

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

MIGUEL FERNANDO MIRABAL,

Respondent.

Supreme Court Case
No. SC21-1469

The Florida Bar File Nos.
No. 2018-70,593(11D)

RESPONDENT/APPELLANT'S INITIAL BRIEF

Herman J. Russomanno, Esq.
Fla. Bar No. 240346
Herman J. Russomanno III, Esq.
Fla. Bar No. 21249
RUSSOMANNO & BORRELLO, P.A.
Co-counsel for Respondent
Museum Tower – Penthouse 2800
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 373-2101
Facsimile: (305) 373-2103
hrussomanno@russomanno.com
herman2@russomanno.com

Kevin P. Tynan, Esq.
Fla. Bar No.
RICHARDSON & TYNAN, PLC
Co-counsel for Respondent
8142 N. University Drive
Tamarac, FL 33321
Telephone: (954)721-7300
Facsimile: (954)721-7142
ktynan@rtlawoffice.com
paralegal@rtlawoffice.com

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PREFACE

The Florida Bar, Appellee will be referred to as “The Bar” or “The Florida Bar”. Miguel Fernando Mirabal, Respondent, Appellant, will be referred to as “Respondent” or as “Mirabal”.

The symbol “RR” will be used to designate the Report of Referee. The symbol “TT” and a page number will be used to designate references to the transcript of the final hearing. As the transcripts are not consecutively numbered there will also be a volume notation added to the “TT”. TT1 denotes the December 1, 2022, proceedings; TT2 denotes the December 2, 2022, proceedings and TT3 denotes the December 16, 2022, proceedings.

Exhibits introduced by the parties hearing will be designated as TFB Ex. __ for the exhibits introduced by the Bar or R. Ex. __ for those introduced by the Respondent.

STATEMENT OF THE CASE & FACTS

A. Procedural Background.

The initial grievance in this matter was received by The Florida Bar on May 14, 2018, and the Respondent timely responded to same on June 8, 2018. TFB Ex. 2. While there were long periods of no record activity in the matter, there was a Finding of Probable cause by a Grievance Committee dated December 4, 2019. The Respondent was elected to the Miami-Dade County Court on August 19, 2020, and was sworn in as a member of the bench on January 4, 2021. He resigned from the judiciary on April 20, 2021. On June 18, 2021, the Bar confirmed they were once again investigating this matter, and there is a second Finding of Probable Cause dated October 18, 2021. On October 26, 2021, some 40 months after the grievance was first received by The Florida Bar, the Bar filed its Formal Complaint in this matter.

On November 8, 2021, the Honorable Daniel A. Casey was appointed to serve as Referee. The parties were able to reach a settlement of this action by way of a consent judgment dated July 27, 2022. While the Referee initially approved the proposed resolution, this Court rejected same by an October 18, 2022, Order

and remanded the case back to Judge Casey for further proceedings. A Final Hearing was held on December 1, 2 and 16, 2022.¹ The Referee entered his Amended Report of Referee on January 10, 2023, which Report finds the Respondent guilty of some, but not all of the allegations raised by the Bar, and also provided his sanction recommendation to this Court.

B. The Respondent.

The Respondent, 52, has been a member of The Florida Bar since December of 2004 and has no disciplinary record. RR43-45. He is the son of two Cuban political prisoners. TT1-239-240.

Respondent received his high school diploma from Christopher Columbus High School, his BA, in political science and history, from St. Thomas University and his JD from Barry University. Respondent had to fully attend law school twice (6 years total), as Barry University had lost its pending provisional accreditation and was undergoing re-application for accreditation. TT1-236-238. The Respondent is also admitted to practice law in Madrid, Spain, and

¹ The Report denotes a fourth date, December 19, 2022, but the testimony originally scheduled for that day did not occur, but post-trial matters were addressed at that time.

was required to attend law school in Spain to secure that license. TT1-238. He also holds a realtor license. TT1-238.

The Respondent testified about his various business ventures, some with his mother, a cosmetology school and real estate ventures. TT1-241-242. When he became a lawyer, he continued in some of these business ventures and his practice of law encompassed primarily the real estate field, some immigration work, and some corporate work. TT1-242.

While it will be addressed in more detail below, the Respondent also testified about his lifetime of community service. TT1-245-249. He also testified about his lifelong desire to be a member of the judiciary, his successful election as a county court judge, and having to resign from the Bench as a result of the issues in this matter. TT1-250-251.

C. Factual background.²

The genesis of this complaint arises from a contested judicial election in 2018, wherein the Respondent was a candidate for

² As there is no cross appeal, this brief will only address the Referee's findings of guilt and not the matters where he found the Respondent not guilty.

county court in Miami-Dade County. His opponent in that race filed the instant grievance (TFB Ex. 2), as well as a complaint to the Florida Elections Commission (“FEC”) during the 2018 election, where his opponent ultimately prevailed in the election. Post her successful election in 2018 the complainant filed additional grievances directed to actions taken by the Respondent to get appointed to the bench, all of which are contained in TFB Ex. 2.

