent's counsel sought to introduce an affidavit from the Respondent, presumably expressing remorse and seeking to take responsibility for the events that led to this proceeding. The Referee refused to admit the affidavit, although counsel was allowed to proffer it for the record. It was not read or considered. Respondent DIACO, throughout this proceeding, has refused to testify under oath regarding anything connected to the events surrounding these proceedings. He may not shield himself from cross-examination by invocation of the Fifth Amendment while at the same time seeking to submit sworn statements supporting mitigation.

Respondent DIACO is an experienced, apparently competent attorney with 20 years in the profession. He and his firm have multiple offices and employ numerous associates and paralegal staff. Adams & Diaco have major clients and are, by all appearances, professionally and financially successful.

Against this backdrop, it is all the more disturbing that Respondent DIACO, one of the firm's managing partners, engaged in actions against a fellow attorney that were inexplicably egregious, spiteful, and malicious. While Mr. Campbell and his firm were reeling from the fallout of the Respondents' conspiracy, Respondent DIACO attempted to leverage the moment to his advantage by proposing to discuss settlement. There was no evidence presented at trial to support the suggestion that Mr. Campbell intended to drink and drive on the night of his arrest,

or that he had a habit of drinking and driving. The clear and convincing evidence was that Respondent DIACO's intent was to target Mr. Campbell for arrest because he was opposing counsel in a high-profile case and that it would benefit his firm and his client.

Respondent DIACO's efforts to exploit the situation did not cease until the identity of Ms. Personius was ultimately discovered. The inevitable attempted cover up followed these multiple offenses, including the bizarre travels of Mr. Campbell's trial briefcase. The cover up effort included false testimony before Judge Arnold, a false affidavit filed in *Schnitt v. Clem*, obstruction of service of process, destruction or secreting of known relevant evidence, and the deliberate failure to disclose a key witness, Kristopher Personius, during discovery in this proceeding.

If the cover up had succeeded, Mr. Campbell would have been the attorney answering charges from The Florida Bar, as well as the State of Florida. This malicious tampering with another person's personal life and career was not only unprofessional, it was inexcusable.

Respondent DIACO's many admittedly generous and unselfish acts do not atone for the multiple aggravated violations he committed. It is the Referee's recommendation that he be permanently disbarred.

B. Robert D. Adams - No. 2013-10,736 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent Robert D Adams:

a. Date of Birth – May 27, 1969
b. Education – University of Florida, B.A. w/Honors, 1991
Stetson College of Law, J.D. w/Honors, 1996
c. Employment – Associate, Harris, Barrett, Mann & Dew, 1996 – 1998; Shareholder Adams & Diaco, 1998 to present.
d. Date Admitted to the Bar – September 26, 1996

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

> a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
> b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. **The Potential or Actual Injury Caused By the Respondents Misconduct**

   a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.
   b. Public humiliation of Mr. Campbell and damage to his professional reputation
   c. Disruption of ongoing jury trial and tainting of jury
   d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department
   e. Removal of Officer Tim McGinnis from DUI Squad
   f. Dismissal of significant number of pending DUI cases
   g. Public loss of confidence in lawyers and legal system
   h. Public loss of confidence in law enforcement

4. **The Existence of Aggravating or Mitigating Circumstances**

   a. Aggravation

The Referee finds the following aggravating factors pursuant to 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
c. A pattern of misconduct;
d. Multiple offenses;
f. submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following mitigating factors pursuant to 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

During the hearing regarding sanctions, several witnesses testified on behalf of Respondent ADAMS. Affidavits were also introduced on his behalf. All were supportive of him as a loyal friend, a worthy mentor to young lawyers, and a generous and competent professional. The Florida Bar conceded that the Respondent had no prior disciplinary record. None of the Respondent's witnesses were aware of any specific information about the Respondent's conduct that resulted in their being called as a character witness.

The Bar did produce one witness to testify in support of an additional aggravation factor for this Respondent.

Dr. Robert Frankl, D.C. is a chiropractor from Miami Shores. During the latter part of 2009 through the first few months of 2010, Dr. Frankl was involved in litigation regarding the collection of fees against Progressive Insurance Company, represented by Respondent ADAMS. The issue in the case was the reasonableness of the doctor's fees for treatment that had been billed to Progressive.

Dr. Frankl testified that a few days prior to trial in the case, two young women appeared at his office for a consultation appointment. Both women gave what were later found to be false names, and when asked, each were unable to provide any identification. Both women claimed to have been injured and in need of chiropractic treatment. Each woman inquired whether Dr. Frankl would be willing to discount his normal rate since they each claimed a lack of applicable insurance coverage. He told them he would not reduce his fees, but was willing to accept payment over time. Dr. Frankl arranged an appointment for both women the following week. Neither woman appeared for their respective appointments and Dr. Frankl never heard from them again.

The week following the consultation with the two women, Dr. Frankl was surprised to see some blown up photographs of his office in the courtroom during the Progressive Insurance Company trial. He could not recall anyone coming in to take the photographs, although they seemed recent since they included a new freezer that had been purchased a few weeks before the trial. After the trial, Dr. Frankl remembered the two strange women who appeared at his office without identification. Using the phone number log on his phone from the women's initial call for an appointment and the internet, Dr. Frankl was able to locate a picture of one of the women and learn that she was a paralegal in the Miami office of Adams & Diaco. He believed that their purpose for visiting him was to lure him into

committing "insurance fraud" or to otherwise obtain admissions from him regarding his fee policy that might be used against him in the upcoming trial.

Dr. Frankl has a history of litigating for his fees, as he freely admitted. He also admitted that he regularly files complaints about attorneys with The Florida Bar. He did so in this instance, and got a response letter back from a Bar representative a few days later. He was advised that it was not a proper Bar matter, and that it would have to be resolved by a civil action. Dr. Frankl was not easily dissuaded. He then filed a complaint with the Division of Consumer Services of the Florida Department of Financial Services regarding the actions of Progressive Insurance Company's counsel and paralegals. In response, Dr. Frankl received a copy of a response letter from a Progressive representative that was sent to the Department responding to the complaint. The letter alleged that Respondent ADAMS did not direct his employees to *"present false information in order to secure evidence against Dr. Frankl at trial; however, it does appear that two non-attorney employees of Adams and Diaco did go to Dr. Frankl's office in order to obtain pictures of Dr. Frankl's office."*

The Division took no further action regarding Dr. Frankl's complaint. A few years later, Dr. Frankl read a newspaper account of the Campbell DUI case and recognized the Adams & Diaco law firm as the subject of one of his numerous ethics complaints. He contacted Mr. Campbell and related his experience regarding

Respondent ADAMS's paralegals that, he was convinced, had attempted to set him up. His story was picked up by a newspaper reporter and thereafter came to the attention of The Florida Bar in this matter.

Dr. Frankl's bias was admitted and his credibility regarding the 2010 incident would be suspect, were it not for the admission by Progressive that two Adams & Diaco employees did appear at his office as he testified. Respondent ADAMS, who testified at the guilt phase of this proceeding, offered no rebuttal to Dr. Frankl's serious accusations during the sanctions phase hearing. If, as the Progressive letter suggests, the only purpose of the two Adams & Diaco employees visit was to obtain photographs of Dr. Frankl's office interior, then there are provisions under the rules that provide for it. At the very least, the incident reflects a willingness to use surreptitious methods to accomplish goals that should have been addressed through an above-board discovery process.

This incident occurred a little over two years before the events that are the subject of this proceeding. No other evidence or testimony regarding it was produced except for copies of the correspondence from Progressive, the letter from The Florida Bar, and some copies of Dr. Frankl's internet search results. In the absence of some reasonable explanation, which was not forthcoming during the sanctions hearing, Dr. Frankl's experience with Respondent ADAM's unorthodox discovery methods cannot be ignored. His counsel in this matter has argued that

Respondent's actions in the events that resulted in this proceeding were "aberrant" or "atypical." Dr. Frankl's unrebutted testimony, confirmed through the correspondence, suggests otherwise. The incident displays willingness to engage in a pattern of conduct employing non-lawyer personnel to deliberately misrepresent their identity to accomplish purposes beyond normal discovery.

The Referee will not reiterate the comments regarding Respondent ADAMS that were previously set out in the narrative of the events of January 23 – 25, 2013. Respondent ADAMS' involvement in those events, as demonstrated by the cell phone call and text records, was extensive. Respondent ADAMS was the first person Ms. Personius called when she spotted Mr. Campbell at Malio's that night, and Respondent ADAMS was the last person she spoke to immediately preceding getting into her car with Mr. Campbell, less than ten minutes before his arrest. She received a text from Respondent ADAMS less than seven minutes before his arrest and sent a text back to Respondent ADAMS two minutes later.

Respondent ADAMS, like his co-Respondents, is an experienced, competent attorney and litigator. His counsel has argued that Respondent suffered a 3-½ hour "lapse in judgment" and that his "mistakes were spontaneous" and "unplanned." The record reflects otherwise. The evidence was clear and convincing that Respondent ADAM's participation in the effort to effect the arrest of Mr. Campbell was calculated and had no other purpose than to gain some advantage in

the ongoing *Schnitt v. Clem* jury trial. Respondent ADAMS had weeks to contemplate the failed attempt to arrest Mr. Campbell on November 29, 2012, and the legal, ethical, and moral implications of that attempt. He had weeks to discuss that effort with the co-Respondents and to exercise his experienced judgment regarding the propriety and advisability of any similar future efforts. When the next opportunity arrived, he didn't caution, he didn't object, he didn't "mentor," and he didn't hesitate.

The next day, Respondent ADAMS was again the first person Ms. Personius called when she discovered Mr. Campbell's trial briefcase in her car. Respondent claimed he was "too busy" to deal with it. When the opportunity came to again exercise some ethical and moral judgment, he declined and passed it off to Respondent DIACO.

The cover up followed. He erased his cell phone text messages and for months refused to testify under oath regarding the events. He too failed to list Kristopher Personius as a person with knowledge of the events of that night in response to The Florida Bar's interrogatories. On the morning of trial, he claimed to have finally realized that his license to practice law might be in jeopardy and chose to testify.

The Referee recommends that Respondent ADAMS be permanently disbarred.

C. Adam Robert Filthaut - No. 2013-10,737 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent Adam Robert Filthaut

a. Date of Birth – June 16, 1974
b. Education – University of Detroit, B.S., 1996
Thomas M. Cooley Law School, J.D., 2000
c. Employment – Hillsborough County Public Defender's Office, 2001 – 2003; Adams & Diaco, P.A., 2003 to present.
d. Date Admitted to the Bar – September 14, 2000

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

> a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
> b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. The Potential or Actual Injury Caused By the Respondents Misconduct

a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.
b. Public humiliation of Mr. Campbell and damage to his professional reputation
c. Disruption of ongoing jury trial and tainting of jury
d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department
e. Removal of Officer Tim McGinnis from DUI Squad
f. Dismissal of significant number of pending DUI cases
g. Public loss of confidence in lawyers and legal system
h. Public loss of confidence in law enforcement

4. The Existence of Aggravating or Mitigating Circumstances

a. Aggravation

The Referee finds the following aggravating factors pursuant to section 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
c. A pattern of misconduct;
d. Multiple offenses;
f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following as to mitigating factors pursuant to section 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

Several witnesses testified on behalf of Respondent FILTHAUT during the sanctions hearing. He was described as a competent professional and a loyal friend. Respondent has no prior disciplinary record and his character and reputation were considered excellent.

Respondent's counsel, in his written argument following the hearing on penalties, argues a number of mitigation factors, but the Referee may not find that they exist based only upon counsel's argument.

The record does not support the remaining mitigating factors urged by Respondent's counsel. There was nothing to suggest the absence of a dishonest or selfish motive. There was no evidence of personal or emotional problems. Negotiating with The Florida Bar for an agreed-upon sanction did not constitute a display of a cooperative attitude toward these proceedings, especially in light of the Respondent's refusal to testify and his failure to retain or produce his cell phone text messages. He certainly has a right to rely on the Fifth Amendment, but doing so did not amount to cooperation. Likewise, the failure to disclose Kristopher

Personius as a person with knowledge of the events that led to these proceedings in response to The Florida Bar interrogatory certainly constitutes the opposite of cooperation.

As the Referee previously indicated in the narrative of the events of January 23 – 25, 2013, the entire two-month effort to accomplish the arrest of C. Philip Campbell, Jr., Esq. was dependent upon the unique relationship of trust and friendship that Respondent FILTHAUT enjoyed with Sergeant Raymond Fernandez. Without Respondent FILTHAUT's participation, which is amply confirmed by the record, the plot had virtually no chance of success. His relationship with Sergeant Fernandez gave him instant access to the efforts of the entire Tampa Police Department DUI Squad. Respondent FILTHAUT acted as the conduit for Sergeant Fernandez regarding the updating of events happening inside Malio's. Respondent FILTHAUT, through his communication with Ms. Personius, became the eyes and ears of the Tampa DUI Squad. He kept the officers immediately informed of what was happening inside Malio's, when Mr. Campbell was leaving, where he was before he left, and what kind of car he would be driving. For over 3 ½ hours, Respondent FILTHAUT essentially presided over a police stakeout of his own creation that was totally dependent upon the information he provided them. That information did not include the fact that Mr. Campbell was an opposing attorney in the *Schnitt v. Clem* case, or that an Adams & Diaco

paralegal, operating under a false identity, was buying him drinks and getting him to drive when he otherwise would not have.

Respondent's willingness to betray a 15-year friendship and sacrifice the career and personal freedom of a fellow attorney for the sake of some potential advantage in an ongoing trial remains stunning. Yet the clear and convincing evidence leaves no doubt that Mr. Campbell was deliberately targeted solely to gain that advantage.

Respondent FILTHAUT also had many weeks to contemplate the professional and ethical propriety of his actions following his first attempt to have Mr. Campbell arrested on November 29, 2012. He was an experienced lawyer with 13 years in the practice. During any stage of the 3 ½ hours that the Respondents remained engaged in the effort to improperly effect Mr. Campbell's arrest, any one of them, including particularly Respondent FILTHAUT, could have called a halt to it.

As was previously suggested in the narrative, following orders is not a legal or ethical basis for avoiding personal and professional responsibility for the many serious violations that the Referee found by clear and convincing evidence were committed.

The Referee recommends that Respondent FILTHAUT be permanently disbarred.

VII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

The following costs regarding Respondent DIACO were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,108.18
3. Bar Counsel Expenses..... $620.27
4. Investigative Costs $819.47
5. Copy Costs $1,350.75
6. Witness Expenses..... $1,029.61

Total $14,178.28

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

B. Robert D. Adams - No. 2013-10,736 (13F)

The following costs regarding were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,488.56

3. Bar Counsel Expenses.....$620.27
4. Investigative Costs.....$819.47
5. Copy Costs.....$1,350.75
6. Witness Expenses.....$1,029.61

Total $14,558.66

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

C. <u>Adam Robert Filthaut - No. 2013-10,737 (13F)</u>

The following costs regarding Respondent FILTHAUT were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,108.18
3. Bar Counsel Expenses.....$620.27
4. Investigative Costs.....$819.47
5. Copy Costs.....$1,350.75
6. Witness Expenses.....$1,029.61

Total $14,178.28

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

/s/ W. Douglas Baird
Honorable W. Douglas Baird, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been sent by U.S. Mail to THE HONORABLE JOHN A. TOMASINO, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and sent by email to: THE HONORABLE JOHN A. TOMASINO, Clerk, Supreme Court of Florida, e-file@flcourts.org; Gregory W. Kehoe, Esq., kehoeg@gtlaw.com, attorney for Respondent Diaco; Joseph A. Corsmeier, Esq., jcorsmeier@jac-law.com, attorney for Respondent Diaco; Mark J. O'Brien, Esq., mjo@markjobrien.com, attorney for Respondent Filthaut; William F. Jung, Esq., wjung@jungandsisco.com, attorney for Respondent Adams; and Jodi Anderson Thompson, Esq., JThompso@flabar.org, Bar Counsel, The Florida Bar, this 27th day of August, 2015.

/s/ W. Douglas Baird
Honorable W. Douglas Baird, Referee

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-2472

In re: FRANCIS MALOFIY,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-14-mc-00139)
District Judge: Honorable Petrese B. Tucker

Submitted Under Third Circuit LAR 34.1(a)
June 13, 2016

Before: AMBRO, JORDAN, and GREENBERG, Circuit Judges

(Opinion filed: June 30, 2016)

OPINION*

AMBRO, Circuit Judge

Attorney Francis Malofiy appeals his suspension from practicing law in the U.S. District Court for the Eastern District of Pennsylvania. A three-judge panel of that Court, after determining that Malofiy violated various rules of conduct by engaging in

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

unprofessional contact with an unrepresented defendant, recommended a suspension of three months and one day. Chief Judge Tucker adopted that recommendation and entered an order from which Malofiy appeals. He argues that he complied with the rules and that, even if he did not, the punishment is overly harsh. We disagree on both counts and affirm the suspension.[1]

I. Background

Malofiy filed a copyright infringement lawsuit in the Eastern District of Pennsylvania in 2011 against the performing artist Usher, as well as other defendants, over the song "Bad Girl." Malofiy's client, Daniel Marino, alleged that he was one of the writers of the song but did not receive credit or proceeds. One of the other defendants was lyricist William Guice, who also worked on the song. Guice, who was unrepresented and previously had never been a defendant in a civil lawsuit, called Malofiy after receiving the complaint to find out what it was about. The core of the allegations is that, in this conversation and subsequent communications, Malofiy misled Guice into thinking he was a witness rather than a defendant who stood to face financial liability.

