IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

KEVAN KENNETH BOYLES,

Respondent.

_____/

Supreme Court Case
No. SC22-160

The Florida Bar File
No. 2022-50,285(15C)OSC

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rules 3-7.6 and 3-7.11(f), Rules of Discipline, the following proceedings occurred:

On February 3, 2022, The Florida Bar filed its Petition for Contempt and Order to Show Cause alleging respondent engaged in violations of the Florida Supreme Court's March 24, 2016 order suspending respondent from the practice of law and made misrepresentations. On February 4, 2022, the Florida Supreme Court issued an order requiring respondent to show cause why he should not be held in contempt. On February 20, 2022, respondent filed a Verified Response to Order to Show Cause. On March 1, 2022, the bar filed its Reply to Order to Show Cause. On April 11, 2022,

the undersigned was appointed as referee in these proceedings. On July 1, 2022, the bar filed The Florida Bar's Motion for Partial Summary Judgment ("MPSJ") seeking summary judgment on all issues contained in its Petition for Contempt. On July 15, 2022, respondent filed a Response to TFB Motion for Partial Summary Judgment and Cross Motion for Partial Summary Judgment ("CMPSJ"). On August 1, 2022, the bar filed The Florida Bar's Response to Respondent's Cross Motion for Partial Summary Judgment (all three motions seeking summary judgment collectively referred to as "motions for summary judgment"). On August 23, 2022, the undersigned held a hearing on the motions for summary judgment and issued its ruling on September 16, 2022, granting the bar's MPSJ. On October 24, 2022, the undersigned held a hearing on sanctions. All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence[1] and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

II.

[1] The bar's exhibits will be referred to as "TFB Ex." or "TFB Comp. Ex" throughout this Report. All exhibits referenced in this Report correspond directly to the exhibits in the bar's MPSJ and were adopted, as numbered, during the hearing on sanctions with two exceptions: there is no exhibit 9 and TFB Ex. 10 was the only exhibit admitted at the hearing on sanctions.

FINDINGS OF FACT

Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

Narrative Summary Of Case. I find the bar proved the following facts[2] by clear and convincing evidence:

A. Issuing Checks from Trust Accounts

On March 24, 2016, an order suspending respondent for one year was entered in Supreme Court case no. SC15-192. The suspension order became effective on April 23, 2016. Respondent has been continuously suspended since April 23, 2016.

When respondent was suspended, he transferred all remaining shares in his law firm to his attorney/wife, Rosemary Cooney (hereinafter "Ms. Cooney"), who was a minority co-owner of respondent's law firm. The firm was renamed Probate Guardianship & Trust, P.A. (hereinafter "PGT").

When respondent was suspended, he opened a business wherein he served in a fiduciary capacity as Trustee or Personal Representative.

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[2] The majority of the facts stated are also found in the order granting The Florida Bar's Motion for Partial Summary Judgment, dated September 16, 2022.

Respondent was suspended, in part, for filing "Petitions for Administration (Petitions) in twelve (12) matters requesting he be appointed the Personal Representative, alleging he was an interested person pursuant to Florida Statute." In truth, "[r]espondent had no communications with the respective decedent's survivors and no authority from them prior to filing [the 12 Petitions or 15 Wrongful Death complaints]." See pp. 3-4 of TFB Comp. Ex. 1.

On March 6, 2017, respondent filed a Petition for Reinstatement, in Supreme Court case no. SC17-364 (hereinafter "First Reinstatement"), requesting to be reinstated to practice law after being suspended for a year. The bar actively objected to and opposed respondent's First Reinstatement, in part, because while suspended from April 27, 2016 through May 3, 2017, respondent was the named trustee for several fiduciary trusts, wherein he "managed trust assets and maintained bank accounts for which he had signature authority and disbursed funds during his suspension." See p. 11 of TFB Comp. Ex. 2.

Some of the trust accounts wherein respondent signed checks were as follows:

- Michael A. Jimenez Trust;
- Alicia Van Auken Special Needs Trust;

- Vera Ann Stuive Special Needs Trust;
- David L. Ellwood Special Needs Trust;
- John L. Dolphin Family Trust.

Alicia Van Auken and John L. Dolphin were respondent's former clients when he was a practicing attorney.

On December 21, 2018, after an appeal was undertaken by the bar, the Florida Supreme Court disapproved the report of referee and the referee's recommendation as to reinstatement and denied respondent's First Reinstatement.

At all times relevant to respondent's conduct of writing checks from the subject fiduciary trust accounts, R. Regulating Fla. Bar 3-6.1(d)(2), read as follows: "(2) Trust Funds or Property. Individuals subject to this rule must not receive, disburse, or otherwise handle trust funds or property."

From January 7, 2019 through February 12, 2020, after the denial of his First Reinstatement, respondent continued to write checks from the above trust accounts. During this period, respondent issued 46 checks on behalf of the Alicia Van Auken Special Needs Trust at UBS Financial Services, trust account ending in #4412.

From September 6, 2019 through December 20, 2019, respondent issued 6 checks on behalf of the Bonita May Brozovsky Trust at SunTrust

Bank, trust account ending in #5586; respondent became an authorized signer on March 14, 2018.