1. 2028 Campaign Finance Reports

The Referee at page 4 of his Report, in relation to these reports, encapsulated the dispute as follows:

The Bar alleges that Respondent intentionally made numerous misrepresentation and omissions in his Campaign Treasurer’s reports throughout his campaign. Respondent acknowledges that there were errors on his Campaign Treasurer's reports, but states they were merely mistakes with his trying to fill out a form with which he was not familiar.

The Referee heard testimony on this issue from the Respondent, the complaining witness,³ and from the Respondent’s

³ At the time the grievance was first filed, Milena Abreu, was an opposing candidate for a county court seat, and she later successfully defeated the Respondent in that race. TT1-212. When she filed her first grievance, she did not have access to the Respondent’s bank records and only saw those records after the

later retained CPA, Ms. Garcia, and considered the actual campaign finance reports, the amendments thereto and certain bank records. TFB Ex. 23-52. The Referee also heard testimony about the Florida Elections Commission (“FEC”) complaint filed by Abreu, at the same time she filed the Bar grievance, and that the Respondent entered into a consent judgment with the FEC to pay a \$2,000.00 fine. TFB Ex. 3 & Resp. Ex. C.

Ultimately, the Referee found that there were errors on these reports, but at the same time acknowledging that the Respondent, and Ms. Garcia, did in fact file multiple amended campaign finance reports in a not always successful manner to correct these errors. RR7-17. The Referee also found that these errors were politically advantageous, as the earlier incorrect double reporting of one deposit made it appear that he had more money in his campaign account at certain key time frames in his race. RR16.

Bar gave them to her (after the Bar subpoenaed these private banking documents from the Respondent and his bank). TT1-212-213. Further, the Bar asked Abreu to opine as an expert on certain issues that the Referee disallowed. Abreu was the only witness called by the Bar and she admitted on cross that she was the only source for all of the additional charges leveled by the Bar against the Respondent and that she and others acting on her behalf (not the Bar) researched these other matters, and she provided them to the Bar. See for example TT1-222.

The Referee found the Respondent guilty of violating R. Regulating Fla. Bar 4-8.4(c) as to the 2018 campaign finance reporting.

2. 2019 JNC Application

On April 10, 2019, the Respondent submitted an application, to a Judicial Nominating Commission (“JNC”), in an attempt to be appointed to a county court position in Miami-Dade County. RR19. The Bar alleged that several of the answers to questions posed on the JNC application were false and/or incomplete.

i. Question 38

Question 38 inquired about the applicant’s litigation history and required the listing of all such lawsuits. RR20. It is undisputed that the Respondent failed to list six distinct lawsuits. RR20-21. The Referee found these omissions to have been intentional, not negligent, and therefore found the Respondent guilty of R. Regulating 4-8.4(c). RR27.

ii. Question 39

Question 39 of the application required the disclosure of a:

. . . . finding of probable cause or other citation issued against you or are you presently under investigation for a breach of

ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. TFB Ex. 1, question 39.

In his response to this question, the Respondent failed to list the pendency of the instant Bar grievance, which at the time of the application had been dormant for some time without a finding of probable cause, but nonetheless needed to be disclosed. RR28. The Respondent also failed to disclose the FEC complaint that he had resolved some six weeks prior to the submission of this JNC application. RR28. The Referee found both omissions to have been intentional and found that the Respondent violated R. Regulating Fla. Bar 4-8.4(c). RR29.

3. Correspondence to the Bar

The Bar alleged and the Referee concurred that an October 9, 2019, letter written by Respondent's counsel violated R. Regulating Fla. Bar 4-8.1(c); 4-8.2(a) & (b); 4-8.2(b) and 4-8.4(d). RR40. The following passage of said letter, which was a response to one of Abreu's supplemental grievances, is at issue:

My client is deeply concerned about the motives underlying this grievance and if necessary is able to relay a series of troubling events which occurred during and after the

campaign, wherein Judge Abreu's then campaign advisor, and others went to great extremes to convince Mr. Mirabal to switch races to allow Judge Abreu to have an uncontested election; this included threats of Bar complaints and much more. After Judge Abreu lost her August 2016 election to sitting Judge Fred Serafin, former candidate Abreu filed a frivolous lawsuit against her former opponent to undo the election.