[1] The District Court's jurisdiction stems from its "inherent authority to set requirements for admission to its bar and to discipline attorneys who appear before it." *In re Surrick*, 338 F.3d 224, 229 (3d Cir. 2003). We have appellate jurisdiction per 28 U.S.C. § 1291. "We review district courts' decisions regarding the regulation of attorneys who appear before them for abuse of discretion." *Surrick*, 338 F.3d at 229. Here the exercise of discretion turned on factual findings, which we review for clear error. *See* Fed. R. Civ. P. 52(a)(6). Meanwhile, our "review of the District Court's interpretation of legal precepts is plenary." *Surrick*, 338 F.3d at 229.

There is no transcript of this first conversation, but the District Court[2] developed the facts in some detail. As a result, we know that during the call Malofiy learned that Guice was unrepresented. Malofiy explained that he represented Marino and that Guice did not need to talk to him. Malofiy said that Guice was a defendant in the lawsuit, but he did not explain that this meant Marino and Guice had an adversarial relationship.

Malofiy wanted to get an affidavit from Guice, but he was unsure how to proceed given that Guice did not have a lawyer. He put Guice on hold and spoke with James Beasley, Jr., an attorney with whom he shared office space and sometimes consulted. Beasley's advice was to tell Guice to get a lawyer and, if he did not want one, to make sure he understood that his interests were adverse to Marino's. Malofiy represents that he followed this first piece of advice and told Guice about the advisability of getting counsel. Guice disputes this, and the District Court credited his testimony; it found that Malofiy never advised Guice during this first conversation to hire a lawyer.

In any event, after placing Guice on hold, Malofiy returned to the call and questioned him about "Bad Girl." Guice said that Marino was involved in writing the song and that he was unaware that Marino had not been credited or paid. Malofiy responded that he would prepare an affidavit for Guice to review. Guice later said that he thought he was helping Malofiy and that he did not believe that he was defending himself against personal liability.

[2] "District Court" in this opinion refers to the Chief Judge and, by extension, to the panel whose findings and recommendations she approved.

Based on this conversation, Malofiy drafted an affidavit and called Guice back. This second call was recorded. Malofiy called Guice "bud" and told him repeatedly that he was going to "hold tight" or "sit tight" with respect to claims against Guice. Appendix ("App.") 28–29 (internal quotation marks omitted). Malofiy also said that he was "not going to do anything" with Guice in the case and that Marino "d[id]n't really want to point the finger at" him. App. 29 (internal quotation marks omitted) (alteration in original). Malofiy added that Marino thought Guice was "pretty cool" and "probably didn't know" that he had not received credit or payment. *Id.* (internal quotation marks omitted). Malofiy even offered to investigate whether Guice should have gotten more money for his role in the song. Without advising him to get a lawyer, Malofiy secured Guice's agreement to sign the affidavit. He then sent Guice the affidavit in an e-mail whose subject line mentioned Usher, but not Guice, as a defendant.

Either before Malofiy e-mailed the affidavit or shortly after, Beasley advised him that the document should memorialize that Guice had been advised to get a lawyer but had chosen not to do so. Malofiy sent a follow-up e-mail to Guice saying that if he wanted "to review [the affidavit] with a lawyer, that's fine too." App. 32 (internal quotation marks omitted) (alternation in original). Within the next week, Guice signed and returned the affidavit without having consulted an attorney.

Guice never filed an answer to Marino's lawsuit. As he later explained, he thought that his affidavit was the only response that was needed. Without notifying Guice in advance, Malofiy sought and obtained a default judgment against him in June 2012 based

on his failure to file a responsive pleading. Guice received a copy of the request for a default judgment but did not understand what it meant and never responded to it.

In the spring of 2013, Malofiy set up a deposition with Guice. They had two calls, but Malofiy never mentioned the default or advised Guice to get counsel. During the deposition, Guice realized for the first time that Marino was seeking money damages from him. He explained that he thought he was a witness in the case. When he learned that a judgment had been entered against him, Guice said that his understanding of his role had been "turned on its head" and that he felt "played" by Malofiy. App. 35 (internal quotation marks omitted).

Later that year, a group of defendants filed a motion for sanctions against Malofiy based on his conduct during discovery. As relevant here, Judge Diamond, who was presiding over the Marino lawsuit, determined that Malofiy had violated Pennsylvania Rule of Professional Conduct 4.3 by obtaining an affidavit and deposition testimony from Guice without first advising him to get a lawyer or correcting his perception that he was merely a witness. That rule, titled "Dealing with Unrepresented Person," provides:

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
>
> (b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.
>
> (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

The first comment to the rule notes that an "unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client." It goes on to say that, "[i]n order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."

As a sanction for the violation, Judge Diamond undid the default judgment and struck Guice's affidavit and deposition testimony. He also ordered Malofiy to pay approximately $28,000 in fees and costs. Finally, Judge Diamond, to determine whether Malofiy should face further sanctions, referred the matter to Chief Judge Tucker, who in turn appointed the three-judge panel discussed above.

Although recognizing the possibility that Judge Diamond's conclusion that Malofiy violated Rule 4.3 might be entitled to preclusive effect, the District Court (through the panel appointed by Chief Judge Tucker) opted to hear testimony and review the record *de novo*. It, like Judge Diamond, concluded that Malofiy violated Rule 4.3. It also found that he violated Pennsylvania Rules of Professional Conduct 4.1(a) (a lawyer "shall not knowingly . . . make a false statement of material fact or law to a third person"), 8.4(c) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation"), and 8.4(d) (same for "conduct that is prejudicial to the administration of justice"). The basis for these three additional violations was Malofiy's representation that he would not take any action against Guice. The Office of Disciplinary Counsel of the Disciplinary Board of the Supreme Court of Pennsylvania,

which was appointed by the District Court to investigate and prosecute the case, recommended a reprimand, but the Court instead imposed a suspension of three months and a day.

II. Discussion

Malofiy challenges the conclusion that he violated Rules 4.3, 4.1(a), 8.4(c), and 8.4(d). He also argues that, even if he did engage in misconduct, the sanction is overly severe. We address each argument in turn.

A. Violation of rules

Like the District Court, we begin with Rule 4.3. Malofiy contends that he complied with the rule by 1) saying during the first conversation that Guice could secure counsel, 2) including a similar statement in an e-mail regarding the affidavit, and 3) informing Guice that he was a defendant. As to the first of these considerations, the District Court rejected Malofiy's testimony that he told Guice during the first call that he could get a lawyer. Instead, it credited Guice's testimony to the contrary. Such "[c]redibility determinations are the unique province of a fact finder," and we reject them only in "rare circumstances." *Dardovitch v. Haltzman*, 190 F.3d 125, 140 (3d Cir. 1999) (internal quotation marks omitted). Malofiy has given us no compelling reason to do so here.

As such, we must determine whether Malofiy's warning in the e-mail and his acknowledgment of Guice's status as a defendant satisfy Rule 4.3. The District Court determined that Malofiy's actions "failed to adequately convey the adversity of interests between [his] client and Mr. Guice." App. 40–41. We agree. Per Rule 4.3(c), Malofiy

"kn[ew] or reasonably should [have] know[n] that the unrepresented person misunderst[ood] the lawyer's role in the matter." Rather than correct the misunderstanding, Malofiy continued to foster the impression that Guice was a witness rather than a person who stood personally to lose money. As the first comment to the rule makes clear, Malofiy should have remedied the confusion by explaining that Guice's interests were adverse to Marino's. However, he consistently suggested that the opposite was true.

We next consider Rule 4.1(a), which prohibits false statements that are made knowingly and are material. Here Malofiy told Guice several times that he was going to "hold tight" or "sit tight" and also said that he was "not going to do anything" with the claims against Guice. App. 29 (internal quotation marks omitted). Instead, Malofiy filed a motion for default judgment against Guice. As such, we agree with the District Court that Malofiy made a false statement. It determined that he did so knowingly, and we have no reason to disturb that finding. Additionally, it correctly concluded that the materiality requirement of Rule 4.1(a) was satisfied because the conduct led to an entry of default judgment, which was only undone through judicial intervention. *See Office of Disciplinary Counsel v. DiAngelus*, 907 A.2d 452, 456 (Pa. 2006) (materiality standard met where "violation affected the outcome of the proceedings").

Finally, the conclusion that Malofiy knowingly made a false statement of material fact is sufficient also to demonstrate a violation of Rules 8.4(c) and 8.4(d). *Id.* As a result, we affirm each of the District Court's conclusions about Malofiy's violations of the Pennsylvania Rules of Professional Conduct.

B. Appropriateness of sanction

Malofiy also argues that, even if he violated the rules, it was due to "youth and inexperience." Appellant's Br. at 56. He describes the suspension as overly punitive and "off the charts." *Id.* He also cites the testimony of various character witnesses who described him as a hard-working and diligent lawyer. His arguments, however, miss the mark.

The American Bar Association publishes a guide that serves "as a model for determining the appropriate sanctions for lawyer misconduct." *In re Mitchell*, 901 F.2d 1179, 1184 (3d Cir. 1990). For violations involving improper communications with individuals in the legal system, the guide provides that a suspension "is generally appropriate . . . when the lawyer knows that [a] communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding." *ABA Standards for Imposing Lawyer Sanctions* § 6.32 (1992) [hereinafter *ABA Standards*].

Here the District Court made findings of both knowing conduct and harm. It determined that Malofiy knew his conduct violated the rules because, after being advised by Beasley of the need to be clear about the adverse relationship between Guice and Marino, Malofiy "led Mr. Guice to believe Mr. Marino was not pursuing claims against him and that he was only a witness in the case." App. 46. As for harm, the Court noted that, "[b]ut for Judge Diamond's intervention, Mr. Guice was at risk of having a default judgment entered against him." App. 47. Malofiy has not demonstrated any fault with these findings.

Moreover, one of the factors courts should consider in imposing sanctions is the "existence of aggravating or mitigating factors." *ABA Standards* § 3.0(d). Here the District Court properly concluded that the aggravating factors outweigh the mitigating ones. As mitigating factors, the Court acknowledged that Malofiy is a relatively young lawyer, he sought advice from Beasley, he had no prior disciplinary record, and he had numerous character witnesses who testified on his behalf. As aggravating factors, it listed his "refusal to acknowledge that his conduct toward Mr. Guice was in any way inappropriate," App. 49, and his tardiness in turning over a full transcript of the recorded call with Guice. The Court was "most troubled" by Malofiy's failure to take responsibility for his actions even when confronted with the transcript. *Id.*

It also noted that, even apart from Malofiy's communications with Guice, "his litigation conduct in this District gives us cause for concern about his professionalism." App. 48. For instance, the following are examples of comments Malofiy made during depositions: "I'm tired of your clap trap and hogwash"; "You're like a little kid with your little mouth"; "This is bullshit"; "This is nauseating—wait. This is nauseating"; and "I never seen [sic] any lawyer do this so bad ever." App. 36 (internal quotation marks omitted). Additionally, Judge Diamond found that Malofiy made 65 "speaking" objections (whereby counsel improperly testifies rather than merely stating the reason for the objection) during a single deposition. Malofiy has since conceded that his behavior during discovery was unprofessional and uncivil.

In light of the District Court's determinations, we find no abuse of discretion in imposing the suspension.

* * * * *

In this context, we affirm both the conclusion that Malofiy violated the Pennsylvania Rules of Professional Conduct and the imposition of a suspension of three months and one day.[3]

[3] The Eastern District of Pennsylvania is an intervenor in this case and has asked us to affirm. Malofiy argues both in his brief and in a motion to strike the Eastern District of Pennsylvania's brief that the intervention was improper. This position is foreclosed by our decision on January 15, 2016 granting the Eastern District of Pennsylvania's motion to intervene. As such, we reject the argument and deny the motion to strike.

Matter of Agola
2015 NY Slip Op 02864 [128 AD3d 78]
March 31, 2015
Per Curiam
Appellate Division, Fourth Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, June 17, 2015

[*1]

In the Matter of Christina A. Agola, a Suspended Attorney, Respondent.
Grievance Committee of the Seventh Judicial District, Petitioner.

Fourth Department, March 31, 2015

APPEARANCES OF COUNSEL

Daniel A. Drake, *Principal Counsel*, *Seventh Judicial District Grievance Committee*, Rochester, for petitioner.

Melvin Bressler, Pittsford, for respondent.

{**128 AD3d at 79} OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law by this Court on July 13, 1994, and formerly maintained offices for the practice of law in Buffalo and Rochester. By order entered September 10, 2013, this Court suspended respondent, pursuant to 22 NYCRR 1022.20 (e), for failing to comply with a subpoena issued by this Court and making misrepresentations to the Grievance Committee and this Court regarding her handling of funds received from several clients (*Matter of Agola*, 109 AD3d 1216 [2013]). In February 2014, the Grievance Committee filed a petition containing seven charges of misconduct against respondent, including misappropriating client funds, failing to produce records

concerning funds received from clients, making false statements and submitting false evidence to the Grievance Committee and this Court regarding her handling of funds received from several clients, and making false statements and filing frivolous pleadings in federal court that resulted in monetary sanctions against respondent. Respondent filed an answer denying material allegations of the petition, and this Court appointed a referee to conduct a hearing. The Referee filed a report sustaining the charges of misconduct and making an advisory finding that respondent owes restitution to eight clients in the total amount of $28,028.15. The Referee additionally made an advisory finding that the doctrine of collateral estoppel precludes respondent from relitigating in this proceeding certain factual determinations made in federal court that were adverse to respondent and gave rise to the sanctions imposed against her.

The Grievance Committee moves to confirm the findings of the Referee, and respondent cross-moves to dismiss on legal grounds the charges alleging misappropriation and other trust account violations, to disaffirm certain factual findings of the Referee, and to disaffirm the Referee's advisory finding concerning the doctrine of collateral estoppel. The parties appeared before this Court for argument of the motion and cross motion, and respondent has submitted matters in mitigation.

With respect to charge one, the Referee found that, from October 2008 through December 2009, respondent was retained on a contingent fee basis in 10 client matters and received from those clients funds in the total amount of $76,605, which were to be used for disbursements. The Referee found, however, {**128 AD3d at 80} that respondent thereafter failed to maintain the funds in her trust account and used a substantial portion of them for personal purposes. The Referee further found that, although respondent incurred disbursements on behalf of the clients in question in the total amount of $1,016.40 and refunded to certain clients unused disbursement funds, she failed to account for funds in the total amount of $28,028.15 that she received from eight clients.

With respect to charge two, the Referee found that, from April 2009 through July 2013, respondent failed to maintain a balance in her trust account sufficient to satisfy her financial obligations to numerous clients; issued 30 trust account checks in the total amount of $34,982.23 payable to cash, rather than a named payee; issued 24 trust account checks in the

total amount of $73,273 payable to herself without recording the purpose of the payment; withdrew from her trust account via bank transfers funds in the total amount of $278,874.24 without making or keeping records sufficient to explain the purpose of the transactions; and issued trust account checks to pay law office expenses such as mortgage payments, advertising expense, and postage. The Referee further found that, in November 2009, respondent received settlement funds in the amount of $75,000 on behalf of a client and, although respondent immediately disbursed $5,000 to the client and $15,000 to herself in payment of her legal fee, she thereafter failed to maintain a balance in her trust account sufficient to satisfy her obligation to the client and did not remit the balance of the funds to the client until March 2010.

With respect to charge three, the Referee found that, during the Grievance Committee's investigation and the proceedings before this Court that resulted in respondent's suspension in [*2]September 2013, respondent made numerous false statements under oath and submitted false evidence to the Grievance Committee and this Court regarding her handling of funds received from several clients. For instance, the Referee found that, during an examination under oath conducted by the Grievance Committee in April 2013, respondent falsely testified that the funds she received from her clients for disbursements, as set forth in charge one, had been deposited into her trust account when, in fact, a substantial portion of the funds had been deposited into her law firm operating account. The Referee additionally found that, during the proceedings that resulted in her suspension in September 2013, respondent filed with this{**128 AD3d at 81} Court papers containing numerous false statements of fact, including that she had received certain of the funds at issue in charge one for legal fees and had deposited certain funds into her law firm operating account, rather than her trust account, owing to the "immediacy" of the expenses she incurred on behalf of certain clients. The Referee found, however, that respondent received all of the funds at issue in charge one for anticipated disbursements, not legal fees, and that certain of the purportedly "immediate" expenses cited by respondent in papers filed with this Court were never incurred. The Referee additionally found that respondent during the suspension proceedings submitted to this Court falsified documents, including a retainer agreement and payment receipt wherein payments that respondent had received for disbursements were falsely characterized as payments for legal fees.

With respect to charges four and five, the Referee found that, from March 2008 though April 2013, respondent filed frivolous pleadings and made false statements in relation to five federal court matters, which resulted in the United States District Court for the Western District of New York imposing monetary sanctions against respondent. With respect to four of those matters, the Referee made an advisory finding that the doctrine of collateral estoppel precludes respondent from relitigating in this proceeding District Court's determination that respondent made misrepresentations and filed frivolous pleadings with that Court and intentionally failed to pay one of its sanctions in a timely manner.

With respect to charge six, the Referee found that respondent throughout this proceeding has refused to produce to the Grievance Committee financial and other records regarding funds received from numerous clients, despite her legal obligation to do so. The Referee further found that respondent purposefully failed to comply with a subpoena issued by this Court, which was returnable August 2, 2013, directing her to appear for an examination under oath and to produce to the Grievance Committee records concerning certain client matters. Notably, respondent testified at the hearing before the Referee that she possesses the records specified in the subpoena and has purposefully failed to produce them. The Referee additionally found that, beginning in November 2012, after respondent became aware that the Grievance Committee had commenced the instant investigation, respondent met with at least four clients and arranged for each of them to execute a{**128 AD3d at 82} "replacement" retainer agreement wherein payments respondent had received for anticipated disbursements were mischaracterized as payments for legal fees. The Referee found that respondent backdated the altered retainer agreements and provided the clients with backdated engagement letters that similarly mischaracterized the prior payments to respondent. Although respondent testified during the hearing that the purpose of the backdated and altered retainer agreements was to prepare for certain alternative dispute resolution proceedings in federal court, the Referee found that respondent's testimony on that point was false and that the true purpose was to conceal respondent's misappropriation of client funds. Finally, the Referee found that respondent or someone acting at her direction forged the signature of a client on a fabricated retainer agreement and, in March 2013, used the forged document in an effort to collect from the client a 40% contingency fee in a matter that respondent had previously agreed to handle on a pro bono basis.