On December 17, 2019, respondent issued the following checks to himself from the following fiduciary trust accounts:

- the Michael A. Jimenez Trust at Wells Fargo Bank, trust account ending in #0436, in the amount of $3,452.09 for trustee fees;
- the David L. Ellwood N/K/A David L. Balme Special Needs Trust at Wells Fargo Bank, account ending in #7857, in the amount of $5,943.07;
- the Alicia Van Auken Spec Nds Tr at UBS, account ending in #4412, in the amount of $15,359.40 for fees and costs;
- the Vera Ann Stuive Special Needs Trust at Wells Fargo Bank, trust account ending in #1580, in the amount of $1,457.65 for trustee fees and costs;
- the Bonita May Brozovsky Tr UAD 05-30-1989, trust account ending in #5586, two checks in the amount of $5,001.85 and $450.00 for fees and costs;
- the John L. Dolphin Family Trust at Wells Fargo Bank, trust account ending in #5692, in the amount of $1,577.00 for trustee fees.

I find respondent's argument, that reference the words "trust funds" in rule 3-6.1(d)(2) only applies to trust funds held in an attorney's trust account, unpersuasive. I also find respondent's argument, that he acted reasonably under the circumstances in relying on the Report of Referee,

which was disapproved by the Florida Supreme Court on December 21, 2018, also unpersuasive.

Respondent issued checks for funds that did not belong to him. The funds were located in six separate trust accounts which belonged to six beneficiaries. At least two of the beneficiaries were his former clients when he was a lawyer in good standing. Respondent had absolute control of the funds as an authorized signer. Since the funds did not belong to respondent, the funds were in the form of trust funds and the rule prohibited respondent from disbursing or otherwise handling the funds. The rule did not require that the funds be located in a lawyer's trust account for the rule to apply.

In *The Florida Bar v. Wolf*, 21 So. 3d 15, 17 (Fla. 2009), the Florida Supreme Court denied Wolf's petition for reinstatement, after a two-year suspension for negligent misappropriation, and found that Wolf handled trust funds when he accepted checks (funds) to retain an attorney on behalf of a consulting client and deposited said funds into his business account.

The Court held, in part, as follows:

> In another instance, one of Wolf's consulting clients gave Wolf checks, made payable to Wolf, so that Wolf could use the money to retain a lawyer in good standing to represent the consulting client. Wolf deposited the checks into his business account on which a lien was later placed. **These funds were**

certainly in the nature of trust funds because they did not belong to Wolf.

Id. at 17 [emphasis supplied].

The *Wolf* Court distinguished this scenario from another instance in which an attorney who employed Wolf "as a paralegal directed two clients to pay to Wolf fees the attorney had earned because he owed Wolf back pay. Wolf accepted the clients' checks." *Id.* at 17. The *Wolf* Court concluded "[a]s the attorney had already earned the fees, we cannot conclude that they constituted trust funds." *Id.*

The funds in the fiduciary trust accounts did not belong to respondent. As such, they were in the form of trust funds. Respondent's argument, that since the funds were not in his lawyer trust account, he did not violate the rule, has no merit. The *Wolf* case clearly defines what are considered trust funds.

Respondent argued that since Chapter 5 of the Rules Regulating The Florida Bar typically refers to funds in a trust account held by a lawyer acting as a lawyer, rule 3-6.1(d)(2) should be read together with Chapter 5 in interpreting the meaning of "trust funds" is limited to funds held in an attorney's trust account. Specifically, respondent points to rule 5-1.1(a)(1), which requires an attorney hold funds received from a third party or a client, in connection with a representation, separate from his own property.

Respondent further points to rule 5-1.2(a), which governs record keeping of lawyer trust accounts and specifically excludes trust funds received or disbursed as a personal representative. I find that Chapter 5, which governs lawyer trust accounts, cannot be read together with rule 3-6.1(d)(2), which governs suspended attorneys. The purpose of the rules is different. If the Florida Supreme Court intended the rules to be read together or that one rule define the other, it would have stated so.[3]

Respondent argued the bar is attempting to apply the new amended portion of the rule ("an ex post facto application of the rule"), prohibiting a suspended attorney from serving as a fiduciary. However, the bar is not charging respondent with serving as a fiduciary. The bar's charges are specific as to the handling of trust funds or the issuing of the checks, which implicates the prohibition as stated in R. Regulating Fla. Bar 3-6.1(d)(2), prior to any amendment, and as defined by the *Wolf* case.

Respondent's actions were contemptuous. He knowingly and deliberately issued checks from the trust accounts. *See The Florida Bar v. Russell-Love*, 135 So. 3d 1034 (Fla. 2014). In fact, respondent was on notice that issuing checks from a fiduciary trust account was a violation of

[3] In 2020, the Florida Supreme Court amended rule 3-6.1(d)(2) to define trust funds in accordance with Chapter 5. Notably, it also amended the rule to prohibit suspended attorneys from serving as a fiduciary for any funds or property in certain circumstances.

R. Regulating Fla. Bar 3-6.1(d)(2). First, one of the reasons the bar objected to and opposed his First Reinstatement was for issuing checks from some of these very same trust accounts. The bar cited to the *Wolf* case during that proceeding and in its brief on appeal. Second, the *Wolf* case, a 2009 opinion, placed respondent on notice as to the definition of trust funds. Third, the plain meaning of the rule and the definition of trust funds ("property held in a trust by a trustee") also placed respondent on notice. See Black's Law Dictionary (11th ed. 2019); *See also Mitchell v. State*, 911 So. 2d 1211, 1214 (Fla. 2005)(holding that "[i]f the language of a statute or rule is plain and unambiguous, it must be enforced according to its plain meaning."). Despite being on notice the rule prohibited him from handling these third-party funds, respondent made a conscious decision to continue his misconduct.