We do not want to escalate this matter any further and would hope that the resolution of the FEC complaint, with the payment of a civil sanction for an accounting error made by a CPA that was not initially caught by Mr. Mirabal but was fully corrected after the retention of a new CPA firm, would be the appropriate remedy and resolution. TFB 57

The Respondent conceded that he later found out that the information imparted in the letter concerned a lawsuit filed by Abreu after her first failed election was inaccurate. TT1-101-103. The Referee found this claimed lawsuit to be a misrepresentation to the Bar. RR40.

In addition, the Bar argued that the passage "(w)e do not want to escalate this matter any further" when coupled with the commentary on Abreu's motives in filing the grievance was an

attempt to intimidate Abreu into silence.⁴ The Referee found that this letter was an attempt to “impugn Judge Abreu’s integrity” and to intimidate her from continuing with her grievance and therefore was conduct prejudicial to the administration of justice. RR42.

4. Sanction Recommendation

The Referee concluded his Report by recommending that the Respondent be disbarred and pay the costs of these proceedings. This appeal seeks to overturn certain findings of guilt and to reduce the recommended sanction.

⁴ The Respondent did attempt to testify as to specific claims made in the letter concerning attempts to have the Respondent not run against Abreu, but the Referee struck that testimony from the record and was not considered in defense of these remarks.

SUMMARY OF ARGUMENT

The Respondent's life has been about service to others. His parents, both of whom were political prisoners in Cuba, instilled in the Respondent this desire, from an early age, through significant volunteer work in his community. Respondent has had a lifelong dedication to community service, mentoring and pro-bono work, decades prior to trying by elected or appoint to the Bench. He was able to achieve that dream by being elected to a county court position in 2020. However, a few months after being sworn in, the events discussed in this appeal resulted in his resignation from the county court.

The Respondent, from the beginning of the Bar's prosecution which has spanned more than forty months, has been proactive frank and open in his admission of sloppy bookkeeping relative to his campaign finance reporting and settled the Florida Ethics Commission complaint filed by his 2018 opponent in his first judicial election and paid a small fine.

Additional complaints were filed by the sole complaining witness "Abreu", many of which the Referee found lacking, but did reveal that the Respondent did not fully and completely reveal on a

2019 Judicial Nominating Commission Application all of the information that needed to be imparted. When this issue first arose, the Respondent also immediately accepted responsibility for his negligence in not filling out the Application correctly.

It is our position that the Referee's determination that these errors were intentional, was erroneous. The record below clearly does not support such a finding. Therefore, the Referee's sanction recommendation of disbarment is also not supported by the record, especially in light of the mitigation present in this case which includes, a lack of a prior disciplinary record, overwhelming character testimony, the imposition of other penalties (inclusive of resigning from the Bench), and his deep remorse for his actions.

Respectfully, while the Respondent should be found guilty of misconduct, it should be negligent misconduct and the appropriate sanction for such misconduct is a one-year suspension.

ARGUMENT

I. THE RESPONDENT DID NOT ENGAGE IN KNOWING AND INTENTIONAL CONDUCT TO MISLEAD THE PUBLIC OR THE JUDICIAL NOMINATING COMMISSION.

At the outset of this case, the Respondent admitted to making unintentional mistakes on his campaign finance reports. He settled that issue with the FEC by paying a small fine. He has also admitted that his 2019 JNC application was unintentionally missing information that should have been included in that application. The Bar's sole witness, the opposing candidate in the 2018, election that filed the original grievance prior to election day, admitted that she did not have personal knowledge as to a great majority of the documentation she gathered and thereafter presented to the Bar. For this and other reasons set forth below, the Referee's findings of intentional misrepresentations are not supported by clear and convincing evidence.

A. Standards.

Respondent fully accepts his burden on appeal and respectfully submits that the record in this case fully demonstrates that the findings of guilt in this case are "clearly erroneous and

lacking in evidentiary support.” *Fla. Bar v. Canto*, 668 So. 2d 583 (Fla. 1996); *Fla. Bar v. Porter*, 684 So. 2d 810 (Fla. 1996).

The Florida Bar carried a heavy burden before the Referee, as it should when it seeks to discipline a lawyer for alleged acts of unethical conduct. In this case, they failed to prove by clear and convincing evidence that the Respondent engaged in the unethical activity plead in the Complaint. This Court previously found that a clear and convincing evidence standard:

. . . requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit, and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

As discussed herein, the Bar’s presentation fell far short of clear and convincing evidence of all of the matters presented to the Referee.

B. Overview.

The Bar’s presentation in this matter focuses on the Respondent’s previous attempts to either be elected to a judicial

position or appointed to one. Admittedly, there were unintentional mistakes made by the Respondent, but they were not intentional acts as alleged by the Bar. While the Bar did not plead its case on a count-by-count basis, we can break this case into several distinct concerns. First, we must address the Respondent's campaign finance reports for the 2018 election and then second, are issues related to his 2019 Judicial Nominating Commission ("JNC") Application.