With respect to charge seven, the Referee found that, after respondent was personally served with this Court's order of suspension in September 2013, she failed to comply with that order, as well as this Court's rule governing the conduct of suspended attorneys (*see* 22 NYCRR 1022.27 [b]), by meeting with clients and prospective clients to discuss their legal matters and failing to notify clients and opposing counsel in all pending matters that she had been suspended [*3]from the practice of law. The Referee additionally found that respondent in October 2013 filed with this Court an affidavit wherein she falsely stated that she had complied with section 1022.27. Finally, the Referee found that respondent sought to circumvent this Court's order of suspension and section 1022.27 in several respects, including forging the signature of an attorney who was associated with her law firm on certain business forms in an effort to remove respondent's name from the name of the firm, to make the associate attorney the "public face" of the firm, and to allow respondent to continue practicing law in the "background." The Referee further found that respondent or someone acting at her direction forged the signature of the associate attorney on correspondence with certain courts in connection with at least two client matters.

The Referee found in mitigation that respondent has received several awards for providing pro bono service to clients. In aggravation of the charges, however, the Referee found that respondent{**128 AD3d at 83} has an extensive disciplinary history that includes a public censure imposed by this Court (*Matter of Agola*, 99 AD3d 251 [2012]), and numerous reprimands and sanctions imposed in federal court for making false statements and filing frivolous proceedings. The Referee further found that respondent has not expressed any remorse and, during the hearing, she gave false and evasive testimony on several points.

We confirm the factual findings of the Referee, except with respect to one federal court matter to which the Referee applied the doctrine of collateral estoppel. In that matter, although District Court had entered an order finding that respondent made misrepresentations to the Court and imposing monetary sanctions against respondent, the United States Court of Appeals for the Second Circuit, without directly addressing the factual findings of District Court, reversed and vacated that order on the ground that the Court had applied an incorrect legal standard in determining that sanctions were warranted (*see Muhammad v Walmart Stores E., L.P.*, 732 F3d 104, 109 [2013]). We conclude that,

under the circumstances of that matter and upon the record before this Court, it would be unjust to apply the doctrine of collateral estoppel to the factual findings that served as the basis for the monetary sanctions that were vacated by the Second Circuit (*see Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 200 [2008]). In addition, because the Grievance Committee in this proceeding relied solely on the doctrine of collateral estoppel to prove those allegations, which are contained in paragraph No. 46 of the petition, we decline to sustain the Referee's findings concerning them.

With respect to respondent's motion to dismiss charges one and two, we reject her contention that the funds she received from clients for anticipated disbursements were not subject to any of the disciplinary rules concerning trust account funds and required records. As found by the Referee, the retainer agreements between respondent and the clients in question provide that the funds at issue were to be used for disbursements, precluding respondent's contention that the funds became property of her law firm upon receipt. Although respondent relies on a prior decision of this Court, *Matter of Aquilio* (162 AD2d 58 [1990]), in support of her contention that the disciplinary rules governing trust accounts do not apply to funds received for disbursements, that decision was based on a prior version of the disciplinary rules. That version explicitly{**128 AD3d at 84} provided that "advances for costs and expenses" were not required to be deposited in a segregated account (*see* former Code of Professional Responsibility DR 9-102 [a] [22 NYCRR 1200.46 (a)] [1978 ed]). The relevant rule was amended in 1990 (*see* former Code of Professional Responsibility DR 9-102 [a], [b] [1] [22 NYCRR 1200.46 (a), (b) (1)] [eff Sept. 1, 1990]), and any general exception to the trust account rules for advances for costs and expenses no longer applies (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.15 [a], [b] [1]). In any event, respondent's conduct in this proceeding belies any suggestion that she believed in good faith that the disbursement funds became the property of her law firm upon receipt. When respondent was initially confronted by the Grievance Committee, she falsely asserted that the funds had been deposited into her trust account. When it became apparent that was untrue, she falsified documents in an effort to mischaracterize the payments she received from clients and made false statements regarding the disposition of the funds. Even assuming, arguendo, that respondent was not required to maintain the disbursement funds in her trust account, that would not excuse her failure to account to clients and maintain required records pursuant to the disciplinary rules (*see* Rules of Professional Conduct [22

NYCRR [*4]1200.0] rule 1.15 [c], [d]).

We have considered the remaining contentions set forth in respondent's cross motion, which primarily challenge the sufficiency of the evidence and credibility determinations of the Referee, and conclude that they lack merit. Except as noted above, the Referee's findings are supported by the record, and we therefore decline to disturb them.

We conclude that respondent has violated the following former Disciplinary Rules of the Code of Professional Responsibility and the following Rules of Professional Conduct:

DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4]) and rule 8.4 (c) of the Rules of Professional Conduct (22 NYCRR 1200.0)—engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

DR 1-102 (a) (5) (22 NYCRR 1200.3 [a] [5]) and rule 8.4 (d) of the Rules of Professional Conduct (22 NYCRR 1200.0)—engaging in conduct that is prejudicial to the administration of justice;

DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]) and rule 8.4 (h) of the Rules of Professional Conduct (22 NYCRR 1200.0)—engaging in conduct that adversely reflects on her fitness as a lawyer;{**128 AD3d at 85}

DR 7-102 (a) (2) (22 NYCRR 1200.33 [a] [2]) and rule 3.1 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0)—bringing or defending a proceeding, or asserting or controverting an issue therein, by knowingly advancing a claim or defense that is unwarranted under existing law that cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or engaging in conduct that has no reasonable purpose other than to delay or prolong the resolution of litigation, or serves merely to harass or maliciously injure another, or knowingly asserting material factual statements that are false;

DR 9-102 (a) (22 NYCRR 1200.46 [a]) and rule 1.15 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0)—misappropriating client funds and commingling client funds with personal funds;

DR 9-102 (b) (1) (22 NYCRR 1200.46 [b] [1]) and rule 1.15 (b) (1) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain client funds in a special account separate from her business or personal accounts;

DR 9-102 (c) (3) (22 NYCRR 1200.46 [c] [3]) and rule 1.15 (c) (3) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain complete records of all funds of a client coming into her possession and to render appropriate accounts regarding them;

DR 9-102 (d) (1) (22 NYCRR 1200.46 [d] [1]) and rule 1.15 (d) (1) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain required bookkeeping and other records concerning her practice of law; and

DR 9-102 (d) (2) (22 NYCRR 1200.46 [d] [2]) and rule 1.15 (d) (2) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed.

In addition, pertaining to conduct that occurred after April 1, 2009, we conclude that respondent has violated the following Rules of Professional Conduct:

rule 1.8 (a) (22 NYCRR 1200.0)—entering into a business transaction with a client if they have differing interests therein and if the client expects her to exercise professional judgment therein for the protection of the client, unless the transaction{**128 AD3d at 86} is fair and reasonable to the client, the terms of the transaction are fully disclosed to the client in writing, the client is advised in writing of the desirability of seeking the advice of independent legal counsel on the transaction and is given the opportunity to do so, and the client gives informed consent in writing to the terms of the transaction and the lawyer's role in the transaction;

rule 1.15 (c) (4) (22 NYCRR 1200.0)—failing to pay or deliver to a client in a prompt manner as requested by the client the funds, securities or other properties in her possession that the client is entitled to receive;

rule 1.15 (e) (22 NYCRR 1200.0)—making withdrawals from a special account payable to cash and not to a named payee;

[*5]

rule 1.15 (i) (22 NYCRR 1200.0)—failing to make available to the Grievance Committee financial records required by the rules to be maintained;

rule 3.3 (a) (1) (22 NYCRR 1200.0)—knowingly making a false statement of fact or law to a tribunal and failing to correct a false statement of material fact or law previously made to the tribunal;

rule 4.1 (22 NYCRR 1200.0)—knowingly making a false statement of fact or law to a third person in the course of representing a client; and

rule 5.5 (a) (22 NYCRR 1200.0)—engaging in the unauthorized practice of law.

In determining an appropriate sanction, we have considered respondent's submissions in mitigation, including that she has received five awards for providing pro bono legal services. We have considered in aggravation of the charges, however, that respondent has a substantial disciplinary history and the misconduct herein includes an extensive course of deceitful conduct for personal gain that resulted in harm to numerous clients. We have additionally considered that respondent throughout this proceeding has demonstrated a shocking disregard for the truth and her professional obligations to clients, the courts and our system of administration of justice as a whole. Accordingly, based upon all the factors in this matter, we conclude that respondent is unfit to practice law and should be disbarred. In addition, we grant the request of the Grievance Committee for an order, pursuant to Judiciary Law § 90 (6-a), directing respondent to make restitution to eight former clients in the total amount of $28,028.15.{**128 AD3d at 87}

Centra, J.P., Peradotto, Lindley, Whalen and DeJoseph, JJ., concur.

Order of disbarment entered.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D28742
O/prt

_____AD3d_____

A. GAIL PRUDENTI, P.J.
WILLIAM F. MASTRO
REINALDO E. RIVERA
PETER B. SKELOS
ARIEL E. BELEN, JJ.

2009-03291 OPINION & ORDER

In the Matter of Craig Steven Heller,
an attorney and counselor-at-law.

Grievance Committee for the Tenth
Judicial District, petitioner;
Craig Steven Heller, respondent.

(Attorney Registration No. 2104909)

Motion by the Grievance Committee for the Tenth Judicial District to strike the respondent's name from the roll of attorneys and counselors-at-law, pursuant to Judiciary Law § 90(4), upon his conviction of a felony. The respondent was admitted to the bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on February 4, 1987.

Robert A. Green, Haupppauge, N.Y. (Michele Filosa of counsel), for petitioner.

Craig Steven Heller, East Meadow, N.Y., respondent pro se.

PER CURIAM. On June 4, 2010, the respondent pleaded guilty before the Honorable Francis Ricigliano, in County Court, Nassau County, to grand larceny in the second degree, in violation of Penal Law § 155.40, a class C felony. He executed a waiver of indictment and

consented to be prosecuted by Superior Court Information. As revealed in the plea minutes, between April 18, 2008, and June 11, 2008, the respondent stole currency in excess of $50,000 from Alfonso Miranda. He was sentenced to a determinate term of imprisonment of 30 days, five years' probation, restitution in the amount of $104,108, and a DNA fee of $50.

Due to his felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law § 90(4)(a) and was automatically disbarred.

Accordingly, the Grievance Committee's motion to strike the respondent's name from the roll of attorneys pursuant to Judiciary Law § 90(4)(b) is granted to reflect the respondent's disbarment as of June 4, 2010.

PRUDENTI, P.J., MASTRO, RIVERA, SKELOS and BELEN, JJ., concur.

ORDERED that pursuant to Judiciary Law § 90(4)(a), the respondent, Craig Steven Heller, is disbarred, effective June 4, 2010, and his name is stricken from the roll of attorneys and counselors-at-law, pursuant to Judiciary Law § 90(4)(b); and it is further,

ORDERED that the respondent, Craig Steven Heller, shall comply with this Court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, the respondent, Craig Steven Heller, is commanded to desist and refrain from (l) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and its is further,

ORDERED that if the respondent, Craig Steven Heller, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10(f); and it is further,

ENTER:

Matthew G. Kiernan

Matthew G. Kiernan
Clerk of the Court

Matter of Jaffe

2010 NY Slip Op 06717 [78 AD3d 152]

September 28, 2010

Per Curiam

Appellate Division, First Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, January 12, 2011

[*1]

In the Matter of Karen Jaffe (Admitted as Karen Jaffe-Nierenberg), an Attorney, Respondent. Departmental Disciplinary Committee for the First Judicial Department, Petitioner.

First Department, September 28, 2010

APPEARANCES OF COUNSEL

Alan W. Friedberg, Chief Counsel, Departmental Disciplinary Committee, New York City (*Stephen P. McGoldrick* of counsel), for petitioner.

Linda F. Fedrizzi, for respondent.

{**78 AD3d at 153} OPINION OF THE COURT

Per Curiam.

Respondent Karen Jaffe was admitted to the practice of law in the State of New York by the Fourth Judicial Department on June 24, 1982 under the name Karen Jaffe-Nierenberg. At all times relevant to this proceeding, she has maintained an office for the practice of law within this Department.

The Departmental Disciplinary Committee now seeks an order, pursuant to 22 NYCRR 603.3, imposing reciprocal discipline on respondent, predicated on an order of the United States Court of Appeals for the Second Circuit (585 F3d 118 [2009]) publicly reprimanding and removing her (disbarring her), or in the alternative sanctioning her as this Court deems appropriate. Respondent seeks dismissal of the petition, or in the alternative a hearing on liability, or at least on sanctions.

This is the second time that respondent has been the subject of reciprocal disciplinary proceedings before this Court. The first proceeding followed the Second Circuit's suspension of respondent in May 2006 for 30 days for having falsely advised the Court, on two occasions, that she was too ill to attend oral arguments, when in fact she was attending hearings in another court. Based on that order, the Board of Immigration Appeals suspended her for 30 days from practice before that court, the Immigration Courts, and the Department of Homeland Security, and this Court publicly censured her (40 AD3d 96 [2007]).

During respondent's federal suspension, the Second Circuit, in an effort to assist her in planning to manage her caseload of pending matters, assigned the former chair of the immigration law committee of the New York City Bar Association to help her. Second Circuit staff also met with her. Nevertheless, in what the Second Circuit termed a "remedial order," dated July 13, 2006, the court relieved respondent from all cases before that court in which she had not yet submitted a brief, and limited her to no more than 30 cases at any one time, due to her "chronic failure to meet briefing deadlines, often despite numerous extensions, and her frequent submission of briefs that do not conform to the Rules of Appellate Procedure and that are of minimal competence." That order also directed respondent to provide the names and addresses of clients in cases identified by the court, so that they could be notified respondent was no longer representing them.{**78 AD3d at 154}

In December 2006, the Second Circuit referred for a hearing the issue of the suspicious filing of briefs in three cases on which respondent had been relieved as counsel. A special master determined that two other people were responsible for the fraudulent briefs, but not respondent. The Second Circuit accepted that conclusion in an August 2007 order.

By order dated April 2, 2008, the Second Circuit referred respondent to its Committee on Admissions and Grievances (CAG) to investigate and report on whether she should be subject to disciplinary measures. The order was based on: (1) the dismissal of 12 of her appeals for failure to comply with briefing schedules; (2) orders in 14 of her appeals warning that continued failure to comply with the Federal Rules of Appellate Procedure could result in sanctions; (3) her continued submission of deficient briefs in two appeals, despite repeated warnings, and her failure to attempt to file revised briefs; and (4) her failure to timely respond to Court orders pertaining to the previous "remedial order."

After conducting a hearing at which respondent and her counsel appeared, and accepting all of

her submissions, the CAG, in a December 2008 report, found her guilty by clear and convincing evidence of misconduct and recommended disbarment if she failed to resign within [*2]60 days.

Respondent conceded that the 12 dismissed appeals identified in the order of referral had been dismissed due to her failure to comply with court briefing schedules, which constituted neglect and conduct prejudicial to the administration of justice. With respect to the quality of her work, the CAG reviewed her submissions in three matters and found them "to be of very poor quality." Specifically:

> "Facts are asserted without citations to the record. The argument section is paltry. The petition is sloppily presented, replete with typographical errors. The table of authorities for each of the three different cases is the same, all containing the same errors . . . , and none matches the presentation of cases in the petition. In one petition, none of the cases listed in the table appear in the petition; in another, fewer than half the cases and decisions listed appear in the petition."

As an excuse, respondent maintained that law students had written many of the briefs she signed and filed, without reading them.{**78 AD3d at 155}

The CAG further determined that respondent had not offered an adequate excuse for her failure, despite numerous extensions, to fully comply with court directives to provide information for the purpose of notifying clients that she had been relieved from representation by the July 2006 "remedial order." The CAG also made a finding that respondent had made false statements to the court (the subject of the prior disciplinary proceeding), and treated her prior sanction (suspension of 30 days) as a mitigating factor. The CAG expressed its concern that respondent:

> "did not take heed of the Court's warnings concerning her deficient briefs. Nor did she attempt to file corrected briefs even after acknowledging that many of the briefs she filed were drafted by law students without her supervision. [Respondent] did not seek permission to file briefs out of time on behalf of the clients whose cases were dismissed because of defaults on the scheduling orders. While she could not keep up with the cases she had on her docket, she continued to take on new matters."

Aggravating factors identified by the CAG were: "(1) the prior disciplinary offenses; (2) a pattern of misconduct involving non-compliance with the Court's briefing schedules, orders, and defective briefing; (3) the multiple offenses; (4) the vulnerability of [respondent's] immigrant clients, many of whom do not speak English; and (5) [respondent's] substantial experience in the practice of law." Mitigating factors were respondent's remorse and cooperation in the proceedings, as well as "personal problems with her own illness and a family member's illness around the time of

the March 22, 2007 order," issued upon her failure to provide all the information requested in the July 2006 "remedial order."