By issuing checks from the trust accounts, respondent intentionally and willfully violated R. Regulating Fla. Bar 3-6.1(d)(2) and the Florida Supreme Court's March 24, 2016 order of suspension.

B. The Misrepresentations in the Amended Petition for Administration and During the Second Reinstatement

On July 3, 2019, while suspended, respondent executed under penalty of perjury, an Amended Petition for Administration (hereinafter "the Amended Petition"), seeking to be appointed personal representative in the

Estate of Jose Rosendo Pecho Cisneros, Palm Beach Probate case no. 50-2019-CP-002980 (hereinafter "the Pecho Cisneros matter").

In the Amended Petition, respondent stated as follows:

> Petitioner has an interest in the above estate as having been asked to serve as personal representative by the decedent's personal injury attorney to bring a survivor action on behalf of the estate.

See p. 5 of TFB Comp. Ex. 4.

On July 3, 2019, the Amended Petition was filed with the probate court by Ms. Cooney. The Amended Petition is an amended pleading from a previously filed Petition for Administration, signed by respondent, containing the same statement under penalty of perjury.

On or about April 15, 2021, respondent filed a second Petition for Reinstatement in Florida Supreme Court case no. SC21-556 (hereinafter "Second Reinstatement"). On August 5, 2021, in the Second Reinstatement, the bar sent respondent a Second Set of Interrogatories with the sole inquiry referencing his Amended Petition in the Pecho Cisneros matter, requesting respondent identify "the personal injury attorney who requested that you serve as personal representative to bring a survivorship action on behalf of the estate." See p. 3 of TFB Comp. Ex. 4.

On September 27, 2021, in a sworn response to the bar's Second Set of Interrogatories, respondent provided the name of attorney Edmund Gonzalez, from the law office of Gonzalez & Henley, P.A. in West Palm Beach, Florida. See p. 9 of TFB Comp. Ex. 4.

On January 6, 2022, during his deposition in the Second Reinstatement, respondent admitted Mr. Gonzalez never asked him to serve as the personal representative.

Respondent testified in part as follows:

> Q. Okay. And, you know, I understand that you've claimed in the petition for administration that Mr. Gonzalez requested that you serve as the personal representative; is that correct?
>
> A. I believe that's what the petition says.
>
> Q. Okay. Do you stand by that?
>
> A. Well, what I stand by is he came to our officer [sic] on two separate occasions, as he had previously done in other circumstances, to open an estate so that he had someone he could bring an action against. He gave us the ability to -- he needed it opened. He didn't look at me in the eye and say, oh, I want you to be personal representative, Mr. Boyles. What he said is I need an estate opened. At the time we were -- I was practicing -- excuse me, bad word. I was serving as a fiduciary and focusing in that area, so it made logical sense to serve as the fiduciary with Ms. Cooney as my attorney. I previously had served as a fiduciary for Mr. Gonzalez when he had requested that estates be opened for the benefit of his clients.

See lines 14-25 and 1-14 of pp. 15-16 of TFB Ex. 8.

> Q. Okay. And is it your testimony that Mr. Gonzalez requested you to open up an estate?
>
> MR. TYNAN: Objection to the form.
> Go ahead and answer, Kevan.
>
> THE WITNESS: I was sitting in the same room with Ms. Cooney when he came in and requested that we -- this office open an estate for the benefit of his deceased client.
>
> BY MS. GONZALEZ:
> Q. Okay. So would you say that Mr. Gonzalez didn't actually request you directly to serve as a personal representative?
>
> A. Yeah, but he didn't ask Rosemary to serve, either. He asked us to get the job done, which is what we did in a professional way.

See lines 20-25 and 1-13 of pp. 16-17 of TFB Ex. 8.

Respondent's sworn statement in the Amended Petition that, "Petitioner has an interest in the above estate as having been asked to serve as personal representative by the decedent's personal injury attorney to bring a survivor action on behalf of the estate[,]" is a misrepresentation since Mr. Gonzalez never "asked" respondent to serve as the personal representative in the Pecho Cisneros matter. Respondent does not dispute that Mr. Gonzalez never asked he serve as personal representative. Instead, respondent attempts to excuse the situation by stating Mr. Gonzalez asked Ms. Cooney, his wife and the attorney for the law firm

respondent was employed by, to open an estate and since he was serving as a fiduciary in that area for others, "it made logical sense to serve as the fiduciary with Ms. Cooney as [his] attorney." See lines 9-11 of p. 16 of TFB Ex. 8. Respondent's explanation, however, does not make the statements in the Amended Petition true.

Respondent was a paralegal at PGT, which is owned by his wife. Respondent provided a letter from Mr. Gonzalez, dated April 18, 2018, addressed to Ms. Cooney and her law firm requesting that an estate be opened in the Pecho Cisneros matter. This letter further supports the undisputed fact that Mr. Gonzalez never asked respondent, a suspended attorney, to serve as the personal representative. He merely asked the law firm PGT, or Ms. Cooney, to open an estate.

Ms. Cooney provided an affidavit stating, "Mr. Gonzalez asked me to open the estate and left the formalities of the same to me as it did not matter to him who would serve as personal representative." See ℙ 4 of Ms. Cooney's affidavit attached to respondent's CMPSJ as Ex. F. Ms. Cooney's affidavit further supports the abundantly clear fact that Mr. Gonzalez did not request that respondent serve as personal representative.

Since Mr. Gonzalez never "asked" respondent to serve as the personal representative, as sworn to under oath in the Petition for

Administration and the Amended Petition, respondent's statements were false. Respondent knew that both the Petition for Administration and the Amended Petition would be filed with the court when he made these false statements.