1. The 2018 Campaign Finance Reports

The uncontroverted testimony at trial was that in 2018 the Respondent was a political neophyte having never run for an elective office or been involved in someone else's political campaign wherein he would have received training on campaign finance reports. TT1-25-251; TT2-21. When he began the 2018 campaign, he did have the assistance of a CPA, but he was the treasurer for his campaign. See TFB Ex. 23. It was the Respondent's uncontroverted testimony that his first CPA was also inexperienced in filing campaign finance reports and that together they made unintentional mistakes in some of the earlier filed campaign finance reports and that in attempting to fix them/amend them, additional

errors arose. TT2-23. Ultimately, the Respondent secured new accounting help through Jhanet Garcia, EA, MST, and her accounting firm of J. Garcia & Associates. TT2-24-25. Respondent and Garcia, with the assistance of Miami-Dade County Election Department employees, filed timely and proper amendments to the Respondent's campaign finance reports. Resp. Ex. A; TT2-26-30.

As is noted above the sole Complainant, Abreu, filed, during the election process, a complaint with the FEC alleging, among other things, that the Respondent overstated personal loans to his campaign.⁵ The Respondent provided uncontroverted testimony that the FEC completely reviewed his bank records and all his campaign finance reports, inclusive of the amendments thereto. The FEC, after a complete investigation, was comfortable with resolving all issues related to the Respondent's errors in his

⁵ While the Bar did not introduce the FEC complaint, the testimony at trial was that the FEC and Bar complaint were similar. The Bar Complaint, TFB Ex. 2, on the second page, clearly makes the claim that the campaign bank account "will clearly show a lesser amount of money than what was actually reported" in the campaign finance reports. Interestingly, the way this statement was made, inclusive of the statement that Respondent was the only signatory on the account, made it appear that the complainant was somehow in possession of the Respondent's confidential banking information, which was later shared with the complainant by the Bar, when it received same pursuant to a subpoena in this case.

campaign finance reports via a Consent Judgment and the payment of a \$2,000.00 civil penalty. The Consent Judgment, TFB Ex. 3, contains the following factual stipulation:

a. Respondent was a candidate for the Miami-Dade County Court, Group 43, in the 2018 election.

b. During his campaign, Respondent certified campaign reports were complete when they were not.

The agreed upon civil penalty was fully paid. See Resp. Ex. C.

The complainant and the Bar assert that the Respondent purposefully inflated his receipts at key times in the campaign to purposefully mislead her and the public about the funds deposited into his campaign. There was testimony at trial about the shifting of various candidates into different 2018 judicial races and that prior to the Respondent deciding to run in Group 43, wherein the complainant was making her second attempt for judicial office, he had been in a different race and had filed campaign finance reports.

The primary focus of the “timing” of amendments related to the first loan of \$10,000.00 made by the Respondent to his judicial campaign and the way it was reported. The first reference to this \$10,000.00 is made on his January 2018 month end campaign

finance report⁶ (TFB Ex. 35)⁷ wherein he lists a \$10,000.00 loan on January 31, 2018. However, the Respondent inadvertently had not yet made the actual deposit into the campaign account. This loan was not deposited into the bank until February 27, 2018. See TFB Ex. 36). A second \$10,000.00 deposit was inadvertently made the next day, February 28, 2018. *Id.* Upon discovery of the mistake, this second \$10,000.00 was withdrawn from the account on March 13, 2018, in order to proactively correct the error

Garcia began assisting the Respondent in March of 2018⁸ and her office assisted in the February 1, 2018, through February 28, 2018, report. See Resp. Ex. A. This was the first report that she

⁶ Please note that this report was filed while the Respondent was still a candidate in Group 18 (which did not include Abreu as an opposing candidate) and not Group 43, as he had not yet redesignated the race, he would ultimately run in.

⁷ It should be noted that the campaign finance reports printed by the Bar as exhibits herein look different online as they are more in a spreadsheet format and not on these actual forms. A comment should also be made about TFB Exhibits 25 through 43 in that the time-period for the report may be different than the bank statements and that a true reflection of the banking comparisons with the reports require the reader to look at more than one exhibit at a time.

⁸ TFB Ex. 59 indicates that Garcia became a campaign treasurer on March 9, 2018.

helped with, and you will note that both \$10,000.00 deposits are noted as loans to the campaign. TFB Ex. 36. The \$10,000.00 withdrawal did not occur in February, so it is not on this report.