In light of respondent's pattern of neglect, repeated failure to follow court orders, the aggravating and mitigating factors, and her assertion that she no longer wished to practice before the Second Circuit, the CAG recommended that she be given the opportunity to resign from the Second Circuit bar, along with a public reprimand; however, if she failed to withdraw, then the CAG recommended disbarment. [*3]

By order dated October 19, 2009, the Second Circuit adopted the factual findings of misconduct and the aggravating and mitigating circumstances, but declined to permit a resignation, and ordered respondent publicly reprimanded and removed (disbarred) (585 F3d 118 [2009]). {**78 AD3d at 156}

The Court acknowledged that "most of [respondent's] briefs were filed within a limited period of time," but noted that

> "she did not request leave to file amended briefs after being put on notice, and, after being advised of her briefing deficiencies as early as December 1, 2005 . . . , she filed at least three deficient briefs after that date . . . . Furthermore, her related argument that her briefs were not deficient . . . renders doubtful the suggestion that she might have improved her briefing in later cases had she been given earlier notice of the deficiencies." (*Id.* at 123.)

With respect to a brief respondent proffered in support of her argument that her work was not deficient, the court observed: "Fully half of the Statement of the Case is irrelevant since its last three paragraphs are duplicated verbatim from an entirely different case concerning a different petitioner and different facts." (*Id.*)

The Second Circuit also rejected respondent's argument that she had already been disciplined for the same conduct and therefore new sanctions were precluded by res judicata or double jeopardy. First, the court noted, she had never been disciplined for some of the conduct, such as filing briefs written by law students without reviewing them. Even though respondent had been criticized for deficient performance in orders issued during the course of particular cases, those orders, the court observed, "did not suggest that the criticism (or other adverse action) was a final 'sanction' for that misconduct." (*Id.* at 121.) The court also stated that, "even if an attorney already has received . . . a final sanction for each of several instances of misconduct, we may nonetheless

impose further discipline if the individual instances of misconduct are found to be part of a sanctionable pattern that has not itself been addressed." (*Id.*) The court specifically stated that it was not disciplining respondent again for discrete misconduct for which she had already been sanctioned. The court further stated, "even if the previously sanctioned misconduct were ignored entirely, or treated as aberrational, [it] would nonetheless find that [disbarment was] warranted by the remaining misconduct." (*Id.* at 122.)

Finally, the court:

> "ma[d]e it clear that the deficiencies of [respondent's] conduct, in the aggregate, bespeak of something far more serious than a lack of competence or{**78 AD3d at 157} ability. They exhibit an indifference to the rights and legal well-being of her clients, and to her professional obligations, including the obligation of candor, to this Court." (*Id.* at 123.)

In a proceeding seeking reciprocal discipline pursuant to 22 NYCRR 603.3 (c), an attorney is precluded from raising any defenses except: (1) a lack of notice or opportunity to be heard constituting a deprivation of due process; (2) an infirmity of the proof presented to the foreign jurisdiction; or (3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this state.

Here, respondent, represented by counsel, actively participated in the Second Circuit disciplinary proceedings, and thus there was no deprivation of due process. Both the CAG and [*4]the Second Circuit cited to specific New York disciplinary rules, thereby satisfying the third prong of the test. Indeed, respondent concedes the sufficiency of the proof, with the exception of the charge relating to her failure to comply with court directives, which she claims was an unintentional consequence of her involvement in a car accident and her responsibilities in connection with her ailing father. However, she was not found guilty of willfully disobeying a court order, but only neglect, based on her own admission that the matter slipped her mind, and her injuries and father's illness were acknowledged as mitigating circumstances. In any event, that charge was not the most serious one, and respondent's principal argument is that the Second Circuit had previously disciplined her for all of the same misconduct, and she should not be sanctioned twice.

As to this argument, we note that the Second Circuit observed that the issue of respondent's submission of law student briefs without reading them had never been addressed in any prior disciplinary order. Indeed, rather than stating that respondent's disciplinary record of a prior suspension for making false statements to the court was an aggravating factor, the Second Circuit

found her guilty of making the false statements, but credited her with a mitigating circumstance for the sanctions previously imposed for those statements. Notwithstanding this, the Second Circuit expressly declared that it was not disciplining respondent "again . . . for that discrete misconduct" (585 F3d at 122).

The balance of respondent's misconduct as found in the order at issue, dismissal of 12 appeals for failure to comply with briefing schedules and the filing of at least 16 grossly inadequate briefs, does appear to have been considered in the Second{**78 AD3d at 158} Circuit's July 2006 order. The Court referred to that order as "remedial," rather than disciplinary. The order was not the result of a formal disciplinary proceeding, and apparently respondent was not given an opportunity to contest the findings therein. The conditions imposed by that order were certainly intended as remedial, and not a sanction. However, the only pertinent factor is that *this* Court has never previously sanctioned respondent for the misconduct outlined in the instant petition. Accordingly, the Second Circuit's October 2009 order, considered alone or in conjunction with the July 2006 "remedial order," provides a predicate for reciprocal discipline.

Insofar as respondent asserts that the Second Circuit punished her because it "was disappointed Judge Keenan could not implicate [her] in any wrongdoing" with respect to the unproven allegation that respondent filed fraudulent briefs, the court specifically stated that her "cooperation and affirmative efforts to expose fraudulent conduct [by the two attorneys who were responsible] were commendable, and are considered mitigating factors" (585 F3d at 122).

As a general rule, this Court accords significant weight to the discipline imposed by the jurisdiction where the charges were originally brought, even if greater or lesser sanctions have been imposed in New York for similar conduct (*Matter of Jarblum*, 51 AD3d 68, 71 [2008]). This Court departs from that principle only with "reluctance" (*Matter of Lowell*, 14 AD3d 41, 48 [2004], *lv denied* 5 NY3d 708 [2005]), primarily where the sanction in the originating jurisdiction deviates materially from this Court's precedent (*Matter of Whitehead*, 37 AD3d 86 [2006]).

This Court has previously held that, where an attorney has "engaged in a pattern of neglect of client matters and failed to comply with court orders, disbarment is warranted" (*Matter of Hatton*, 44 AD3d 49, 52 [2007] [reciprocal disbarment based on Southern District of New York disbarment]). Here, respondent neglected numerous client matters, and failed to even [*5]attempt to address her deficiencies, despite warnings and opportunities to do so. At least as late as the most recent Second Circuit disciplinary proceeding, respondent even maintained that her work was competent. She has not evinced any insight into the impropriety, and resultant harm, of submitting

law student work product without review, and even tries to invoke that misconduct as a mitigating factor. The pervasiveness of respondent's neglect is compounded by the vulnerability of her immigrant clients. Her prior disciplinary history (of making {**78 AD3d at 159} false statements) and her accusations of base motives by the Second Circuit are further aggravating circumstances. Because the sanction of disbarment imposed by the Court of Appeals for the Second Circuit is in accord with this Court's precedents involving similar misconduct, we adopt that sanction.

Accordingly, the Committee's petition should be granted, respondent's request for a hearing should be denied, and respondent should be disbarred and her name stricken from the roll of attorneys and counselors-at-law in the State of New York.

Mazzarelli, J.P., Andrias, Nardelli, Catterson and McGuire, JJ., concur.

Respondent disbarred, and her name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective the date hereof.

Matter of Shapiro

2004 NY Slip Op 03488 [7 AD3d 120]

April 30, 2004

Appellate Division, Fourth Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Thursday, November 18, 2004

[*1]

In the Matter of James J. Shapiro, an Attorney, Respondent. Grievance Committee of the Seventh Judicial District, Petitioner.

Fourth Department, June 30, 2004

APPEARANCES OF COUNSEL

Daniel A. Drake, *Principal Counsel*, *Seventh Judicial District Grievance Committee*, Rochester, for petitioner.

Harter, Secrest & Emery LLP (*Thomas G. Smith* of counsel), Rochester, for respondent.

Bruce S. Rogow, Ft. Lauderdale, Florida, for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law by this Court on February 15, 1983, and, prior to December 2003, maintained an office for the practice of law in Rochester. The Grievance Committee filed a petition charging respondent with violations of the disciplinary rules arising from his conduct in sending a letter to a hospitalized accident victim and in airing certain television commercials in the western New York area. Respondent filed an answer denying material allegations of the petition, and a referee was appointed to conduct a hearing. After the hearing, the Referee submitted a report, which the Grievance Committee now moves to confirm and respondent cross-moves to disaffirm.

The Referee found that a letter sent by respondent to a hospitalized accident victim was an

impermissible solicitation of legal employment. The Referee found further that respondent aired television commercials that contained false and misleading statements and that a client had retained respondent based upon the false information contained in the commercials. In addition, the Referee found that, although the client believed, based upon the commercials, that respondent would personally take action on his behalf, respondent never met the client and did not review his file or take any action on his behalf. Finally, the Referee rejected respondent's affirmative defense that the television commercials were constitutionally protected hyperbole pursuant to a prior decision of this Court.

We agree with the finding of the Referee that the letter sent by respondent to a hospitalized accident victim was an impermissible solicitation of legal employment in violation of Code of Professional Responsibility DR 2-103 (a) (2) (iv) (22 NYCRR 1200.8). That rule prohibits a lawyer from soliciting professional employment from a prospective client by written communication when "the lawyer knows or reasonably should know that the . . . physical, emotional or mental state of the recipient make it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney . . ." (DR 2-103 [a] [2] [iv]).

The letter sent by respondent states, in pertinent part, "We are holding a letter containing valuable information regarding your legal rights . . . When you are well enough to exercise such judgment, please call me." We conclude that the letter, sent to a comatose patient in the intensive care unit of a hospital three days after her automobile collided with a train, was a solicitation of legal employment sent at a time when respondent, who acknowledged that he had read newspaper articles reporting the accident and the condition of the victim, knew or reasonably should have known that the recipient was unable to exercise reasonable judgment in retaining counsel. Despite language in the letter acknowledging the likelihood that the recipient was then unable to exercise reasonable judgment in retaining counsel, we are not persuaded by the explanation of respondent that he sent his letter to a stranger under these circumstances in order to educate her regarding her legal rights.

In the alternative, respondent contends that DR 2-103 (a) (2) (iv) is overly broad and vague and therefore unconstitutional. We reject that contention.

A state has a compelling interest in and broad power to regulate the practice of law (*see Goldfarb v Virginia State Bar*, 421 US 773, 792 [1975], *reh denied* 423 US 886 [1975]; *Matter of von Wiegen*, 63 NY2d 163, 170-171 [1984]). Although lawyer advertising is commercial speech and is accorded the [*2]protection of the First Amendment (*see Florida Bar v Went for It, Inc.*, 515

US 618, 623 [1995]; *Shapero v Kentucky Bar Assn.*, 486 US 466, 472 [1988]; *Bates v State Bar of Ariz.*, 433 US 350 [1977], *reh denied* 434 US 881 [1977]), it is now familiar law that commercial speech may be regulated to advance a substantial interest provided that the regulation goes no further than necessary to advance that interest (*see Went for It, Inc.*, 515 US at 625-635; *Central Hudson Gas & Elec. Corp. v Public Serv. Commn.*, 447 US 557, 566 [1980]; *von Wiegen*, 63 NY2d at 173-175).

Contrary to respondent's contention, the disciplinary rule at issue is not overbroad. The substantial interests of a state in protecting the privacy of vulnerable prospective clients and in preventing the erosion of confidence in the legal profession have been recognized (*see Went for It, Inc.*, 515 US at 635; *Matter of Anis*, 126 NJ 448, 457, 599 A2d 1265, 1269 [1992], *cert denied sub nom. Anis v New Jersey Comm. on Attorney Adv.,* 504 US 956 [1992]) and DR 2-103 (a) (2) (iv) prohibits lawyers from soliciting prospective clients at a time when the clients are unable to exercise reasonable judgment with regard to the retention of counsel. The disciplinary rule does not impose an absolute bar on contact by lawyers with prospective clients for a specified period (*cf. Went for It, Inc.*, 515 US at 620-621), nor does it proscribe a particular type of solicitation (*cf. Matter of Koffler*, 51 NY2d 140 [1980], *cert denied* 450 US 1026 [1981]) or solicitations directed to a particular group (*cf. von Wiegen*, 63 NY2d at 168-170). Instead, the disciplinary rule strikes a balance between the interests of vulnerable prospective clients in being free from unwanted intrusions at a time when they are unable to exercise reasonable judgment and the interests of prospective clients in receiving information regarding available legal services and of lawyers in advertising their services. Consequently, it cannot be said that the rule is overbroad.

Nor do we find the disciplinary rule to be unconstitutionally vague. The Supreme Court of New Jersey, in upholding a nearly identical rule, concluded that, in the days immediately following the tragic Lockerbie crash, any reasonable lawyer would have known that the families of the victims would be weak and vulnerable, and that "any reasonable lawyer would conclude that an obsequious letter of solicitation delivered the day after a death notice would reach people when they 'could not exercise reasonable judgment in employing a lawyer' " (*Anis*, 126 NJ at 458, 599 A2d at 1270).

We reach a similar conclusion here. Applying the standard articulated by the court in *Anis*, we conclude that any reasonable attorney would know that a solicitation letter sent to a hospitalized comatose patient in the days immediately following a collision between her automobile and a train would reach the patient and her family at a time when they were unable to exercise reasonable

judgment in retaining an attorney. Respondent, who had actual knowledge of the condition of the accident victim, will not be heard to argue that the disciplinary rule required him to be a "mind and body reader" in order to determine whether his solicitation letter could be sent.

We also agree with the finding of the Referee that the television commercials aired by respondent contained false and misleading statements. The commercials depicted respondent as an experienced, aggressive personal injury lawyer who was prepared to take and had taken personal action on behalf of clients. The evidence presented at the hearing, however, supports the finding of the Referee that respondent has not been actively engaged in the practice of law in this state since 1995. Respondent has conceded that he has continuously resided in the State of Florida since 1991. The daily operations of the Rochester firm of Shapiro and Shapiro have been entrusted to one or two attorneys and several paralegals. Respondent's role has been limited to acting as spokesperson, providing funding and responding to questions. In contrast to the image [*3]of respondent depicted in the commercials, respondent has never tried a case to its conclusion and has conducted approximately 10 depositions.

The record also supports the finding of the Referee that a severely injured accident victim retained respondent based upon those commercials, which grossly exaggerated and falsely depicted his skill and experience and failed to inform viewers that he does not reside in New York and has not engaged in the practice of law here since 1995. Respondent took no personal action on behalf of that client and did not even review his file.

We reject the contention of respondent that his television commercials consist of constitutionally protected hyperbole. The statements in the television commercials aired by respondent are false; they do not consist of hyperbole. In the commercials, respondent, or an actor speaking on his behalf, makes statements regarding actions that respondent has taken or will take on behalf of clients when, in fact, respondent has not practiced law in a number of years and intended to take no action on behalf of any client. The Constitution does not protect the dissemination of false or misleading information (*see Zauderer v Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 US 626, 637 [1985]; *Central Hudson Gas & Elec. Corp.*, 447 US at 563-564; *Matter of Zang*, 154 Ariz 134, 141, 741 P2d 267, 274 [1987], *cert denied sub nom. Whitmer v State Bar of Ariz.*, 484 US 1067 [1988]). In our view, the depiction of respondent in the commercials as a tough, aggressive advocate who has recovered and will recover all that clients are entitled to recover was "flattering past the point of deception" (*Zang*, 154 Ariz at 145, 741 P2d at 278).

We therefore confirm the findings of fact made by the Referee and conclude that respondent

has violated the following Disciplinary Rules of the Code of Professional Responsibility:

DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4])—engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7])—engaging in conduct that adversely reflects on his fitness as a lawyer;

DR 2-101 (a) (22 NYCRR 1200.6 [a])—disseminating a public communication to a prospective client containing statements or claims that are false, deceptive or misleading; and

DR 2-103 (a) (2) (iv) (22 NYCRR 1200.8 [a] [2] [iv])—soliciting professional employment from a prospective client by written communication when he knew or reasonably should have known that the age or the physical, emotional or mental state of the recipient made it unlikely that the recipient would be able to exercise reasonable judgment in retaining an attorney.

We have considered, in determining an appropriate sanction, the mitigating factors found by the Referee, i.e., that respondent consulted counsel concerning the language in his solicitation letters and that he retained outside counsel to assist with some of the cases handled by his firm. Respondent, however, was previously censured by this Court for a misleading advertisement placed in the yellow pages of the telephone directory (*Matter of Shapiro*, 225 AD2d 215 [1996]). Additionally, on two prior occasions, respondent received letters of caution for sending letters to clients containing misleading language regarding legal costs. Finally, respondent has received a letter of caution for sending a solicitation letter to a hospitalized accident victim. Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended for one year and until further order of the Court.

Pigott, Jr., P.J., Green, Hurlbutt, Kehoe and Hayes, JJ., concur.

Order of suspension entered.

Matter of Weber
2013 NY Slip Op 05535 [110 AD3d 24]
July 31, 2013
Per Curiam.
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, October 30, 2013

[*1]

In the Matter of Dean Weber (Admitted as Dean Gary Weber), an Attorney, Respondent. Grievance Committee for the Tenth Judicial District, Petitioner.

Second Department, July 31, 2013

APPEARANCES OF COUNSEL

Robert A. Green, Hauppauge (*Leslie B. Anderson* of counsel), for petitioner.

{**110 AD3d at 24} OPINION OF THE COURT

Per Curiam.

The instant matter emanates from an opinion and order of the United States District Court for the Southern District of New York dated August 3, 2012, which suspended the respondent from the practice of law before that Court for a period of one year. The suspension is predicated upon a finding that the respondent violated Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.1 (competence), 1.3 (diligence), 1.4 (communication) and 8.4 (d) (conduct prejudicial to the administration of justice) in connection with, inter alia, his mishandling of a bankruptcy matter.

On October 19, 2012, the respondent was personally served with notice pursuant to Rules of the Appellate Division, Second Department (22 NYCRR) § 691.3, which advised him of his right

to file, within 20 days, a verified statement setting forth any of the defenses to the imposition of reciprocal discipline enumerated in 22 NYCRR 691.3 (c).