In *The Florida Bar v. Johnson,* 648 So. 2d 680 (Fla. 1994), the Florida Supreme Court reversed the referee's finding that Johnson was not guilty of a misrepresentation. The Florida Supreme Court found that Johnson made a misrepresentation to a bank in an affidavit, in which he swore under oath he had a valid lease with his son-in-law, who was attempting to get a loan from the bank. In the affidavit, Johnson stated he paid his son-in-law $751.33 a month for rent. Although these statements were false and respondent knew the bank would rely on these statements to loan money to his son-in-law, the referee seemingly excused Johnson's actions finding in part that "he was acting as a father and father-in-law to help those for who he cared. This help would not affect a third person." *Id.* at 681. In reversing the referee and finding Johnson's statements "were a misrepresentation which constituted a dishonest act," the Florida Supreme Court held, in part, "This Court will not condone attorneys making affidavits for submission to a lender or to any other person or entity which are in fact not true and correct as to the statements therein." *Id.* at 682.

Respondent knowingly and deliberately signed the Petition for Administration and the Amended Petition containing the false statements. *See The Florida Bar v. Russell-Love*, 135 So. 3d 1034 (Fla. 2014)(Evidence that attorney acted knowingly and deliberately was sufficient to support finding that attorney violated bar rule prohibiting conduct involving dishonesty or misrepresentation.) Respondent's deposition testimony pertaining to the events surrounding Mr. Gonzalez asking that PGT and Ms. Cooney open an estate were clearly remembered. Similarly, Ms. Cooney's affidavit and respondent's testimony coincided. There was never a dispute or a doubt as to what occurred. Respondent knew, when he signed the Petition for Administration and the Amended Petition under oath, that he had not been "asked" by Mr. Gonzalez to serve as the personal representative for the estate.

When he responded to the bar's Second Set of Interrogatories in the Second Reinstatement, respondent continued his misrepresentations by providing the name of Edmund Gonzalez, once again falsely representing that this individual was the personal injury attorney who asked that he serve as the personal representative. This too was a misrepresentation as no such request was made.

The Hearing on Sanctions

Respondent testified he was admitted as a member of The Florida Bar in 1979. Respondent testified that at all times he was in compliance with Rule 3-6.1(d)(2) and did not violate the rule when he handled trust funds in a fiduciary capacity, prior to its amendment, despite some of the beneficiaries being his former clients. He testified he reviewed the eight areas the bar took issue with in the First Reinstatement and made changes. For instance, he ceased having direct client contact and handling funds in his prior law firm's trust account. He understood and respected the referee's ruling but did not agree with it.

Respondent testified he was in a car accident where he suffered injuries. Respondent stated he has memory loss and suffers from depression. These statements are conclusory. Respondent did not provide any evidence to support this testimony and did not correlate any ailment to the underlying misconduct.

Respondent testified that he completed 600 hours of community service at the Historical Society of Palm Beach County, a museum.

With respect to the handling of the trust funds from the fiduciary trust accounts, respondent testified that the Florida Supreme Court "hung [him]

out to dry" by not issuing an opinion when it denied his reinstatement in Florida Supreme Court case no. SC15-192.

As to his misrepresentations, respondent stated his position still remains that Mr. Gonzalez did ask him to serve as the personal representative in the Pecho Cisneros case. Despite admitting in his deposition that he was never asked by Mr. Gonzalez to serve as the personal representative, respondent testified that subjectively he sees it as he was asked to serve. Respondent testified that his daughter's room was painted blue and because he is colorblind, he sees it as green. When he is told the color is blue, to him subjectively, the color is green. Similarly, he believes Mr. Gonzalez asked him to serve as the personal representative because that is how he subjectively interprets the situation. Respondent's subjective interpretation of facts to fit his beliefs demonstrate he is not fit to practice law. An attorney must be able to tell the difference between the truth and his own version of reality, and in this instance, respondent appears unable to do so.

Respondent presented two character witnesses during the hearing. Leonard Jones testified he has been a resident of Palm Beach County for 20 years. He owns a car wash business and has cleaned respondent's vehicle for the last 15 years. He also does odd jobs for respondent when he

needs money to pay a bill. He testified he is paid more than he is worth, and respondent is like family. He has never been a law firm client of respondent or Ms. Cooney. He does not know the facts of the case that led to respondent's suspension or why these proceedings are being conducted. He described respondent as "the best."

Terri Becker testified she has been a court reporter for the last 10 years. Her work is based out of Palm Beach County. She has known respondent and his wife since 1990, when she moved to Florida. In January 2022, she became a legal client of respondent's wife. To comply with the no client contact rule, she has not spoken to respondent since then. She described her relationship as being closer to respondent's wife. She stated respondent was a prominent member of the legal community when he practiced law, and she never heard any complaints about him. Her opinion of respondent is that he has integrity. The last time she spoke with respondent was in November 2021 when her mother passed away. Ms. Becker testified she does not have any knowledge regarding why respondent was suspended, or as to the misconduct found in these proceedings.

III. RECOMMENDATIONS AS TO GUILT.

I recommend respondent be found guilty of contempt for 1) violating the Florida Supreme Court's order of suspension, dated March 24, 2016, and R. Regulating Fla. Bar 3-6.1(d)(2) by handling trust funds while suspended, and 2) making misrepresentations in the Petition for Administration, Amended Petition and in response to the bar's Second Set of Interrogatories, in violation of R. Regulating Fla. Bar 4-8.4(c).