Resp. Ex. A and B, along with the uncontroverted testimony of Respondent and Garcia, indicate that a problem with the reporting of the correct amount of the loan was discovered in late February of 2018 and they immediately tried to fix the report through an amendment. Resp. Ex. A & B. The first amendment to the February report is filed on March 8, 2018. TFB Ex. 45. However, while the report accurately reflects two \$10,000.00 deposits during the time frame, it does not delete the first ten thousand deposit on the January 2018 report and it does not notate the \$10,000.00 withdrawal.⁹

On May 3, 2018, in the early afternoon, Garcia and Respondent filed a series of amendments to try and correct the accounting issues that they had discovered and knew needed to be

⁹ This was fixed by an amendment dated May 3, 2018, which is for some reason was not originally included in TFB Ex. 46 with other amendments from that date, but part of the report is attached as exhibit L to the initial grievance which is TFB Ex. 2. The Referee allowed the parties to supplement the record for completeness of this exhibit.

corrected. See composite Ex. 46. For reasons unknown, the composite exhibit does not include the amendment submitted on May 3, 2018, at 13:39:08, but the cover sheet for this report is attached to TFB Ex. 2 at sub-exhibit M.

It is the complainant's assertion, and the Bar's, that the timing of the May 3, 2018, amendment that reduced the monies in the campaign account was somehow purposefully delayed. The Respondent and Ms. Garcia¹⁰ both testified that upon discovery of the issue they attempted to promptly correct it. Resp. Ex. A & B; TT2-12. In Resp. Ex B, on page 4, there is a March 9, 2018, e-mail from the Respondent, copied to Garcia, identifying that the software was counting twice and had inflated the deposits. Later March 2018, e-mails in Resp. Ex. B indicate that Garcia was aware of the issue and would resolve same, but that it might take until April 10, 2018.

Resp. Ex A, which is Garcia's letter of June 20, 2018, written close in time to the issues at hand, explains the delay in getting this

¹⁰ In its cross of this witness the Bar took issue with Garcia's lack of precise memory of the exact financial matters. However, Garcia's testified that she had not personally reviewed these reports and the related bank records since 2018 and did not have her workpapers or notes to rely upon during her testimony. TT2-162.

amendment filed:

As described previously, this was a mistake which we were alerted by Mirabal on March 12, 2018. As he also emailed Vanessa Innocent, Suzy Trutie and Wilfredo Castro of the Miami Dade County Elections Board to put everyone on notice of the accounting error. Unfortunately, I was on a business trip that week and we were also in the midst of the 2018 Income Tax season, and severely understaffed, therefore it took us longer than expected to correct the mistake and learn how to use Voter Focus and the Miami Dade County Elections Board Judicial Financial Reporting and Accounting Web Portal. The issue was corrected and fixed within a few weeks, not months as Ms. Abreu falsely alleges. There was never any nefarious intent or willful misrepresentation to overstate the account.

Notwithstanding, Mirabal, the Miami Dade County Elections Board and J. Garcia and Associates, PA, had both written and verbal communications on this matter on March 9th, 2018, March 12th, 2018 and March 29th 2018, Finally on May 3, 2018, I was directed on the phone by Wilfredo Castro of the Miami Dade County Elections Board on how to fix any and all issues with the appropriate amendments. Furthermore, while on the phone with him, I reiterated to him the issues and his professional response was that we didn't need to worry as "that is what the amend button is for" to amend any errors.

The foregoing explains the process for the amendment, the reason for the delay (waiting on the accounting professional) and that there was no nefarious reason for any delay in correcting the reports.¹¹ As is noted above, the filing deadline to enter a judicial race was May 4, 2018, and the amendment was filed before the actual deadline wherein other candidates could chose to enter or leave the race. Respectfully, the only hard evidence in this case – outside of the complainant’s mere speculation (which is not clear and convincing evidence) as to motive – is that the problem was identified by the Respondent, he gave notice to the election department of the need to amend; requested his accounting professional to examine the problem and take proactive corrective measures; and that corrective measures were taken to correct the filing, which reduced the deposits to the campaign by \$20,000.00.

In concluding the campaign finance report analysis, it is important to note that the Respondent has freely admitted throughout this grievance process as well as the FEC process

¹¹ There does not appear to be a statutory deadline for making an amendment during a political campaign, except that there is a deadline for a final report.

that his initial financial reporting was unintentionally inaccurate. That is why he agreed to a civil penalty and understands that certain rule violations may also flow from this issue. Those potential rule violations will be discussed below.

2. **The 2019 JNC Application**

The second area of concern relates to matters that should have been revealed on the Respondent's 2019 JNC Application ("Application"). The Respondent fully accepted responsibility for the omissions in his Application. For the reasons set forth below, it is clear that these omissions were unintentional.

The Application, TFB Ex. 1, was executed by the Respondent on April 15, 2019, and some of the attachments are dated a day or two later. Respondent's uncontroverted testimony (TT2-43) was that he had previously submitted a JNC Application and that he took the old application and made additions thereto, that he thought properly updated the older application. Further, he looked at his credit report to see if he was missing any debt or other obligation. What he did not do, and should have done, is complete a refreshed examination of

the public records in counties where he knew had prior personal or business litigation.

i. Question 39.