The respondent submitted a verified statement in which he admitted that he mishandled the subject bankruptcy matter, described numerous mitigating circumstances, and requested leniency. Inasmuch as he failed to set forth any of the defenses enumerated in 22 NYCRR 691.3, and did not request a hearing before this Court, there is no impediment to the imposition of reciprocal discipline.

Under the totality of the circumstances, the application of the Grievance Committee for the Tenth Judicial District is granted, and the respondent is publicly censured.

Eng, P.J., Rivera, Skelos, Dillon and Leventhal, JJ., concur.

Ordered that the petitioner's application to impose reciprocal discipline is granted; and it is further,

Ordered that the respondent is publicly censured.

Matter of Weber
2015 NY Slip Op 07674 [134 AD3d 13]
October 21, 2015
Per Curiam.
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, January 7, 2015

[*1]

In the Matter of Dean Gary Weber, an Attorney, Respondent. Grievance Committee for the Tenth Judicial District, Petitioner.

Second Department, October 21, 2015 On the Court's own motion, it is ordered that the opinion and order of this Court dated July 1, 2015 (131 AD3d 38 [2015]), in the above-entitled matter is recalled and vacated, and the following opinion and order is substituted therefor:

APPEARANCES OF COUNSEL

Mitchell T. Borkowsky, Hauppauge (*Daniel M. Mitola* of counsel), for petitioner.

McDonough & McDonough, LLP, Garden City (*Chris McDonough* of [*2]counsel), for respondent.

{**134 AD3d at 14} OPINION OF THE COURT
Per Curiam.

The Grievance Committee for the Tenth Judicial District served the respondent with a petition dated July 25, 2013,{**134 AD3d at 15} containing four charges of professional misconduct, arising from the respondent's employment of a disbarred attorney, Craig Heller, as a "legal assistant." After hearings conducted on October 24, 2013 and November 20, 2013, both parties were notified by the Court that the Honorable Charles F. Cacciabaudo, who had been

assigned as Special Referee to hear and report, recused himself in this matter. By decision and order on motion of this Court dated March 24, 2014, the matter was reassigned to John P. Clarke, Esq., as Special Referee, to hear and report. Prior to reading the record, on April 16, 2014, the Special Referee held a conference and afforded the parties the opportunity to present further evidence and argument. The petitioner and the respondent declined to do so.

After a review of the record, the Special Referee issued a report dated May 15, 2014, which sustained all charges. The Grievance Committee now moves to confirm the Special Referee's report and to impose such discipline upon the respondent as this Court deems appropriate. The respondent, by his counsel, submitted an affirmation in opposition seeking to disaffirm the report of the

Special Referee and to dismiss the proceeding. Alternatively, in the event that the report of the Special Referee is confirmed, the respondent requests that this matter be returned to the petitioner for a private sanction or that this Court issue no sanction greater than a censure. Additionally, counsel for the respondent seeks to file a sur-reply.

Charge one alleges that the respondent assisted a nonlawyer in the unauthorized practice of law, in violation of rule 5.5 (b) of the Rules of Professional Conduct (22 NYCRR 1200.0), as follows:

> "1. At all relevant times, the respondent's law firm provided legal services to clients with respect to loan modification and bankruptcy applications.

"2. In or about the Spring of 2010, the respondent hired Craig Heller to assist him with his loan modification and bankruptcy practice.

"3. The respondent knew at the time he hired Craig Heller that Heller was facing criminal charges, which would likely result in his disbarment.

"4. The respondent knew or learned that on or about June 4, 2010, Craig Heller pleaded guilty to{**134 AD3d at 16} grand larceny in the second degree, a felony, and that, as a result, Craig Heller was disbarred as an attorney in the State of New York.

"5. At all relevant times, from June 4, 2010, through the present, the respondent knew or should have known that, as a disbarred attorney, Craig Heller was forbidden from practicing law, holding himself out as an attorney-at-law, and soliciting clients on his own behalf or on behalf of the firm.

"6. At all relevant times, from June 4, 2010, through the present, the respondent knew, or should have known that, as an attorney, he was prohibited from employing Craig Heller, a disbarred attorney, to solicit clients on his own behalf or on behalf of his firm, and provide legal services to clients.

"7. At all relevant times, from June 4, 2010, through the present, the respondent utilized Craig Heller to, among other things, solicit clients on behalf of the firm, handle and manage loan modification and bankruptcy files, communicate with clients and lenders, and collect executed retainer agreements and fees from clients on behalf of the firm.

[*3]

"8. At all relevant times, from June 4, 2010, through the present, the respondent knew that Craig Heller used the assumed name of 'Craig

Miller' when communicating with clients of the firm and others."

Based upon the factual specifications of charge one, charge two alleges that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of rule 8.4 (c) of the Rules of Professional Conduct (22 NYCRR 1200.0); charge three alleges that the respondent engaged in conduct prejudicial to the administration of justice, in violation of rule 8.4 (d) of the Rules of Professional Conduct (22 NYCRR 1200.0); and charge four alleges that the respondent engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of rule 8.4 (h) of the Rules of Professional Conduct (22 NYCRR 1200.0).

Notwithstanding the respondent's claim that Heller merely performed work as a "legal assistant," the Special Referee found that Heller continued to practice law while in the respondent's {**134 AD3d at 17} employ and that, by permitting Heller to do so, the respondent assisted a nonlawyer in the unauthorized practice of law. Although the respondent's counsel urges this Court to give no weight to the findings of the Special Referee with respect to credibility, since he did not preside over the hearings, we note that, after this matter was reassigned to that Special Referee, the respondent chose not to present further evidence and argument when given the opportunity to do so. Nevertheless, upon review, we conclude that the evidence supported the Special Referee's findings. The respondent testified at the hearing that he hired Heller because Heller knew everything about the respondent's law practice, given his prior legal

experience with real estate matters, and as a bankruptcy lawyer. Indeed, the respondent relied upon Heller's legal knowledge and expertise to allow Heller great autonomy in the performance of his work on clients' legal matters, and to delegate to him responsibility to act as the principal contact with clients with little or no supervision. Further, evidence of the respondent's complicity in Heller's deceptive conduct is found in his endorsement of Heller's use of a false identity, "Craig Miller," when communicating with the firm's clients and others. We find that the respondent authorized Heller to use an assumed name, in part, to conceal and deceive others concerning Heller's status as a disbarred attorney, and that Heller misled the respondent's clients to believe that he was an attorney named "Craig Miller." The record also reflects that the respondent authorized Heller to improperly solicit clients on behalf of the

respondent's firm in violation of 22 NYCRR 691.10 (a).

In view of the respondent's admissions, and the credible evidence adduced, we conclude that the Special Referee properly sustained all charges. Accordingly, the Grievance Committee's motion to confirm the Special Referee's report is granted. The respondent's counsel's request to file a sur-reply is granted, and the sur-reply was considered in reaching this determination.

In determining an appropriate measure of discipline to impose, this Court has considered the respondent's lack of remorse and the absence of character evidence, as well as the respondent's disciplinary history, which consists of a public censure by opinion and order of this Court dated July 31, 2013, following his suspension before the

United States District Court for the Southern District of New York for a period of one{**134 AD3d at 18} year (*see Matter of Weber*, 110 AD3d 24 [2013]), and a letter of admonition. Under the totality of the circumstances, we find that the respondent's conduct warrants his suspension from the practice of law for a period of two years.

Eng, P.J., Mastro, Rivera, Dillon and Leventhal, JJ., concur.

Ordered that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further,

Ordered that the respondent, Dean Gary Weber, is suspended from the practice of law for a period of two years, commencing November 20, 2015, and continuing until further order of this

Court. The respondent shall not apply for reinstatement earlier than May 20, 2017. In such application, the respondent shall furnish satisfactory proof that during said period he: (1) refrained from practicing or attempting to practice law, (2) fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10), (3) complied with the applicable continuing legal education requirements (*see* 22 NYCRR 691.11 [c] [2]), and (4) otherwise properly conducted himself ; and it is further,

[*4]

Ordered that pursuant to Judiciary Law § 90, during the period of suspension, and until the further order of this Court, the respondent, Dean

Gary Weber, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law ; and it is further,

Ordered that if the respondent, Dean Gary Weber, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10 (f).

Matter of Zweig
2014 NY Slip Op 03040 [117 AD3d 96]
May 1, 2014
Per Curiam
Appellate Division, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, June 18, 2014

[*1]

In the Matter of Richard H. Zweig (Admitted as Richard Henry Zweig), an Attorney, Respondent. Departmental Disciplinary Committee for the First Judicial Department, Petitioner.

First Department, May 1, 2014

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (*Stephen P. McGoldrick* of counsel), for petitioner.

Scalise & Hamilton, LLP (*Beverly M. Ma* of counsel), for respondent.

{**117 AD3d at 97} OPINION OF THE COURT

Per Curiam.

Respondent Richard H. Zweig was admitted to the practice of law in the State of New York by the First Judicial Department on July 9, 1984 as Richard Henry Zweig. At all times relevant to this proceeding, he maintained an office for the practice of law within the First Judicial Department.

The Departmental Disciplinary Committee initiated a sua sponte investigation against respondent after he testified as a mitigation witness in a disciplinary proceeding concerning attorney Mac Truong (*Matter of Truong*, 22 AD3d 62 [1st Dept 2005], *appeal dismissed* 6

NY3d 799 [2006]).

The Committee's investigation focused on respondent's participation, between 2000 and 2007, in various state and federal actions in which he purportedly represented the government of Vietnam at Truong's direction. Specifically, the litigation concerned assets that had been frozen in the United States when Vietnam nationalized 10 shipping companies that were doing business collectively under the name Vishipco. After Vishipco was nationalized, Vietnam changed the name to Vitranschart.

On or about July 15, 2009, the Disciplinary Committee served respondent with a notice and statement of charges alleging{**117 AD3d at 98} that: by commencing and prosecuting unauthorized and fraudulent litigation in New York state and federal court, purportedly on behalf of the government of Vietnam, he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Code of Professional Responsibility DR 1-102 (a) (4) (22 NYCRR 1200.3 [a]; [4]) (charge one) and in conduct that was prejudicial to the administration of justice in violation of DR 1-102 (a) (5) (22 NYCRR 1200.3 [a]; [5]) (charge two); by giving false testimony in the disciplinary proceeding *Matter of Mac Truong* on May 20, 2004, respondent violated DR 1-102 (a) (4) (22 NYCRR 1200.3 [a]; [4]) (charge three) and DR 1-102 (a) (5) (22 NYCRR 1200.3 [a]; [5]) (charge four); by giving false testimony at his sworn deposition before the Committee in September 2008 and February 2009, he violated DR 1-102 (a) (4) (22 NYCRR 1200.3 [a]; [4]) (charge five) and DR 1-102 (a) (5) (22 NYCRR 1200.3 [a]; [5]) (charge six); by failing to make an application before Judge Crotty to dismiss Truong's counterclaims against respondent's purported client, he intentionally prejudiced or damaged his client in violation of DR 7-101 (a) (3) (22 NYCRR 1200.32 [a]; [3]) (charge seven); by commencing unauthorized and fraudulent legal actions against Charles Schwab, former Vishipco shareholders, and their counsel, respondent took legal action intended solely to harass and/or maliciously injure another in violation of DR 7-102 (a) (1) (22 NYCRR 1200.33 [a]; [1]) (charge eight); and by engaging in the above misconduct, respondent engaged in conduct that adversely reflected on his fitness as a lawyer in violation of DR 1-102 (a) (7) (22 NYCRR 1200.3 [a]; [7]) (charge nine).

In August 2009, respondent served an answer denying the charges. During October and

November 2009, a referee held seven days of hearings on the charges. On January 6, 2010, the Referee issued a 43-page report of his "Initial Findings of Facts" wherein he found, among other things, that respondent testified falsely and conspired with Truong to use litigation improperly, and that respondent was "a puppet and Mac Truong was his puppeteer" who directed various fraudulent conduct along the way.

Following the parties' submissions of memoranda, wherein respondent requested reconsideration of the Referee's findings on the charges, the Referee issued a report on March [*2]15, 2010 denoted "Notice of Charges Sustained," in which he sustained eight out of nine charges, having not sustained charge seven (intentionally prejudicing or damaging his client in violation of{**117 AD3d at 99} DR 7-101 [a]; [3]; [22 NYCRR 1200.32 (a) (3)]). Respondent admitted only to charge nine, that he engaged in conduct that adversely reflects on his fitness as a lawyer (DR 1-102 [a]; [7]; [22 NYCRR 1200.3 (a) (7)]). A sanction hearing was held on March 22 and on April 19, 2010, the Referee issued his final report and recommended disbarment.

After hearing oral argument, a Hearing Panel issued a report dated October 20, 2010, where it agreed with the Referee's findings and recommendation of disbarment.

The Disciplinary Committee now moves for an order pursuant to Rules of the Appellate Division, First Department (22 NYCRR) §§ 603.4 (d) and 605.15 (e) (2) confirming the report of the Referee and the determination of the Hearing Panel, and disbarring respondent from the practice of law. Respondent argues that disbarment is disproportionate to the non-venal conduct involved and requests a sanction between a censure and a one-year suspension.

In finding respondent guilty of commencing and prosecuting unauthorized and fraudulent litigation in state and federal court purportedly on behalf of the government of Vietnam (charges one and two), the Referee held that respondent

> "engaged over many years in an intentional course of conduct involving repeated instances of dishonesty, fraud, deceit and misrepresentation, lying both to the Court and to his putative client about the true nature of the litigation brought at the instance of, and primarily for the benefit of, Mac Truong . . . [S];uch conduct is prejudicial to the administration of justice."

In sustaining charges three through six, the Referee found that respondent testified falsely at Truong's 2004 disciplinary proceeding, and testified falsely in his own deposition before the Committee in 2008 and 2009, when he denied that he colluded with Truong in connection with the Vitranschart litigation.

The Referee did not sustain charge seven (intentionally prejudicing or damaging his client in violation of DR 7-101 [a]; [3]; [22 NYCRR 1200.32 (a) (3)]), having determined that although respondent did intentionally fail to move to dismiss the counterclaims against Vitranschart when invited to do so by the federal court, "because [respondent]; was still working with Mac Truong to use that litigation for improper purposes," he did not believe that failure established that respondent intentionally or actually prejudiced or damaged his client. In sustaining charge{**117 AD3d at 100} eight, the Referee found that respondent's conduct "served merely to harass or maliciously injure Charles Schwab and the Vishipco Entities and their lawyer" in violation of DR 7-102 (a) (1) (22 NYCRR 1200.33 [a]; [1]). And, as noted above, respondent admitted to charge nine, a violation of DR 1-102 (a) (7) (22 NYCRR 1200.3 [a]; [7]).

The Referee summarized respondent's conduct as follows:[FN*]

> "Respondent engaged in an intentional fraud on multiple state and federal courts over a multiyear period in order to help Mac Truong pursue vexatious litigation against the Vishipco Entities and Charles Schwab. He then lied in his testimony at Mac Truong's disciplinary hearing, and when deposed by the Disciplinary Committee Staff as part of their investigation of Respondent himself, regarding the true nature of his representation of Vietnam. . . .

[*3]

> "In order to assist Mac Truong's goal of holding on to Vishipco's assets, Respondent filed an unnecessary federal lawsuit (Federal Action #2) without the permission of his putative client, the government of Vietnam. He did so, he claims, in reliance on the vague instructions of an unnamed employee of a Vietnamese shipping company to 'protect our interests' until the Embassy could decide whether to retain him. . . .
>
> "The real reason for the rush to start a new lawsuit was to try to help Mac Truong delay the long-form accounting ordered by Justice Cozier. Mac Truong's own

federal lawsuit (Federal Action #1) had been stayed pending the outcome of the state case, and so Mac Truong required another mechanism by which to avoid discovery and delay Justice Cozier. The fact that Respondent did not file a related case statement with Federal Action #2 is consistent with the picture of forum shopping at the direction of Mac Truong . . . The fact that one of Respondent's first acts after filing Federal Action #2 was to ask U.S. District Judge Stein to enjoin the state action—a motion which solely benefitted Mac Truong—is further {**117 AD3d at 101}proof that the real purpose was to assist Mac Truong in pursuing vexatious litigation, rather than to represent Vietnam honestly."

Additional examples of respondent's handling of the litigations in a manner that assisted Truong but was not in the best interest of his putative client include that: the language of the complaint in federal action No. 2 (and most other documents) was consistent with Mac Truong's own writing and entirely inconsistent with respondent's; he made an incomprehensible summary judgment motion asking the federal court to "certify facts" which were drafted to benefit Truong to stave off the state court; he joined in baseless attacks on Vishipco's attorney, David Levy, including moving for his disqualification, which was consistent with Truong's long-running "vendetta" against Levy; and he "consistently failed to fully and accurately inform his client of the true nature of the litigation."

With respect to whether respondent had in fact been authorized to represent Vietnam, the Referee concluded as relevant:

"[i];n the absence of a witness from Vietnam to contradict his testimony, I find that Mac Truong and Respondent in fact met with the Ambassador [of Vietnam]; . . . and that Respondent obtained some measure of authority to appear in court on behalf o[f]; Vietnam. However, in light of Respondent's subsequent actions and the way his correspondence is crafted to avoid fully and accurately informing the Vietnamese government of the salient facts, I find that this meeting was part of Respondent's agreement with Mac Truong to use Vitranschart as a pawn in Mac Truong's battles with the Vishipco entities."