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY

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

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

6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION

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

(1) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or

(2) improperly withholds material information and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

7.1 DECEPTIVE CONDUCT OR STATEMENTS AND UNREASONABLE OR IMPROPER FEES

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

8.1 VIOLATION OF COURT ORDER OR ENGAGING IN SUBSEQUENT SAME OR SIMILAR MISCONDUCT

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

(1) intentionally violates the terms of a prior disciplinary order and the violation causes injury to a client, the public, the legal system, or the profession; or

(2) has been suspended for the same or similar misconduct and intentionally engages in further similar acts of misconduct.

V. CASE LAW

I considered the following case law prior to recommending discipline:

In *The Florida Bar v. Parrish*, 241 So. 3d 66, 80 (Fla. 2018), the Florida Supreme Court declared a case that was decided over fifteen years ago was not controlling because "in more recent years the Court has imposed even more severe discipline for unethical and unprofessional conduct than in the past." See also *The Florida Bar v. Adler*, 126 So. 3d 244, 247 (Fla. 2013) (noting "this Court has moved towards stronger sanctions for attorney misconduct") and *The Florida Bar v. Rotstein*, 835 So. 2d 241, 246 (Fla. 2002) (noting many of the cases cited by the respondent were inapplicable "because the cited cases are dated and do not reflect the evolving views of this Court" and that "[i]n recent years, this Court has moved towards stronger sanctions for attorney misconduct").

In *The Florida Bar v. Cox*, 718 So. 2d 788, 794 (Fla. 1998), the Florida Supreme Court held,

> Disbarment is appropriate where, as here, there is a pattern of misconduct and history of discipline. *See, e.g., Florida Bar v. Maynard*, 672 So.2d 530 (Fla. 1996) (holding that disbarment is appropriate where attorney made false statement to a tribunal and engaged in conduct involving fraud, dishonesty and misrepresentation); *Florida Bar v. Knowles*, 572 So.2d 1373 (Fla. 1991)(attorney's neglect and dishonesty constituted cumulative misconduct which warranted disbarment.)

In the instant matter, respondent engaged in two cumulative patterns of misconduct: a pattern of dishonesty and a pattern of handling trust funds

in violation of rule 3-6.1(d). In 2016, he was also suspended for engaging in a similar pattern of deceit by filing 12 petitions for administration containing false sworn statements.

In *The Florida Bar v. St. Louis*, 967 So. 2d 108, 122-23 (Fla. 2007), the Court noted,

> The Bar argues that the referee's recommended disciplinary sanction of suspension is not supported and that disbarment is the appropriate sanction. We agree. St. Louis engaged in several acts of dishonesty. He violated rules 4-3.3 and 4-8.4(c) when he made false statements to Judge Wilson. This Court typically imposes the severe sanction of disbarment on lawyers who intentionally lie to a court. An officer of the court who knowingly seeks to corrupt the legal process can expect to be excluded from that process.

In *The Florida Bar v. Bitterman*, 33 So. 3d 686, 688-89 (Fla. 2010), the Court held Bitterman in contempt and imposed disbarment. The Court found, "Existing case law also supports disbarment. This Court has found disbarment to be proper when a suspended attorney is held in contempt for engaging in the practice of law during the period of suspension." *Id.* at 688. The Court further stated,

> The fact that Bitterman did not give legal advice, make an appearance on behalf of a client, or otherwise file pleadings in court is not relevant to our analysis, as she held herself out to be a member in good standing of The Florida Bar and represented that she was counsel for her incarcerated friend.

Id. at 688-89. Here, respondent, as a suspended attorney, was prohibited from handling trust funds. By engaging in such prohibited conduct, he violated the order of suspension.

Furthermore, "the Court views cumulative misconduct more seriously than an isolated instance of misconduct, and cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct." *Parrish*, 241 So. 3d 66, 79; see also *The Florida Bar v. Vining*, 761 So. 2d 1044 (Fla. 2000).

The Court in *The Florida Bar v. Orta*, 689 So. 2d 270, 273 (Fla. 1997), disbarred Orta for making three separate misrepresentations which "established a pattern of 'flagrant and deliberate disregard for the very laws that [Orta] took an oath to uphold.'" In finding Standard 8.1 applicable, the Court held,

> Despite the evidence of recent rehabilitation and other mitigation, we are unable to overcome the fact that Orta's current multiple violations all took place while he was under suspension for past similar misconduct involving dishonesty-a time when he should have been conducting himself in the most upstanding manner. Although Orta eventually acted to rectify some of his omissions, we are not convinced that he would have done so had the Bar not discovered them in the first place. In light of the aggravating circumstances in this case, disbarment is warranted.

Id. at 273-74. Here, Standard 8.1 is also applicable since respondent engaged in the same misconduct that led to his suspension - false

statements in petitions for administration - while suspended. When the bar began its investigation concerning his statements regarding being "asked" to serve as personal representative in the petitions, he continued his misrepresentation by giving the name of the attorney, Edmund Gonzalez, and failing to disclose the truth. It was only in his deposition that he disclosed the truth. Significantly, during the final hearing, he testified that subjectively the statements were true.

Notably, respondent violated both provisions of Standard 8.1 as he had been suspended for the same or similar acts of misconduct and intentionally engaged in further similar acts of misconduct and intentional violations of a prior disciplinary order, which caused injury to the legal profession and the legal system.