At question 39 on page 20 of TFB Ex. 1, the following inquiry is posed:

Has there been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, give the particulars.

The Referee found that the Respondent's negative response to this question was misleading in that the May 2018 Bar grievance was still pending. As noted above, Respondent accepts the responsibility for not making a proper disclosure about the pending Bar complaint. Respondent testified at trial that he primarily copied his old JNC application and did not catch that he needed to reply to this question in the affirmative (although he should have) and that he was uncertain of the Bar grievance status in April of 2019 in that there had been no

activity regarding same for quite some time.¹² TT2-18-19. Further, the FEC portion of the grievance had been closed at the FEC¹³ the month before and was no longer pending. See TFB Ex. 3. Despite the foregoing explanation, the Respondent takes full responsibility for this error, but has continually explained that this mistake was not intentional.

ii. Question 38.

The Bar's complaint at paragraph 22 asserts that the Respondent, in his response to Question 38 of the Application, which required a listing of all litigation files (plaintiff or defendant) was misleading in that he failed to list certain matters, delineated at paragraphs 22 A through 22 F and that he made misrepresentation as to the resolution of one matter found at paragraph 22 G. For any matter not listed on said Application, the Respondent accepts

¹² The last correspondence in this record, a June 15, 2018, letter to the Bar by the complainant, was almost a year prior to the Application. See TFB Ex. 2.

¹³ The Bar's complaint does not assert that this question required disclosure of the FEC resolution and Respondent would note that there was no finding of probable cause in that matter, and he paid a civil penalty to resolve same. However, the Referee found the lack of disclosure also to have been a misrepresentation by omission.

full responsibility for the omission of such matter, but it continues to be his position that these omissions were caused by a lack of memory or negligent inadvertence regarding said omission. As to paragraph 22 G the Respondent continues to deny, for the reasons set forth below, that he provided an incorrect description of the ultimate resolution of said case.

22A¹⁴- *Mirabal v. Faus*

This is a 2007 action from Monroe County. TFB Ex. 4 is the docket for the case which indicates that the matter was filed by the Respondent on March 23, 2007, and was dismissed on May 7, 2007, with a few post-trial motions that were apparently never heard.

No testimony was presented by the Bar, as to this case, other than the reference that this matter was not disclosed on the Application. The Respondent's uncontroverted testimony was that he was the plaintiff seeking a restraining order and that the conduct at issue related to an individual that had been harassing his mother and him. TT2-50-52. The Respondent testified that he had no recollection of this action, as it was approximately 12 years

¹⁴ These references are to paragraph 22 of the Bar's complaint.

old when he completed his Application.

As is stated elsewhere, Respondent should have done a search of the public records to ascertain all prior litigation matters to avoid missing anything and that he copied his previous JNC application thinking that was an accurate rendition of his prior litigation files. The failure to list this approximately three month 12-year-old litigation file was inadvertent and due to a lack of memory of the matter, which was not an intentional omission. Further, it is believed the fact that he was the plaintiff seeking a restraining order would not have adversely impacted his viability as an applicant.

22B – Washington Mutual V. Mirabal, et. al.

This is a 2008 foreclosure action wherein the lender sued the Respondent and an entity known as Little Torch Property Investment Inc. See TFB Comp. Ex. 15. The uncontroverted trial testimony from Respondent was that this was an investment property co-owned by a corporate entity wherein his “partner” in that company was the person who handled this case, as he was living in Spain at the time this case was litigated. TT2-53-60. The Respondent further testified, without any testimony or document presented to the contrary, that his business partner had informed

him during the time frame of the litigation, that the property had been sold leaving him with the impression that the foreclosure was never completed. He also testified, without any contrary position espoused by the Bar, that he had examined a recent credit report prior to completion of his Application and this judgment was not found on his credit report, which has never reflected that judgment leading him to believe, apparently incorrectly, that the matter had indeed been resolved without a foreclosure. TT2-60.

The judgment shows, at page 6 of TFB Ex. 15, that the Respondent was served a copy of the judgment through a business entity known as Martinique Property Investments. The Bar introduced documents from Sunbiz that were printed during the trial to document that this entity had three directors – his mother (who was also the registered agent for the corporation, the Respondent and a third person). See TFB Ex. 60. Interestingly the address on the judgment is not the same as the address on the corporate records. While there is also an address for Little Torch, the Respondent testified that he believed this address belonged to his former business partner who is mentioned in the judgment. The Respondent testified that he had never seen this judgment until

the issue arose in this action.