In mitigation respondent offered, among other things, his lack of a disciplinary history; the absence of a venal motive and, in fact, that he lost money insofar as he took the case on a [*4]one-third contingency basis and failed to obtain any recovery; his client was not harmed; his good reputation in the legal community as testified to by two character

witnesses (one who skimmed the voluminous record and the other who declined counsel's offer to do so before the hearing); that a suspension or disbarment would irreparably harm his low-income immigrant clients; and that "judgment should be tempered with mercy"—detailing the significant effects disbarment would have on his family.{**117 AD3d at 102}

The Referee recommended disbarment. The Hearing Panel agreed with the Referee as to the charges sustained and the recommended sanction of disbarment, with one minor exception regarding the Referee's finding that hardship to respondent's family, particularly his two "young" sons (ages 15 and 18 at the time of the hearing), was a mitigating factor. The Panel noted that respondent's wife is a teacher and respondent testified that she would like to go back to work.

This Court confirms the findings of fact and conclusions of law of the Referee and Hearing Panel as to liability and to impose the sanction of disbarment (*see Matter of Alejandro*, 65 AD3d 63 [1st Dept 2009], *appeal dismissed* 13 NY3d 788 [2009], *lv denied* 13 NY3d 714 [2009]; [disbarment for conduct that included testifying falsely during deposition before DDC]; *Matter of Fagan*, 58 AD3d 260 [1st Dept 2008], *lv denied* 12 NY3d 813 [2009]; *Matter of Truong*, 22 AD3d 62 [2005]; *Matter of Gadye*, 283 AD2d 1 [1st Dept 2001]; [disbarment for, inter alia, bad faith court filings, failure to advise of conflict of interest issues and participation in a fraud upon bankruptcy court]; *Matter of Gelbwaks*, 260 AD2d 47 [1st Dept 1999]; [disbarment for collusion with client in bogus transfer of assets to evade creditor, bad faith bankruptcy filings, unauthorized disbursement of client funds, impermissible conflict of interest with client in a financial transaction]; *Matter of Kramer*, 247 AD2d 81 [1st Dept 1998], *lv denied* 93 NY3d 883 [1999], *cert denied* 528 US 869 [1999]; [disbarment for pattern over several years of, inter alia, willful disobedience of discovery orders, and filing an unauthorized appeal and petition for rehearing after his discharge by client; disciplinary history and no remorse]).

Respondent's contention that he has been unfairly blamed for the misconduct committed by disbarred attorney Mac Truong, and that disbarment is too severe of a sanction for whatever misconduct he engaged in as a result of his inexperience and lack of legal sophistication minimizes his misconduct. Respondent testified to his active participation in litigation that stretched over seven years in multiple courts. While he is

correct that the Committee failed to produce a witness to testify that he conspired or colluded with Truong in the frivolous litigation, the record is replete with pleadings, motions and other filings which were drafted for the benefit of Truong and potentially disadvantaged his own client. Moreover, while the Referee determined that respondent was given some measure of authority to appear on behalf of the government of Vietnam, he{**117 AD3d at 103} found respondent failed to inform his client clearly and completely of various actions he was taking on its behalf. Additionally, respondent testified falsely and did not express remorse for his misconduct. Contrary to respondent's assertion that the Referee did not consider his evidence in mitigation, the Referee concluded that those factors did not "adequately mitigate" respondent's intentional wrongdoing.

Accordingly, the Committee's motion to confirm should be granted and respondent disbarred and his name stricken from the roll of attorneys and counselors-at-law in the State of New York.

[*5]

Mazzarelli, J.P., Friedman, Sweeny, Acosta and Andrias, JJ., concur.

Respondent disbarred, and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective the date hereof.

Footnotes

Footnote *:The Referee issued three reports due to the lengthy nature of the findings of misconduct.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

FORMAL OPINION 1998-1

TOPIC:Attorney employing disbarred or suspended attorney to work in law office; aiding unauthorized practice of law.

DIGEST:Attorney may not aid non-lawyer, including disbarred or suspended attorney, in unauthorized practice of law. It is improper for lawyer or law firm to employ disbarred or suspended attorney in any capacity related to practice of law. What acts constitute unauthorized practice is question of law for Appellate Division.

CODE:DR3-101(A); DR1-102(A)(4); EC3-6.

QUESTION

Under what circumstances, if any, may an attorney in good standing employ a disbarred or suspended attorney to work in a law office?

OPINION

An attorney in good standing is contemplating hiring a disbarred lawyer to work in her law office, and is concerned that his activities might result in her violation of the disciplinary rules. She asks what work, if any, it is permissible for him to perform in a law office.

This question poses issues of both ethics and law, ultimately involving the application of DR3-101(A): "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." See Matter of Mason, 208 A.D.2d 1, 621 N.Y.S.2d 582 (1st Dep't 1995) (attorney violated "DR3-101 [aiding a nonlawyer in the unauthorized practice of law]"). See also, DR1-102(A)(4): "A lawyer or law firm shall not: ... Engage in conduct that is prejudicial to the administration of justice...." And see, Annotation, "Disciplinary Action Against Attorney for Aiding or Assisting Another Person in Unauthorized Practice of Law," 41 A.L.R.4th 361 (1985).

Matter of Rosenbluth, 36 A.D.2d 383, 320 N.Y.S.2d 839 (1st Dep't 1971), observes that "[a] suspended or disbarred attorney holds approximately the same status as one who has never been admitted...." This holding is consonant with Judiciary Law §486, which makes it a misdemeanor for any disbarred or suspended attorney to do "any act forbidden by the provisions of this article to be done by any person not regularly admitted to practice law in the courts of record of this state...." Another part of the same article, Judiciary Law §478, makes it unlawful for anyone not duly licensed and admitted in New York to practice or appear in court other than pro se or to act in any manner that would give the impression he is an attorney.

Consistently with these statutes, in Matter of Gajewski, 217 A.D.2d 90, 634 N.Y.S.2d 704 (1st Dep't 1995), an attorney was disciplined for allowing a disbarred attorney to affix her name to affirmations included in court papers; and in Matter of Riely, 101 A.D.2d 351, 475 N.Y.S.2d 473 (2d Dep't 1984), an attorney was punished for "aiding a suspended attorney in the unauthorized practice of law." See also, Matter of Mainiere, 274 A.D. 17, 80 N.Y.S.2d 31 (1st Dep't 1948): "Any member of the bar who lends assistance to a disbarred attorney which enables the latter to keep up the appearance of continuing professional standing subjects himself to discipline." Indeed, in Matter of Takvorian, 240 A.D. 95, 670 N.Y.S.2d 211(2d Dep't 1998), the court held that even inadvertently aiding a non-lawyer in the practice of law can warrant professional discipline.

Judiciary Law §90(2) requires the Appellate Division to insert in every order of suspension or disbarment that the attorney must "thereafter ... desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee." Additionally, the order must specifically "forbid ... [t]he appearance as an attorney ... before any court, judge, justice, board, commission, or other public authority" and "[t]he giving to another of an opinion as to the law or its application, or of any advice in relation thereto."

By §§603.13(a), 691.10(a), 806.9(a) and 1022.26(a) of the Rules of the Appellate Division, all four Departments also explicitly require disbarred, suspended and resigned attorneys to comply fully with Judiciary Law §§478 and 486, as well as §§479 and 484. The Rules of the First (§603.13) and Second (§691.10) Departments contain additional language requiring such attorneys to "comply fully and completely with the letter and spirit" of the statutes "relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony."

In order to opine whether a lawyer would violate DR3-101 and DR1-102 by aiding a non-lawyer -- including a disbarred or suspended attorney -- in "the unauthorized practice of law," it is first necessary to determine whether the disbarred attorney's contemplated conduct would constitute "unauthorized practice." See, generally, Annotation, "Nature of Legal Services or Law-Related Services Which May be Performed for Others by Disbarred or Suspended Attorneys," 87 A.L.R.3d 279 (1978). At least two of our sister bar associations have already dealt with these issues at some length.

In Opinion #92-15, the Committee on Professional Ethics of the Bar Association of Nassau County considered the question of whether an attorney in good standing may employ a disbarred attorney, in the capacity of a paralegal, to handle document drafting, research and organization of files. The Nassau County Opinion noted that notwithstanding Judiciary Law §§478, 486 and 90(2) and DR3-101(A), EC3-6 contemplates that it is permissible for lawyers to "delegate[] tasks to clerks, secretaries and other lay persons" acting under the attorneys' supervision.

The Committee went on, however, to cite ABA Opinion 1434, unpublished Opinion 7 of the ABA Ethics Committee, and Opinion 666 of the New York County Lawyers' Association for the proposition that "the statutory and code provisions ... impliedly place greater restrictions upon the ability of a disbarred lawyer from earning a living by use of his or her training and talent and experience than are encountered by non-lawyers generally." According to the Nassau County Opinion, however, the determination of what paralegals may do is more properly a matter of law beyond the purview of an ethics committee.

N.Y. County 666 (1985) is not as deferential, holding that an attorney may not employ a disbarred lawyer as a law clerk whose functions would include the conduct of pre-trial depositions and the attendance at real estate closings on behalf of the inquiring attorney. The New York County Opinion adhered to the view that "it is clear that the employment by a lawyer or law firm of a disbarred lawyer, in any capacity related to the practice of law is improper.... The danger that an unsuspecting member of the public or even other lawyers may be misled as [to] the status of a disbarred lawyer who is employed by a law firm is too grave to ignore." The Committee added, however, that it expressed "no opinion as to whether a disbarred lawyer may be employed in some other capacity such as a process server, messenger, secretary, investigator, etc."

While concurring in the Nassau County Bar Association's general view that what constitutes the unauthorized practice of law is itself a question of law and thus beyond this Committee's jurisdiction, we also agree with the conclusion of the New York County Lawyers' Association that it is clearly impermissible for an attorney to employ a disbarred lawyer to conduct depositions or attend closings on the attorney's behalf. We would add, moreover, that the employment of a disbarred lawyer is fraught with ethical peril even with respect to activities that nonlawyers may properly engage in. Courts may reasonably scrutinize such activities and conclude that their performance by a disbarred lawyer poses greater risk to the public than their performance by a nonlawyer.

Indeed, in Matter of Parker 241 A.D.2d 208, 670 N.Y.S.2d 414(1st Dep't 1998), the Appellate Division recently held that an attorney had "certainly" violated DR3-101(A) by aiding a non-lawyer in the practice of law "by allowing ... a resigned attorney ... to prepare a contract of sale and appear on the seller's behalf in order to postpone a foreclosure sale." Noting that "[w]e are certainly loath to have attorneys improperly delegating their responsibilities as attorneys to non-lawyers and, depending on the circumstances of each case, severe

penalties are warranted," the First Department cited with approval the hearing panel's analysis of the relevant issues:

In sustaining Charge One, the Panel found that, by authorizing Butler, a resigned attorney, to negotiate, draft and finalize Mrs. Hunter's contract of sale and affidavit on Oct. 22, 1994, and to appear on her behalf and negotiate and execute the forbearance agreement on Oct. 24, 1994, respondent aided a non-lawyer in the unauthorized practice of law in violation of DR3-101(A). It noted the proliferation of the use of legal assistants in the last two decades and found generally that the appropriate use of legal assistants facilitates the delivery of legal services at reasonable cost in fulfillment of the obligation of lawyers to make legal counsel available to the public. Recognizing that there is no clear cut definition of the unauthorized "practice of law" and the nature and scope of activities appropriately permissible to legal assistants, the Panel found, nevertheless, that "it is clear that delegation of tasks to legal assistants cannot substitute for the personal availability of the lawyer's experience and judgment to the client." While surmising that respondent may have been influenced by Butler's experience as a former lawyer and not doubting that respondent believed he was acting in good faith and appropriately, the Panel did not think that a reasonable lawyer under the circumstances would have been justified in the level of delegation which occurred, even if the ultimate advice would not have been different, and found that respondent "crossed the line between appropriate reliance on an assistant and abdication to a non-lawyer of the lawyer's responsibility to the client."

Guidance as to other activities that have been determined to constitute "unauthorized practice" can be found in prior opinions of the Appellate Division. These would include the following **1**:
Matter of Emmanuel, 157 A.D.2d 134, 555 N.Y.S.2d 174 (2d Dep't 1990): Attorney disciplined who "permitted a nonlawyer to appear as her associate counsel."

Matter of Caracas, 171 A.D.2d 358, 576 N.Y.S.2d 293 (2d Dep't 1991): Attorney disciplined who "allowed an employee," not admitted anywhere as an attorney, "to consult with a client and to prepare legal papers for the client," who "was unaware ... that the employee was not admitted to the practice of law."

Matter of Mason, supra: Attorney "improperly facilitated the practice of law" by allowing non-lawyer to try Housing Court case and another non-lawyer to draft court complaints.

Matter of Mainiere, supra: Attorney disciplined for permitting use of name as counsel in litigation in which disbarred attorney was interested, thereby enabling disbarred attorney to maintain appearance of being engaged in legal practice.

Matter of Nadelweiss, 260 A.D. 89, 20 N.Y.S.2d 773 (1st Dep't 1940): Attorney disciplined for aiding his uncle, in whose law office he was employed, in permitting a disbarred attorney to hold himself out as the uncle and practice under the latter's name.

Matter of Lerner, 270 A.D. 602, 61 N.Y.S.2d 661 (1st Dep't 1946): Attorney disciplined for allowing disbarred attorney to use office, to hold himself out as entitled to practice law, to interview witnesses and, in certain particular cases, to practice law, and for allowing another disbarred attorney to use his office and his facsimile signature stamp.

Matter of Sutherland, 252 A.D. 620, 300 N.Y.S. 667 (1st Dep't 1937): Attorney disciplined who "permitted and requested" disbarred attorney "to perform the duties of a law clerk on numerous occasions."

Matter of Olitt, 145 A.D.2d 273, 538 N.Y.S.2d 537 (1st Dep't), cert. denied, 493 U.S. 937, 110 S. Ct. 333, 107 L. Ed. 2d 322 (1989): Suspended attorney may not serve as "house counsel" for company in which he has controlling interest, appear in court for brokerage firm while filing papers in his name, draft contracts for brokerage house, or appear in arbitration proceedings before stock exchange allegedly pro se on behalf of company in which he has interest.

Matter of Stahl, 200 A.D.2d 285, 613 N.Y.S.2d 437 (2d Dep't 1994): While employed in law office, disbarred attorney improperly made "determinations to initiate actions at law and settle collection claims and actions."

Matter of Abbott, 175 A.D.2d 396, 572 N.Y.S.2d 467 (3d Dep't 1991): Suspended attorney may not "maintain an office ... giving at least the appearance of a law office," with the building directory and office door designating

him as an attorney; may not use letterhead and envelopes designating him an attorney; may not continue to represent clients or attempt to do so; and may not continue to hold clients' funds in escrow.

Matter of Koffler, 236 A.D. 240, 258 N.Y.S. 611 (1st Dep't 1932): Disbarred attorney held in contempt for representing to trial court that he was an attorney entitled to practice, examining witnesses in case, and testifying as an expert in case while identifying himself as an attorney without revealing disbarment.

Matter of Markowitz, 28 A.D.2d 262, 284 N.Y.S.2d 463 (1st Dep't 1967): Suspended attorney may not represent "sellers, as clients, in two real estate or purchase and sale transactions."

Proopis v. Equitable Life Assur. Soc. of the U.S., 183 Misc. 378, 48 N.Y.S.2d 50 (Kings Sup. Ct. 1944): Disbarred attorney may not "associate himself with counsel in an examination before trial or any other legal proceeding in which he actively participates in planning and executing the progress of the litigation" by his "presence ... so that he may assist and take part in a legal proceeding" as an "actuarial expert" "by giving advice to counsel as the facts, upon which he is an expert, are developed." **2**

Matter of Israel, 230 A.D.2d 293, 655 N.Y.S.2d 538 (1st Dep't 1997): Suspended attorney disbarred for "continuing to represent clients and practice law."

Matter of Ratafia, 268 A.D. 987, 51 N.Y.S.2d 558 (2d Dep't 1944): Disbarred attorney may not serve as senior law clerk in State Labor Department, examining and preparing contested cases for hearings before referees, disposing of applications for adjournments, initiating investigations, and issuing subpoenas.

Matter of Katz, 35 A.D.2d 159, 315 N.Y.S.2d 97 (1st Dep't 1970): Suspended attorney may not be employed by a City Marshal, a public official whose work is closely allied with courts and judicial proceedings and whose duties include enforcing court orders.

Matter of Spar, 100 A.D.2d 71, 473 N.Y.S.2d 192 (1st Dep't 1984): Disbarred attorney guilty of misdemeanor and contempt for unauthorized practice of law.

Matter of Glick, 126 A.D.2d 5, 512 N.Y.S.2d 413 (2d Dep't 1987): Suspended attorney guilty of misdemeanor for unauthorized practice of law.

On the other hand, in Matter of Rosenbluth, supra, a divided court held it permissible for a disbarred attorney to run a calendar watching service. According to the First Department majority, citing various Opinions of the A.B.A. and this Association, among the other "law related activities" that suspended or disbarred attorneys "have been permitted to engage in" are: aiding an attorney in preparing a law book (in which event disbarred lawyer's name may be used); soliciting lawyers for process serving business to be turned over to a process serving firm; and acting as an investigator or adjuster for an insurance company.

The Court of Appeals has analyzed these issues in Matter of Rowe, 80 N.Y.2d 366, 590 N.Y.S.2d 179, 604 N.E.2d 728 (1992). In discussing the right of a suspended lawyer to publish "a law-related article" on the right to refuse treatment, the court confined "[t]he practice of law" to "the rendering of legal advice and opinions to particular clients" and held the article permissible as an exercise of the First Amendment because it "sought only to present the state of the law to any reader interested in the subject" and "neither rendered advice to a particular person nor was intended to respond to known needs and circumstances of a larger group." The Court of Appeals cited Matter of Rosenbluth, supra, approvingly for the proposition that the Appellate Division in Rowe had "improperly 'prohibit[ed] him from engaging in endeavors which he could have undertaken had he never been admitted to the Bar in the first place'...." The Court of Appeals also held that the suspended attorney could properly use "the letters J.D. following his name," as "[t]he letters identified him as one who had successfully completed a law school curriculum, not as a member of the Bar licensed to practice law."