I find that respondent has a lack of remorse for his actions. He believes he has done nothing improper. His testimony was devoid of anything he would have done differently. Respondent never testified he would have changed the wording of the petitions, made disclosures to the bar or ceased handling trust funds. Respondent stands by his actions, a fact that deserves the greatest aggravator in support of disbarment.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

Due to the repeated and serious acts committed by respondent during his period of suspension, the undersigned recommends the following:

A. That respondent be found guilty of misconduct justifying a finding of contempt, and be disbarred for a period of five (5) years, and

B. Payment of The Florida Bar's costs in these proceedings.

Respondent will eliminate all indicia of respondent's status as an attorney on email, social media, telephone listings, stationery, checks, business cards office signs or any other indicia of respondent's status as an attorney, whatsoever.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

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

Personal History of Respondent:

Age: 67

Date admitted to the Bar: November 10, 1979

Aggravating Factors: I find the following seven aggravating factors by clear and convincing evidence:

(1) Prior Disciplinary Offenses: Respondent conceded this aggravating factor.

In *The Florida Bar v. Boyles*, Florida Supreme Court case no. SC15-192, respondent was suspended for one year. In that case, respondent requested Traffic Crash Reports from the Florida Department of Highway Safety and Motor Vehicles for cases in 2009 where there was a traffic fatality. He requested insurance information from the insurance companies listed on the reports, even though he was not a claimant and did not represent a claimant. Utilizing the information received, "**respondent filed Petitions for Administration (Petitions) in twelve (12) matters requesting he be appointed the Personal Representative, alleging he was an interested person pursuant to Florida Statute.**"[4] See page 3 of TFB Comp. Ex. 1. These sworn statements were not true. Respondent filed Wrongful Death actions in 15 matters without any communication with the respective decedent's survivors and no authority from them. Respondent did not have a client despite his allegation to the Court that he represented the Personal Representative. One of the actions could not be dismissed due to the concern about the res judicata effect on the action. "The Court deemed respondent's declaration in the Wrongful Death action

[4] This quoted phrase is bolded to emphasize the conduct in SC15-192 that this court finds is similar in nature to the instant case.

that he was Personal Representative in the estate to be a fraud upon the court and the Wrongful Death action ... was dismissed as a nullity and a fraud." See page 6 of TFB Comp. Ex. 1. One of the seven rules violated in that case was 4-8.4(c), "conduct involving dishonesty, fraud, deceit, or misrepresentation...." See page 8 of TFB Comp. Ex. 1.

(2) dishonest or selfish motive: Respondent engaged in dishonest conduct by filing two petitions before the probate court falsely stating under oath he was an interested person due to being asked by the personal injury attorney (Edmund Gonzalez) to serve as personal representative. Respondent's sworn statements in the petitions were untrue. Respondent was dishonest when he responded to the bar's interrogatory furthering the misrepresentation by providing the name of Edmund Gonzalez.

Respondent had a selfish motive by continuing to handle the trust funds of beneficiaries located in fiduciary trust accounts while suspended. Two beneficiaries were his former clients when he was an attorney in good standing. Respondent testified at the hearing on sanctions that the bar's opposition in his First Reinstatement case was based on eight (8) separate issues. Respondent testified he reviewed those issues and made changes. Respondent, however, did not change his conduct as to the handling of the trust funds in the fiduciary accounts, despite that issue being one of the

issues used by the bar to oppose his reinstatement. See page 25 of TFB Comp. Ex. 2. I find respondent's refusal to adhere to rule 3-6.1(d)(2) was motivated by financial gain. The evidence shows respondent's fees and costs, from August 1, 2018 through December 31, 2019, while serving as a fiduciary totaled at least $33,241.06. See TFB Comp. Ex. 7.

(3) a pattern of misconduct: Respondent engaged in three instances of misrepresentation in the instant matter. Two of the misrepresentations were similar to the misrepresentations filed in the 12 petitions for administration that led to his one-year suspension in SC15-192. These misrepresentations were all sworn to under oath in petitions filed before courts. Respondent's deceptive conduct in the instant matter and his prior disciplinary case has a created a pattern of misconduct with respect to misrepresentations. *See The Florida Bar v. Patterson*, 330 So. 3d 519, 526 (Fla. 2021)(finding that a pattern of misconduct "was established ... by the similarity in misconduct between the earlier disciplinary proceeding and this one...."); *see also The Florida Bar v. Norkin*, 132 So. 3d 77, 87 (Fla. 2013) (pattern established across disciplinary proceedings); *The Florida Bar v. Ratiner,* 46 So. 3d 35, 39 (Fla. 2010) (pattern based on repeated behavior addressed in single disciplinary proceeding).

(4) multiple offenses: Respondent engaged in multiple violations of R. Regulating Fla. Bar 4-8.4(c) and 3-6.1(d)(2). See *The Florida Bar v. Barley*, 831 So. 2d 163, 170 (Fla. 2002)("every time Barley withdrew funds from Mr. Emo's trust account he was committing another offense. Therefore, the referee's findings of a 'pattern of misconduct' and 'multiple offenses' as aggravating factors are supported by competent, substantial evidence in the record and we approve those findings.") Similarly, here, every time respondent made a misrepresentation or wrote a check from a fiduciary trust account, he committed another offense.