The Respondent also testified that he recalled executing a deed in lieu of foreclosure in favor of the lender. See TFB Ex. 16. The Bar also introduced TFB Ex. 17, a copy of a later recorded Affidavit of Non-Acceptance of Real Property Transfer which disclaimed the referenced deed. This Affidavit does not show service upon the Respondent. In any event, these documents do not impact the Respondent's lack of knowledge of the foreclosure case or the fact that it does not appear on his credit report. For these reasons failure to list this case on his Application was due to a lack of memory and not an intentional misrepresentation.

22C – F.D.I.C. v. Mirabal

The Respondent admitted in his Answer that *F.D.I.C. v. Mirabal, and Global Title, LLC*, was inadvertently not disclosed on his JNC application in that said litigation occurred in 2010 while he was living in Spain and a business partner was running the title company that was sued in this case. However, he did list a state case, in his application, that related to real estate closings at the title company, and unfortunately at the time he completed the JNC application he only recalled the state case.

The Bar introduced at TFB 18 a variety of documents, inclusive of the docket, the complainant, and a settlement agreement. The complaint alleged all manner of fraud in the closing transaction and the Bar, through its sole witness tried, without foundation, to infer that Respondent was involved in the fraudulent activity. However, upon cross-examination the complainant was asked to publish the following paragraph from the settlement agreement that clearly indicated that Respondent was not involved in fraudulent activity:

WHEREAS, in entering into this MOA, Mirabal admits no liability for an claims asserted against him in the Litigation and **Plaintiff** acknowledges and **does not contend that Mirabal personally committed any fraud** in connection with any matters arising out of or connected with the litigation. **(Emphasis added).**

The Bar presented no other documentation that would have explained any fraudulent conduct and the Complaint, included in the exhibit, is nothing more than salacious allegations, and not proof of anything.

As to the failure to disclose the federal litigation related to the state litigation that was in fact included in the Application, the

Respondent accepts full responsibility for this omission, but it was not intentional, as he did not recall that there was also a federal component to this case that was settled almost eight years prior to the completion of his Application.

22D - Bank of America v. Senra Mirabal & Mirabal

This is a 2014 foreclosure case against property owned by Respondent's mother, Margarita Senra-Mirabal, but wherein he was also in title for estate purposes. The Bar introduced, TFB Ex. 19, a copy of the docket for this case and a copy of an Answer filed by the Respondent on his own behalf on June 19, 2014. The docket reflects that the action was filed May 28, 2014, with the case being voluntarily dismissed by the plaintiff on August 4, 2015. See TFB Ex. 19, page 1.

It was the Respondent's uncontroverted testimony, supported by Exhibit 19, that this case concerned his mother's property, and that the Respondent was not on the note, making the debt his mother's and not his. TT2-68-69. The Respondent accepted responsibility for not including this case on his Application, even though this was not his financial obligation. He further testified that he was aware the case had been settled by his mother and that

he always thought of this case as his mother's litigation and not his. TT2-69. That said, Respondent understands that the question at issue required disclosure, and that he inadvertently did not include same on the Application.

22E - PNC Bank v. Senra Mirabal & Mirabal

This is a 2016 foreclosure case concerning the Respondent's mother. See TFB Comp. Ex 5. No testimony was elicited by the Bar other than the Respondent's Application omitted this matter.

The Respondent's uncontroverted testimony was that this was his mother's property and that he was named in the litigation as he was on title for inheritance purposes. TT2-70-72. The final judgment dated June 27, 2017, shows that Respondent's mother's lawyer also represented the Respondent. TFB Ex. 5, page 4. The next page of TFB Ex. 5 indicates that the foreclosure was vacated on March 7, 2018, and the docket found on the next page of the exhibit shows the matter being finally dismissed in June of 2018.

The Respondent fully accepts responsibility for this case not being referenced on his Application. However, his testimony was that he incorrectly recalled the case as only concerning his mother. He was wrong and should have disclosed it, but his failure to do so

was unintentional and based upon a faulty recollection.

22F - *Mirabal v. Bank of America* (federal action)

On page 18 of his Application the Respondent listed *Mirabal v. Bank of America*, a state court action which was initiated by the Respondent in July of 2014. See the docket at page 3 which was introduced as part of TFB Ex. 6. This cause of action was removed to federal court on May 14, 2015. TFB Ex. 6 at page 1; TFB Ex. 9 at page 2 of the federal court docket. Once removed no further pleadings were filed in the case until June of 2016, when the court on its own initiative dismissed it for a failure to prosecute the case, but the dispute over the mortgage and the property was already resolved through a short sale. Further as the case was removed there was no need to prosecute the state court action.