Citing the Second Department's order in Matter of Wolfram, **3** Nass. Co. 92-15 suggested that an adjudication of the question of what a disbarred or suspended attorney may do in a specific instance might be obtained by motion in the Appellate Division. While Rosenbluth won relief in precisely that fashion to enable him to run a calendar watching service, it is noteworthy that, without elucidation, the Second Department denied Wolfram's motion to allow him "to be employed in a law office as a paralegal, law clerk or legal research assistant." It is worth repeating that N.Y. County 666 declined to opine on whether a disbarred lawyer might properly be

employed by a law firm as a process server, messenger, secretary or investigator; and we concur that only the Appellate Division, on proper application, can decide such an issue or, for that matter, whether there are circumstances in which a disbarred attorney might be able to act as a paralegal while "desist[ing] and refrain[ing] from the practice of law in any form."

CONCLUSION

It is clearly improper for a lawyer or law firm to employ a disbarred or suspended attorney in any capacity related to the practice of law. What acts constitute the unauthorized practice of law is a question of law for the Appellate Division.

Issued: December 21, 1998

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1 One lower-court opinion is also cited.

2 This case is cited approvingly in N.Y. County 666 for the proposition: "Certain it is that our law rigidly excludes those who have been disbarred from the slightest participation in the work of a lawyer or of his office, to which employment, as a layman, there could not be the slightest objection, were it not for the fact of disbarment."

3 The correct citation of the order is 11/27/89 N.Y.L.J. 6.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:	CHAPTER 7
Mac Truong and Maryse Mac-Truong,	Case No.: 03-40283 (NLW)
Debtor.	
Steven P. Kartzman,	Adv. No.: 03-2681
Plaintiff,	
v.	**MEMORANDUM DECISION**
Mac Truong and Maryse Mac-Truong, Sylvaine Decrouy and Hugh Mac-Truong,	
Defendants.	

Before: HON. NOVALYN L. WINFIELD

A P P E A R A N C E S :

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Steven P. Kartzman ("Trustee") as Chapter 7 Trustee for Mac Truong and Maryse Mac

Truong ("Debtors") has moved for an injunction to limit the Debtors' effort to repeatedly litigate matters decided adversely to them. As set forth below, with some modifications, the relief requested is granted.

This court has jurisdiction to hear and determine this matter pursuant to 28 U.S.C. § 1334 and § 157(a) and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984. This motion is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A). The following constitutes the findings of fact and conclusions of law required by Fed. R. Bankruptcy P. 7052.[1]

I.

The instant motion is not the Trustee's first request for a filing injunction. At the Trustee's request, on March 20, 2006 this court entered an order that enjoined the Debtors from filing "any pleadings, motions or cross motions" in bankruptcy case 03-40283 or adversary proceeding 03-2681 without first obtaining leave of the court. This filing injunction was necessitated by the unnecessarily litigious manner in which the Debtors defended the adversary proceeding and attempted to thwart the Trustee's ability to administer the bankruptcy estate.

The adversary proceeding litigation actually began in April, 2004 in the Superior Court of the State of New Jersey, Bergen County, Chancery Division ("State Court Action") on a complaint

[1] Typically, a request for injunctive relief requires commencement of an adversary proceeding under Bankruptcy Rule 7001(7). However, under Bankruptcy Rule 1001 the court may construe the Bankruptcy Rules so as "to secure the just, speedy, and inexpensive determination of every case or proceeding." Because of the excessive litigation history of this case, the concomitant expense to all parties from the protracted litigation that has marked this case, and the fact that the Debtors have had the opportunity to fully respond to this motion, the Court will not require the Trustee to file an adversary proceeding.

filed by Broadwhite Associates ("Broadwhite") to set aside the Debtors' transfer of their property at 327 Demott Avenue, Teaneck, New Jersey (the "Property"). The complaint was premised on the New Jersey fraudulent transfer statute. The complaint alleged that in 1999 the Debtors transferred the Property to Sylvaine Decrouy ("Decrouy"), the sister of Maryse Mac Truong, and that the deed was recorded on January 10, 2000. The complaint further alleged that in June 2001, Decrouy transferred the Property to the Debtors' son, Hugh MacTruong. The Debtors, Decrouy and Hugh MacTruong were named as defendants in Broadwhite's complaint.

Several months after the State Court Action was filed, the Debtors filed their Chapter 7 petition on September 15, 2003. Because of the bankruptcy filing the state court entered an order on September 23, 2003 which (i) dismissed the action as to the Debtors only, and (ii) provided a procedure for restoring the matter to the active trial calendar if relief from the automatic stay was obtained. Six days later, on September 29, 2003, the Debtors removed the State Court Action to the United States District Court for the District of New Jersey. By order of the Hon. William G. Bassler dated October 6, 2003 the litigation was referred to the bankruptcy court and was assigned adversary proceeding number 03-2681.

In January 2004 the Debtors moved before this court to dismiss the complaint. Among the grounds for dismissal the Debtors alleged (i) the matter had been dismissed by the state court and the Rooker-Feldman doctrine precluded continuation of the litigation in bankruptcy court, (ii) the fraudulent conveyance cause of action was barred by the applicable New Jersey statute of limitations, and (iii) the cause of action, if any, belonged to the bankruptcy estate. Opposition to the Debtors' motion was filed by Broadwhite and the Trustee. The court found that the cause of action belonged to the bankruptcy estate, and that the complaint stated a fraudulent conveyance cause of

action. It also determined that the Debtors' grounds for dismissing the complaint were without foundation and entered an order dated May 5, 2004 denying the Debtors' motion to dismiss the complaint.

While the Debtors' motion was pending, the Trustee moved to be added as the party plaintiff and to amend the complaint to allege bankruptcy jurisdictional provisions, to add Bankruptcy Code §§ 544 and 550 as grounds for recovery of the Property, and to clarify the relief sought against Decrouy. The Debtors cross-moved for denial of the Trustee's motion, asserting the following grounds for denial:

a) Not all parties were properly served in the State Court Action, and no summons from the Bankruptcy Court had been served;

b) The State Court Action was dismissed with regard to the Debtors;

c) The discharge order precluded the Trustee from proceeding;

d) The Debtors were not insolvent at the time of the transfers;

e) The New Jersey statute of limitations barred the Trustee from proceeding; and

f) The Trustee failed to serve the Debtors with the application to retain counsel to the Trustee.

On August 27, 2004 the court issued an opinion and order granting the relief sought by the Trustee and denying the Debtors' cross-motion. The court's decision is attached hereto as Exhibit 1.

The Debtors' subsequent motion for reconsideration was denied by Letter Opinion and Order dated November 18, 2004. The court's Letter Opinion is attached hereto as Exhibit 2. Rather than appeal the ruling, the Debtor's filed a new motion for dismissal that repeated their earlier assertions for dismissal. This was denied as well. Undeterred, the Debtors recycled their allegations into a

"Motion for an Order Dismissing Amended Complaint Under Rule 7012(b), and/or For Summary Judgment Under Rule 7056 and/or To Renew Under F.R.Cv.P. 60(b) Defense Motion to Vacate This Court's August 27, 2004 Order Authorizing Substitution of Trustee As Party Plaintiff and Amending Complaint." Because all of these matters had been previously addressed, the court denied this motion as well. Indeed, up to entry of the filing injunction in March 2006 the Debtors repeatedly filed motions which simply restated each of the arguments that the court found meritless. Additionally, in the main case, 03-40283, the Debtors opposed the Trustee's retention of counsel by merely repeating the very same arguments they advanced in adversary proceeding 03-2681. When their objections were overruled by the court, they simply retooled their objections into motions to remove the Trustee. A comprehensive recitation of each motion and its disposition would unreasonably burden this opinion. However, attached to this opinion as Exhibit 3 are the court dockets for the adversary proceeding and main case, which reveal the repetitive and voluminous nature of the filings by the Debtors.

It was also necessary to enter a filing injunction with regard to pleadings filed by Hugh MacTruong. In the adversary proceeding 03-2681, Hugh MacTruong repeatedly advanced arguments identical to those advanced by the Debtors; these were likewise found to be without merit. Additionally in February 2006 Hugh MacTruong filed an action in the Superior Court of the State of New Jersey, Bergen County, Law Division, against the Trustee and his counsel claiming abuse of process. Hugh MacTruong's complaint essentially asserted that the trustee lacked authority to seek recovery of the Property from him and that all of the Trustee's actions were undertaken with the intention to cause harm to him and the Debtors. After the Trustee removed the matter to this court pursuant to 28 U.S.C. § 1452 and Bankruptcy Rule 9027, the Trustee moved to dismiss the

complaint. On April 12, 2006, the Court dismissed the complaint with prejudice inasmuch as the Trustee's prosecution of adversary proceeding 03-2681 is well within the scope of his duties under Bankruptcy Code § 704. Thereafter, at the request of the Trustee, and because Hugh MacTruong's claims were devoid of legal or factual support, the Court entered an order on May 18, 2006 that prevented Hugh MacTruong from filing any papers in any state or federal forum without first obtaining leave of this Court.

Beginning in 2006, the Debtors focused much of their efforts on the appellate process - appealing various decisions rendered in the main bankruptcy case and in the adversary proceeding. As has been true with regard to the Debtors' various motions, the appeals have also been found to be either procedurally or substantively deficient. Since 2006, the Debtors have filed eleven appeals, nine of which have been either dismissed or determined adversely to the Debtors. The two most recent appeals have not yet been considered by the district court.

However, the litigation in the bankruptcy courts did not abate. In October 2006 the court granted the Trustee's motion for summary judgment, avoiding the transfer of the Property from the Debtors to Decrouy, and the transfer from Decrouy to Hugh Mac Truong.

Approximately one month later the Trustee was before the court again to request amendment of the summary judgment orders to include subsequent transferees. It appears that just before the Trustee filed his summary judgment motion Hugh MacTruong deeded the property to an entity known as MT-EARS LLP.[2] The existence of this entity was never revealed to the Trustee or the court either while the motion was pending or at the hearing. Further, several days after the hearing on the summary judgment motion, on October 16, 2006, MT-EARS LLP conveyed title to the

[2]According to formation documents the Trustee obtained from the State of New Jersey the general partners of MT-EARS LLP are Mac Truong and Maryse MacTruong.

Property to an entity known as To-Viet-Dao LLP. Mac Truong executed the deed as the general partner for MT-EARS LLP. The deed to To-Viet-Dao was recorded on October 27, 2006. The Trustee only learned of these transfers as a result of a title search. On December 7, 2006, based on the record before it, the court entered a supplemental order granting summary judgment avoiding the transfer to MT-EARS LLP and the subsequent transfer to To-Viet-Dao LLP. Additionally, in order to foreclose any further transfers of the Property, the court entered an order enjoining the Debtors, the adversary defendants, or any entity acting on their behalf from further transferring the Property.[3]

Because of the surreptitious transfer of the Property to To-Viet-Dao, and to ensure the Debtors' cooperation with the Trustee, the court entered an order on December 7, 2006 that required the Debtors to provide the Trustee, his representatives, and any prospective purchaser with access to the Property. Regrettably, the Debtors' cooperation was not forthcoming and on February 15, 2007, the Court entered an order that (i) required the Debtors to vacate the Property by April 1, 2007 and (ii) authorized the Trustee, with the assistance of the U.S. Marshal, if necessary, to take possession of the Property.

Presumably because (i) the Debtors were not finding the courts in the District of New Jersey to be hospitable and (ii) they sought to delay their removal from the Property, the Debtors caused To-Viet Dao LLP ("To-Viet-Dao")to file a Chapter 13 petition in the Bankruptcy Court for the Southern District of New York on March 15, 2007.[4] Despite this court's avoidance of the transfer

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[3]The December 7th order, as well as the earlier orders granting summary judgment were appealed by the Debtors. The summary judgment orders were affirmed by the Hon. Garrett Brown on July 5, 2007.

[4]The Chapter 13 Case was subsequently converted to a Chapter 11 case because a limited liability company is not eligible for Chapter 13 relief.

of the Property, the To-Viet-Dao petition scheduled the Property as an estate asset. Based on the To-Viet-Dao bankruptcy, the Debtors informed the Trustee that the automatic stay in the To-Viet-Dao bankruptcy prevented the Trustee from continuing his efforts to sell the Property. Further, in July 2007, on an affirmation of Maryse Mac Truong, To-Viet-Dao obtained entry of an Order to Show Cause for the Trustee to demonstrate why he should not be stayed from proceeding against the Property, and for a determination of the ownership of the Property. The Trustee filed extensive papers in opposition, including Judge Brown's opinion, which upheld the bankruptcy court's orders that avoided the transfers of the Property. After reviewing the Trustee's papers and relying in significant measure on Judge Brown's opinion, the Hon. James M. Peck found that To-Viet Dao had no interest in the Property. Judge Peck specifically noted that Judge Brown's affirmance of the bankruptcy court's orders setting aside the transfers of the Property occurred eight days before To-Viet Dao filed its request for an Order to Show Cause. *See* Ex. 4 *infra* at 8. Judge Peck was understandably concerned that the affirmation in support of the Order to Show Cause did not fully set out the proceedings that occurred in the New Jersey case. He stated:

> At the time that the affirmation in support of order to show cause was presented to this Court on Friday, July 13th, the affirmation, which speaks for itself, made no reference to the various court orders including the memorandum decision of Chief Judge Brown relating to this property. As a result, this Court was misled and based upon the history of this litigation, this Court believes intentionally misled by an affirmation that failed to include material information that was necessary in order to make the affirmation clear and understandable.
>
> The relief requested is not obtainable as a matter of law. It is apparent based upon this record that at the time To-Viet-Dao, LLP commenced a Chapter 13 case in March of 2007, the transfer of 327 Demott Avenue, Teaneck, New Jersey to this debtor had already been avoided and set aside by final orders of the bankruptcy court for the District of New Jersey. Those orders, to the extent appealed to the District Court, have now been affirmed.

> There are serious questions of misconduct here; misconduct, misrepresentation, and bankruptcy abuse for which the individual responsible should be held accountable.

Ex. 4 at 11. At the conclusion of the hearing, the To-Viet Dao bankruptcy case was dismissed with prejudice and a one-year nationwide injunction against further filings was entered. *Id.* at 19.

Just one day after the hearing before Judge Peck, on July 19, 2007, Mac Truong filed an individual Chapter 13 petition in the Bankruptcy Court for the Southern District of New York.[5] The case was assigned to Judge Peck, who scheduled a Case Management Conference, at which Mac Truong was required to appear and give testimony as to whether his Chapter 13 case was filed in good faith. After consideration of Mac Truong's testimony, the papers filed by the Trustee and the United States Trustee, Judge Peck dismissed Mac Truong's Chapter 13 case with prejudice and with a one-year nationwide injunction prohibiting further filings by Mac Truong and Maryse MacTruong. *See* Ex. 5 *infra* at 34, 38.

Thereafter, at the Trustee's request, this court issued an order on July 30, 2007, which confirmed that the summary judgment orders as well as the order directing the removal of the Debtors from the Property remained in effect. This court deemed it necessary to issue such an order because of the Debtors' contentions that (i) Judge Peck's dismissal of Mac Truong's Chapter 13 case also resulted in a dismissal of the Chapter 7 case pending before this court and (ii) the purported dismissal of the Chapter 7 case nullified the order which directed the removal of the Debtors from the Property.

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[5]On the same date that Mac Truong filed his Chapter 13 case in New York, he filed in the New Jersey bankruptcy court a document captioned "Notice of Withdrawal of Joint Chapter 7 Petition," which contained language purporting to make the withdrawal effective immediately. By correspondence dated July 20, 2007 this court informed Mr. Truong that a motion on notice to all parties was required for dismissal of the Debtors' case and that his notice was deficient and would not be acted upon by the court.

Despite all of the Debtors' legal maneuvering the removal of the Debtors took place without incident on August 3, 2007. On the morning of August 3rd, the U.S. Marshals, accompanied by members of the Teaneck Police Department, entered and secured the Property after Mac Truong left the premises.

However, the Trustee's removal of the Debtors from the Property did not end the Debtors' litigation efforts. Rather, it appears to have triggered the Debtors' most recent spate of litigation in non-bankruptcy court venues. Just five days after the Debtors were removed from the Property, Mac Truong filed a complaint in the United States District Court for the Southern District of New York requesting a declaratory judgment that the Trustee lacked authority to administer the Property and requesting $5,000,000 in damages for robbery or conversion of assets. On August 20, 2007 the Debtor's complaint was dismissed by the Hon. Laura Taylor Swain based on Mac Truong's failure to obtain leave of court to file the complaint, as required by an order of the Hon. Shira Scheindlin dated June 27, 2006. *See, Ex.6 infra.*

Judge Scheindlin's order was a product of a suit commenced by Mac Truong against the Departmental Disciplinary Committee for the First Judicial Department ("Committee") and others for the alleged violation of his rights to due process and freedom, as well as defamation and libel. Judge Scheindlin not only dismissed the complaint but also enjoined Mac Truong from filing another complaint because of his "history of vexatious and frivolous litigations. *Ex. 6 at 17.*

Even this disciplinary matter has a history in this court before it reached Judge Scheindlin. Just prior to the Debtor's filing bankruptcy case 03-40283, Truong was suspended from the practice of law, as reflected in an order issued by the Appellate Division, First Department. *See, In Re Truong*, 2 A.D. 3d 27, 768, N.Y.S. 2d 450 (1st Dept. 2003)(per curiam). In November 2003 Truong

removed the disciplinary proceeding to the bankruptcy court purportedly pursuant to 28 U.S.C § 1452. However, on a motion for remand brought by counsel for the Committee this court remanded the disciplinary proceeding by order dated February 18, 2004. The court's decision was grounded in the fact that the plain language of 28 U.S.C. § 1452 excepts from removal a governmental unit's action to enforce its police or regulatory power. Ultimately, Truong was disbarred as set forth in a 2005 opinion and order from the Appellate Division, First Department. *See, In re Truong*, 22 A.D. 3d 62, 800 N.Y.S. 2d 12 (1st Dept. 2005).