(6) submission of false evidence, false statements, or other deceptive practices during the disciplinary process: Respondent engaged in deceptive practices during the disciplinary process by providing Edmund Gonzalez' name in response to an interrogatory propounded by the bar. The bar requested the name of the personal injury attorney who "asked" him to serve as personal representative. Instead of clarifying what he already knew to be true, that he had not been asked to serve as personal representative by Edmund Gonzalez, respondent continued his misrepresentation by falsely provided the name of Mr. Gonzalez. *See The Florida Bar v. Altman*, 294 So. 3d 844 (Fla. 2020), (finding that Altman acted deceptively during the disciplinary process in her responses to the

grievance committee and the Court by falsely stating that she was the only child of her mother living in Broward County which was "not accurate."); *see also The Florida Bar v. Fortunato*, 788 So. 2d 201, 203 (Fla. 2001)(finding this aggravating factor to be a "significant" aggravating factor.)

(7) refusal to acknowledge the wrongful nature of the conduct: Respondent did not dispute he engaged in the conduct at issue. Nevertheless, respondent continued to assert that his conduct did not violate the rules. With minimum of legal research, respondent could have discovered that his actions were unethical. *See Johnson*, 648 So. 2d 680 ("This Court will not condone attorneys making affidavits for submission to a lender or to any other person or entity which are in fact not true and correct as to the statements therein."); *see also Wolf*, 21 So. 3d 15, 17 (defining trust funds as funds which belong to a third party) and Black's Law Dictionary (11th ed. 2019)(defining trust funds as "property held in a trust by a trustee"). Where, as in the instant matter, "the issue rests on a legal question, the aggravating factor of failing to acknowledge the wrongfulness of the conduct clearly applies." *The Florida Bar v. Germain*, 957 So. 2d 613, 623 (Fla. 2007).

(8) substantial experience in the practice of law: Respondent became a member of The Florida Bar in 1979. Respondent conceded this aggravating factor.

Mitigating Factors: I find respondent failed to prove by clear and convincing evidence the following mitigating factors as stated below:

(2) absence of a dishonest or selfish motive: Although respondent testified he did not have a dishonest or selfish motive, the evidence supports the finding that he benefited financially and he made the conscious decision not to follow the guidance provided by the Supreme Court of Florida in the *Wolf* opinion. *See The Florida Bar v. Alters*, 260 So. 3d 72, 82 (Fla. 2018)(finding that lack of dishonest or selfish motive did not apply where Alters "received substantial amounts of money from the firm and deposited it into his personal bank account" for a year after he became aware of the improper transfers.)

(4) timely good faith effort to make restitution or to rectify the consequences of the misconduct: Respondent testified he endeavored to rectify his misconduct by reviewing the eight (8) issues the bar highlighted when it opposed his First Reinstatement. He reviewed those issues and made changes, such as eliminating direct client contact and ceasing handling his former law firm trust account funds. Respondent decided not

to change his conduct as to the handling of the trust funds in the fiduciary accounts, which is now one of the issues giving rise to the instant proceedings. Despite there being caselaw directly on point as to the prohibition of a suspended attorney handling third party funds, respondent turned a blind eye and continued this misconduct because it was lucrative for him.

(5) full and free disclosure to the bar or cooperative attitude toward the proceedings: Respondent argued he should be entitled to this mitigating factor because he responded to the Petition for Contempt and provided discovery as required during these proceedings. These things are expected of every member of the Bar. In order for this mitigating factor to be applicable, the Florida Supreme Court requires a respondent to go "above and beyond the normal cooperation expected of every member of the Bar." *The Florida Bar v. Herman*, 8 So. 3d 1100, 1106 (Fla. 2009). The *Herman* Court provided the following examples where such mitigation would be appropriate:

- *The Florida Bar v. Pincket*, 398 So. 2d 802 (Fla.1981), where "the attorney voluntarily paid full restitution with interest to one of his clients; self-reported an additional violation of the trust account provisions to the Bar in an effort to prevent any further harm to the public, the courts, or the Bar; pled guilty to the rule violations with which he was charged; voluntarily advised the Bar of his trust account deficiencies; and waived grievance and referee proceedings." *Id.* at 1106.

- *The Florida Bar v. Hochman*, 815 So. 2d 624 (Fla. 2002), where the attorney "admitted himself into a facility for treatment and, upon completing treatment, voluntarily informed the Bar and his clients that he had misappropriated funds, entered into a guilty plea and consent judgment with the Bar under which he was suspended for three years and required to continue rehabilitation and make restitution, and complied with all of the terms of his consent judgment and continued to be very proactive in his recovery efforts." *Id.* at 1106-07.

Respondent has not proven that he has gone above and beyond the normal cooperation expected of an attorney. To the contrary, TFB Ex.10 admitted at the hearing on sanctions is a string of emails between respondent's counsel and bar counsel. This exhibit demonstrates that four (4) weeks prior to the hearing on sanctions, beginning on September 23, 2022, the bar began a series of requests to respondent's counsel for a list of witnesses for the hearing on sanctions. The bar's emails went unanswered until Friday, October 21, 2022, the last business day prior to the hearing, when respondent's counsel provided a list of three previously undisclosed witnesses. On Sunday, October 23, 2022, the day prior to the hearing, respondent's counsel provided the bar four previously undisclosed exhibits for the hearing. This Court excluded the exhibits and allowed two (2) character witnesses who appeared in person to testify. Respondent's failure to timely disclose these witnesses and exhibits to the bar, despite multiple requests during the discovery phase of this case, belies

respondent's testimony that he cooperated as required in these proceedings.

(7) character or reputation: In *Herman*, 8 So. 3d 1100, the Florida Supreme Court upheld a referee's decision that the mitigating factor of character and reputation did not apply because the underlying facts did not support such finding. In that case, Herman knew his client's former employee, whom Herman hired to work at his newly formed company, had been his client's top salesman, his company would be in direct competition with his client, his client's former employee would have day-to-day control over his company, and he needed to disclose his activities to the client, but he did not. Here, respondent knew Mr. Gonzalez had not asked him to serve as the personal representative as he had stated in the two petitions filed with the court, the bar was investigating his statements in the petitions, and he needed to disclose the truth to the bar, but he did not. Respondent's actions in continuing to hide the truth despite knowing the bar was investigating his statement belies a finding of good character or reputation. Furthermore, respondent's two character witnesses did not know anything concerning respondent's conduct that led to his one-year suspension or the conduct in the instant disciplinary matter. Such knowledge was relevant to

their opinion of respondent's character and may have changed their opinion of respondent.

(8) physical or mental disability or impairment or substance related disorder: Respondent testified he was involved in a car accident which resulted in memory loss and he suffers from depression. Respondent never disclosed this to the bar in his response to interrogatory requesting disclosure of the mitigating factors he would be seeking. Consequently, respondent's claims of memory loss and depression could not be properly investigated by the bar. Additionally, respondent did not provide any evidence, other than his own testimony, to support his claim that he suffers from memory loss and depression. Finally, there was no testimony as to the causal connection or nexus of his alleged memory loss and depression to the underlying conduct. *See The Florida Bar v. Horowitz,* 697 So. 2d 78, 83 (Fla. 1997)(upholding the referee's decision finding Horowitz' testimony, that he suffered from depression, insufficient to establish mitigation when "no evidence was submitted to substantiate these statements...."). In *The Florida Bar v. Behm*, 41 So. 3d 136 (Fla. 2010), the Court declined to consider the mitigating factor of personal or emotional problems or physical disability or impairment, even though Behm included a transcript attached to the appendix to one of his briefs from the personal injury case stating he

had to bury his family as a result of a traffic accident and a letter from his treating physician stating he was treating Behm for depression. In declining to consider this mitigation, the Court stated, "there was no testimony from Behm correlating his losses from this traffic accident to his tax behavior." *Id.* at 150. As a result, respondent failed to prove this mitigating factor by clear and convincing evidence. Here, respondent did not provide any evidence to support his testimony and respondent did not correlate his testimony regarding his memory loss and depression to the underlying misconduct.

(10) interim rehabilitation: A finding of interim rehabilitation is appropriate as a mitigating factor when it is supported by the record. *The Florida Bar v. Valentine-Miller*, 974 So. 2d 333, 336 (Fla. 2008)(finding the mitigating factor of interim rehabilitation was supported by the record, "which show[ed] that respondent checked herself into an inpatient rehabilitation facility where she demonstrated progress.") Aside from respondent's testimony that he had been rehabilitated because he completed 600 hours of community service at a museum, there was no evidence in the record to support this mitigating factor. Furthermore, community service at a museum does not qualify as interim rehabilitation. Respondent did not testify how this community service correlated to

rehabilitating him from the underlying misconduct. *See Behm*, 41 So. 3d 136 and *Horowitz,* 697 So. 2d 78.

(13) remoteness of prior offenses: Respondent's conduct which led to the one-year suspension, in Florida Supreme Court case no. SC15-192, began in 2010. He was suspended by Court order dated March 24, 2016, effective April 23, 2016. Notably, respondent was suspended for filing false statements in 12 petitions for administration, among other deceptive conduct. Respondent has been continuously suspended since April 23, 2016, despite filing two petitions for reinstatement. See TFB Ex. 1. During the First Reinstatement, in Florida Supreme Court case no. SC17-364, it was discovered respondent engaged in several acts of misconduct while suspended, including handling trust funds for his former law firm and fiduciary trust accounts in violation of rule 3-6.1(d)(2), holding himself out as an attorney in good standing in violation of rule 3-6.1(d)(3), having direct client contact in violation of rule 3-6.1(d)(1), violating Florida Statute §117.107(11) by notarizing his wife's signature on a document, and violating rule 4-8.6(e) by failing to sever his financial interest in his former law firm in funding the law firm's operations. See TFB Comp. Ex. 2. On December 21, 2018, respondent's reinstatement was denied by the Florida Supreme Court, and he was prohibited from seeking reinstatement for one

year. See TFB Comp. Ex. 2. On April 15, 2021, respondent filed the Second Reinstatement in Florida Supreme Court case no. SC21-556. During the investigation in that case, it was discovered respondent had not ceased handling trust funds from fiduciary trust accounts and had made false statements in two petitions. During that reinstatement proceeding, he made another misrepresentation to the bar. Respondent's misconduct has been continuous since 2010. Respondent's suspension in 2016, merely six years ago, is not remote in time. *See The Florida Bar v. Ratiner*, 238 So. 3d 117, 126 (Fla. 2018)(finding that Ratiner's conduct which had occurred "only two and four years earlier than the misconduct herein at issue" were "not especially remote in time."). Furthermore, the Florida Supreme Court has held "where, as here, there is great similarity between the offenses, the remoteness of the prior offense is not a mitigating factor." *Patterson*, 330 So. 3d 519 (citing to *The Florida Bar v. Varner*, 992 So. 2d 224, 230 (Fla. 2008)). Most significantly, respondent has not ceased his misconduct since he was suspended.

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

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Fee		$1,250.00
Court Reporters' Fees	$692.50	
Investigative Costs	$356.35	
	TOTAL	$2,298.85

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this ___8th____ day of _____November_____, 2022.

__/S/ ELLEN MEG FELD_____
Honorable Ellen Meg Feld, Referee
West Regional Courthouse
100 N. Pine Island Rd.
Plantation, FL 33324-7816

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