Searching for another venue in which to press his arguments regarding the Trustee's administration of the bankruptcy case, on September 7, 2007 Mac Truong filed criminal complaints against the Trustee and Barbara Ostroth ("Ms. Ostroth") with the Teaneck Police Department. The complaints focused on the alleged misconduct by the Trustee and Ms. Ostroth with regard to the Property. It accused the Trustee and Ms. Ostroth of illegal possession of the Property, theft of personal property and unlawful breaking and entering. After conducting a probable cause hearing on September 19, 2007 the Teaneck Municipal Court dismissed the complaint for lack of probable cause.

Undeterred by the dismissal of the above described complaint, Mac Truong again filed a criminal complaint against the Trustee, this time adding Adam Brief ("Mr. Brief"), the Trustee's counsel, as a defendant. The primary claim in this complaint was that the Trustee and Mr. Brief offered "a false instrument for filing". The allegedly false instrument was the Trustee's motion to dismiss the September 2007 complaint, which stated that Mac Truong left the property of his own accord, and that no forcible entry onto the Property was required. On November 28, 2007 the

Teaneck Municipal Court once again dismissed all charges for lack of probable cause.[6]

Unbowed by his lack of success in Teaneck Municipal Court, Mac Truong filed criminal charges against the Trustee in the Municipal Court of Newark and the Municipal Court of Parsippany-Troy Hills. The complaint in the Newark court also named as a defendant Bruce Etterman ("Mr. Etterman"), special counsel for the Trustee. The Trustee moved to dismiss the charges in both courts, but as of the hearing date on the Trustee's motion to enlarge the filing injunction, the matters had not been heard.

The frivolous and vexatious nature of the criminal charges cannot be overstated. The charges against the Trustee and Mr. Etterman are emblematic of Mac Truong's cavalier approach to both the facts and the law. As part of his submission to the Third Circuit in connection with one of the Debtors' appeals, Mr. Etterman included as an exhibit the schedule of unsecured creditors that the Debtors filed with their bankruptcy petition. Mac Truong asserts that the schedule is a false statement because he and his wife have received their Chapter 7 discharge. By his analysis the elimination of personal liability for their debts thereby eliminates their creditors and there is no basis for the Trustee to continue his efforts to sell the Property. This analysis of the Bankruptcy Code is flawed and his motions and cross-motions to dismiss his case or remove the Trustee on this basis have been rejected by this court on various occasions.[7] Accordingly, Mac Truong's criminal charges

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[6]The Trustee advises that Mac Truong also filed a second complaint against Ms. Ostroth which was likewise dismissed by the Teaneck Municipal Court for lack of probable cause.

[7]Bankruptcy Code § 101(10)(A) defines a creditor as an entity that has a claim against the debtor that arose at or before the order for relief. By the Debtors own admission on their schedules they had creditors when they filed for bankruptcy. Additionally the court's claim register of filed proofs of claim reveal claims amounting to $785,096.25. Finally, Bankruptcy Code § 727(b) makes it plain that the discharge merely discharges a debtor from personal liability on claims that arose before the petition date it does not eliminate the existence of creditors, whose claims can be satisfied from funds in the bankruptcy estate if the Trustee finds

lack foundation.

It is important to understand that the litigation history just recited is only the most recent history. The litigation that precipitated both the present case and the Debtors' prior Chapter 11 case, 00-37093, actually began in the 1990's. In approximately 1997 Mac Truong filed suit against several defendants over the ownership of various investment accounts maintained at Charles Schwab & Co. The matter was fully litigated in the Supreme Court of the State of New York, County of New York and determined adversely to Mac Truong. Mac Truong's efforts to relitigate the matter in the United States District Court for the Southern District of New York were also unsuccessful. In 2003, Judge Sidney Stein enjoined the Debtors from further litigation against these defendants due to the Debtors harassing and vexatious litigation tactics. *See* Ex. 7, 8 *infra*. Debtors' efforts to further relitigate these matters in this bankruptcy court were also rejected by the court. *See* Ex. 9 *infra*.

Truong followed the same pattern with regard to his landlord/tenant dispute with Broadwhite. In 1995 Broadwhite commenced an action in the Supreme Court of the State of New York, County of New York, against both Debtors essentially for breach of lease and nonpayment of rent. Eventually a bench trial was held before the Justice Harold Tompkins. On January 6, 2000, Justice Tompkins rendered an oral decision granting judgment in favor of Broadwhite, and on January 20, 2000 an order was entered against the Debtors in the amount of $356,509.83.[8] Debtors appealed Justice Tompkins's decision and on May 7, 2002 the trial court's decision was affirmed by the Appellate Division. The Debtors thereupon moved for reargument, or alternatively, leave to appeal

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assets.

[8]The Judgment in this case caused Broadwhite to institute the suit for fraudulent transfer that was removed to this court by the Debtors.

to the Court of Appeals for the State of New York. That motion was denied in October 2002. However, even before the appeal of Justice Tompkins's decision could be decided by the Appellate Division, the Debtors sought to overturn the state court judgment by commencing suit against Justice Tompkins and others in the United States District Court for the Southern District of New York. Both that complaint and the amended complaint were dismissed for lack of subject matter jurisdiction. As part of the order dismissing the amended complaint, the Hon. Shira A. Scheindlin directed that the Debtors were enjoined from filing any new lawsuits related to the Broadwhite state court action without prior leave of court. *See* Ex. 10 *infra*. Regrettably, Judge Scheindlin's injunction only temporarily ended Mac Truong's litigation. As we know, once Broadwhite began its efforts to enforce its judgment the Debtors filed for bankruptcy in the District of New Jersey and all of the events described above began to unfold.

II.

The authority of a district court to restrict the activity of abusive litigants is well recognized. *Abdul-Akbar v. Watson*, 901 F.2d 329, 332-33 (3d Cir. 1990); *Tripati v. Beaman*, 878 F.2d 351, 352 (10th Cir. 1989); *Procup v. Strickland*, 792 F.2d 1069, 1073 (11th Cir. 1986)(en banc); *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984); *In re Green*, 669 F.2d 779, 785 (D.C. Cir. 1981)(the right of access to the courts is neither absolute nor unconditional).

This ability to restrict a litigant's access to the court is frequently grounded in the court's inherent authority to manage its jurisdiction and in the All Writs Act. That statute provides in pertinent part that "the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and

principles of law." 28 U.S.C. § 1651(a). The Third Circuit has succinctly summarized the reasoning for reliance on the All Writs Act as follows:

> It is well within the broad scope of the All Writs Act for a district court to issue an order restricting the filing of meritless cases by a litigant whose manifold complaints raise claims identical or similar to those that already have been adjudicated. The interests of repose, finality of judgements, protection of defendants from unwarranted harassment, and concern for maintaining order in the court's dockets have been deemed sufficient by a number of courts to warrant such prohibition against relitigation of claims. (citations omitted).

In re Oliver, 682 F.2d 443, 445 (3d Cir. 1982). Thus, in *Oliver* the court agreed with the First and District of Columbia Circuits that "a continuous patterns of groundless and vexatious litigation can, at some point, support an order against further filings of complaints without permission of the Court." *Id.* at 446.

Oliver was also quick to point out that (i) litigiousness alone is not an adequate basis for an injunction that restricts access to the court, and (ii) since such an order is an extreme remedy it should be used only in extreme circumstances. *Id.* At 445-46. Thus, the court must be careful to tailor the remedy so that access to the court is not unreasonably burdened.

In determining whether to issue a filing injunction the court must determine "if a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." *Safir v. U.S. Lines, Inc.*, 792 F. 2d 19, 24 (2d Cir. 1986). Plainly, the Debtors have demonstrated an inclination for repetitive and vexatious litigation and it is doubtful that they will desist. They have repeatedly attempted to relitigate in this bankruptcy court and in the District Court for the Southern District of New York matters that were commenced in the mid 1990's and fully litigated in the state courts of New York. When faced with rulings that displeased them, they peppered this court with repeated motions for reconsideration or renewed motions for summary

judgment, all without setting forth any new facts or law to support them. Likewise, the District Court for the District of New Jersey has been barraged with appeals. Some of the appeals have been dismissed due to procedural failures by the Debtors, and others have been decided adversely to the Debtors. Their litigiousness has cause Judges Scheindlin and Stein of the Southern District of New York, and this court to issue filing injunctions designed to prevent the flow of frivolous pleadings produced by the Debtors.

Moreover, the Debtors' filings have been characterized by misstatements of fact and mischaracterizations of law as amply demonstrated in the exhibits attached to this opinion. The Debtors' most recent filings with the Teaneck Municipal Court alleging that the Trustee and Ms. Ostroth were acting unlawfully in marketing and entering onto the Property demonstrate that in all likelihood the Debtors will continue to cast about for new venues to relitigate matters. They are also illustrative of the lack of foundation for the Debtors' court filings. As is readily evident in the record of this bankruptcy case, this court unwound the fraudulent transfers and revested the property in the bankruptcy estate. This ruling was affirmed, the Trustee was empowered by this court to take possession of the Property after the Debtors' refusal to cooperate with the Trustee, Ms. Ostroth was retained by court order to market the Property, and in selling the Property the Trustee was fulfilling his obligations under Bankruptcy Code § 704. The Debtors, as participants in each and every matter before this court have full knowledge of these facts. Moreover, the unfounded allegations in Teaneck Municipal Court are particularly egregious given the fact that Mac Truong is an attorney by training, though now disbarred.

All of this endless litigation has produced needless expense and delay to the bankruptcy estate. Additionally the allegations against the Trustee and his professionals have unnecessarily

forced them to incur the cost of personally defending themselves. Seeing no end in sight, the Trustee now asks the court to expand the filing injunction it entered on March 20, 2006. Under the terms of that filing injunction the Debtors were enjoined from any filings in the main bankruptcy case or adversary proceeding 03-2681 without first obtaining leave of court. The filing injunction required the Debtors to submit their proposed document together with a certification stating that (i) the document contained new claims, issues and/or facts that had never before been raised and disposed on the merits by any federal court, (ii) the Debtors believed the facts to be true, (iii) that they had no reason to believe that the claims were foreclosed by controlling law, and (iv) the Debtors acknowledge that they may be held in contempt of court if anything in the certification was willfully false. The order also provided that it will remain in effect until both the bankruptcy case and the adversary proceeding are closed. The court believes that this filing injunction comports with the requirements of Abdul-Akbar v. Watson, Matter of Packer Avenue Associates, 884 F.2d 745, 748 (3d Cir. 1989) and In re Oliver.

The Trustee now seeks to enlarge the filing injunction to enjoin the following:

> Mac Truong, Maryse Mac-Truong and any individual or entity acting on their behalf shall be and hereby are permanently enjoined from filing any pleadings, motion, cross-motion, complaint, application, or any other paper in any administrative agency, municipal, state or federal court nationwide related to the bankruptcy case bearing Case No. 03-40283; the adversary proceeding bearing Adversary Proceeding No. 03-2681; or any appeal from either matter, or which seeks the imposition of liability, whether administrative, civil or criminal, against Steven P. Kartzman, Esq., Adam G. Brief, Esq., the firm of Mellinger, Sanders & Kartzman, LLC, any present, past or future employee of Mellinger, Sanders & Kartzman, LLC, Richard B. Honig, Esq., Bruce S. Etterman, Esq., the firm of Hellring, Lindeman Goldstein & Siegel, LLP, and any present, past or future employee of Hellring, Lindeman Goldstein & Siegel, LLP, Barbara Ostroth, Coldwell Banker, and any present, past or future employee of Coldwell Banker, or any other professional retained by the Trustee

> in the main bankruptcy case or the adversary proceeding, without leave of this Court.

As with the current filing injunction, the proposed filing injunction requires that a written certification be submitted with the proposed document. The Trustee requests that the certification include statements that (i) the new claims, issues or facts are not barred by principles of claim or issue preclusion, (ii) the requesting party believes that the claims can withstand a motion to dismiss, and that the claims are not violative of a court order. Further, the Trustee asks that "[i]f papers are filed in the absence of leave from this court, the clerk of the respective court is authorized and directed to immediately and summarily strike the filing upon receipt of a copy of this Order." Finally, the Trustee proposes that this court retain jurisdiction to enforce the injunction and impose sanctions.

For the most part, the factual record supports the expanded filing injunction requested by the Trustee. In particular, the court finds it appropriate to require the Debtors, whether acting individually, jointly or by proxies, to seek leave of this court prior to commencing any new actions in any tribunal that arise out of or relate to bankruptcy case 03-40283 or 03-2681, that seek relief against the Trustee and his court authorized professionals who have assisted him in the administration of this case. Notably, this relief is not without precedent. The Second Circuit in *In re Anthony R. Martin-Trigona v. Lavien, et al. (In re Martin-Trigona),* 737 F.2d 1254, 1263 (2d Cir. 1984) found that to protect federal jurisdiction it was appropriate to "shield federal litigants, their counsel, court personnel, their families and professional associates from Martin-Trigona's vexatious litigation in all courts, state or federal." As in the *Martin-Trigona* case, these Debtors have engaged in meritless litigation and have forced the Trustee and his professionals to defend themselves in various fora. Accordingly, to protect the bankruptcy court's jurisdiction, it is essential to shelter

from harassment those individuals whose services are essential to the functioning of the bankruptcy system.

To the extent the Trustee proposes to require the Debtors and their proxies to obtain leave of this court before they file any further pleadings, motions of other papers in matters currently pending in other courts or agencies, this court believes that it lacks the authority to grant such relief. Such an injunction exceeds the gatekeeping function of a filing injunction and actually impinges on the authority and jurisdiction of other courts. However, to the extent that a motion is pending in any non-bankruptcy forum, the Debtors must submit the expanded filing injunction and this opinion with all of its exhibits, along with any motion or pleading it files.

Similarly, this court finds that the Debtors cannot be required to seek leave of this court prior to filing an appeal. Particularly if an appeal is taken from an order of this court, it is inappropriate for it to decide whether the appeal has sufficient merit. Likewise, it would be an unwarranted intrusion for this bankruptcy court to interfere with the appellate process of another court. However, the Debtors shall be required to submit with the appeal a copy of the expanded filing injunction and this opinion with all of its exhibits.

The court has taken the unusual step of appending exhibits to its opinion in order to evidence the Debtors' practice of relitigating matters. The requirement that the Debtors submit the expanded filing injunction and the opinion in connection with a motion for reconsideration or an appeal is intended to provide the other tribunals with the Debtors' litigation history, and thus a greater context for consideration of the specific issue before them.

CONCLUSION

The factual record before the court reveals that the Debtors have engaged in duplicative and vexatious litigation, and that they are likely to persist in such conduct. As a result, enlargement of the March 20, 2006 filing injunction is warranted.

Matter of Wachtler; Grievance Committee for the Tenth
Motion No: 1993-04807
Slip Opinion No: 2007 NYSlipOp 62640(U)
Decided on February 6, 2007
Appellate Division, Second Department, Motion Decision
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This motion is uncorrected and is not subject to publication in the Official Reports.

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

M50484

K/nl

A. GAIL PRUDENTI, P.J.

HOWARD MILLER

ROBERT W. SCHMIDT

STEPHEN G. CRANE

DAVID S. RITTER, JJ.

1993-04807

In the Matter of Sol Wachtler, admitted

as Solomon Wachtler, a disbarred attorney.

(Attorney Registration No. 1189752)

DECISION & ORDER ON MOTION FOR REINSTATEMENT

Motion by the respondent, Sol Wachtler, for an order reinstating him as an attorney and counselor-at-law or, in the alternative, referring this matter to the Committee on Character and Fitness for a hearing and report. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on April 4, 1956, under the name Solomon Wachtler. By opinion and order of this court dated August 2, 1993, the respondent was disbarred upon his submission of a resignation, dated July 20, 1993, which followed his plea of guilty in the United States District Court in Trenton, New Jersey, on March 31, 1993, to a violation of 18 USC § 875(c), a Federal felony. The respondent's first application for reinstatement was denied by decision and order on application of this court dated April 14, 2003.

Upon the papers filed in support of the motion and the papers filed in response thereto, it is

ORDERED that the motion is granted to the extent that the matter is referred to the Committee on Character and Fitness to investigate and report on the respondent's current fitness to be an attorney, including but not limited to an updated report from his treating physician, and the motion is otherwise held in abeyance in the interim.

PRUDENTI, P.J., MILLER, SCHMIDT, CRANE and RITTER, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court

Matter of Wachtler; Grievance Committee for the Tenth Judic
Motion No: 1993-04807
Slip Opinion No: 2007 NYSlipOp 79678(U)
Decided on October 1, 2007
Appellate Division, Second Department, Motion Decision
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Supreme Court of the State of New York

Appellate Division: Second Judicial Department

M60621

K/nl

A. GAIL PRUDENTI, P.J.

HOWARD MILLER

ROBERT W. SCHMIDT

STEPHEN G. CRANE

DAVID S. RITTER, JJ.

1993-04807

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as Solomon Wachtler, a disbarred attorney.

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Upon the report of the Committee on Character and Fitness and the exhibits annexed thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that, effective immediately, the respondent, Sol Wachtler, admitted as Solomon Wachtler, is reinstated as an attorney and counselor-at-law and the Clerk of the Court is directed to restore the name of Sol

Wachtler, admitted as Solomon Wachtler, to the roll of attorneys and counselors-at-law.

PRUDENTI, P.J., MILLER, SCHMIDT, CRANE and RITTER, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court