The Bar introduced several documents from the federal action – a copy of the third amended complaint (TFB Ex. 9) and a copy of the March 2016 order of dismissal with prejudice (TFB Ex. 10). The Bar also admitted several exhibits related to the short sale for the property that resolved the dispute over the mortgage and the property. See TFB Ex. 11 (seller's affidavit) and TFB Ex. 12, (warranty deed). Of interest is the seller's affidavit (written by the

lender) at paragraph 5 that recites the Respondent as the owner of the property at the time of the sale and specifically references both the federal litigation and a prior quit claim deed executed by the Respondent (TFB Ex. 8) relative to this property.

The Bar contends that the Respondent should have included the federal action on his Application. In hindsight, the Respondent agrees with that proposition and accepts responsibility for not including the federal litigation on the same issues in the state court action that clearly shows that it was removed to federal court. When completing the Application, the Respondent recalled the dispute found the state court information and incorrectly believed that was all that needed to be disclosed. He now realizes the more complete answer was to also list the federal aspect of this dispute, but he disclosed the dispute and the issue.

The Bar also contended that Respondent was attempting to hide the harsh language of the order of dismissal, but his testimony on this issue (not crossed by the Bar) was that he incorrectly thought that he had made a proper disclosure of the issue, by revealing the state court action and the overall resolution of the dispute (discussed below). He was wrong in this analysis, but he

did not intentionally make a misrepresentation by omission regarding the federal action.

22G – Explanation of resolution of Bank of America litigation

At paragraph 22 G of the Bar’s complaint the Bar contends that the Respondent made a misrepresentation in his Application by stating, at page 18 of the Application, that the matter was “settled in June 2016 with the short sale of the property.” Interestingly, the Bar introduced documentation evidencing the short sale in June of 2016. See TFB Ex. 11 and 12. Thus, there was no misrepresentation, and the statement was fully accurate.

The Bar seems to be arguing that this must be an untrue statement, as prior to the short sale the federal case was dismissed, and the state court case was dismissed for a lack of prosecution after the short sale. The state court dismissal, respectfully, has no bearing on the analysis, as this order was really a nullity in that the case was removed to federal court and there was therefore nothing to dismiss in the state court action.

When you read the total explanation of the matter found at page 18 of the Application, you will note the dispute between the parties being disclosed, albeit just the state portion of the matter,

and the correct final resolution was disclosed – a short sale. This is not unlike the other explanations of litigation matters found in the Application – the matter is disclosed with a very brief description of how the dispute was ultimately resolved. Respectfully, there was no intentional misrepresentation as to the ultimate resolution of the Respondent’s dispute with Bank of America.

3. **The responsive letter to the Bar**

The Bar, at paragraphs 28 through 31 of the complaint, address two matters from his lawyer’s letter dated October 9, 2019, which was submitted to the Bar in response to a letter sent to him about additional grievances made by the complainant. See TFB Ex. 57. The full portion of said letter at issue reads as follows:

My client is deeply concerned about the motives underlying this grievance and if necessary is able to relay a series of troubling events which occurred during and after the campaign, wherein Judge Abreu’s then campaign advisor, and others went to great extremes to convince Mr. Mirabal to switch races to allow Judge Abreu to have an uncontested election; this included threats of Bar complaints and much more. After Judge Abreu lost her August 2016 election to sitting Judge Fred Serafin, former candidate Abreu filed a frivolous lawsuit against her former opponent to undo the election.

We do not want to escalate this matter any further and would hope that the resolution of the FEC complaint, with the payment of a civil sanction for an accounting error made by a CPA that was not initially caught by Mr. Mirabal but was fully corrected after the retention of a new CPA firm, would be the appropriate remedy and resolution.

The first allegation raised concerns the claim that the complainant had “filed a frivolous lawsuit against her former opponent to undo the election.” The Respondent’s uncontroverted testimony was that this information had been supplied to him by a trusted friend and that he believed it to be a true statement at the time the October 9, 2019, letter was drafted. TT2-102-103. That said, later information supplied by the Bar indicated that there was no such lawsuit in the public records and the Respondent has now verified that fact and agrees that there is no lawsuit. However, Respondent, in reliance on information provided to him by a trusted source made a statement that he thought to be true.¹⁵ This is not an intentional misrepresentation by the Respondent.

¹⁵ His beliefs about Abreu from this time frame included the fact that multiple people called to threatened and try to talk him out of running in this particular race. Abreu confirmed she knew at least two of such persons. TT1-233.

The next issue is that comments made in these two referenced paragraphs “attempted to malign Judge Abreu’s credibility and attack her motivations for filing the instant grievance”. See para. 29 of Complaint. Further at paragraph 31 of the complaint the Bar alleges that some of the language cited above “was clearly designed to silence and intimidate her and/or the bar from proceeding further with her complaint, and as such was prejudicial to the administration of justice.” The Respondent disagrees with both claims, but the Referee ruled against him. RR40-42.

The Bar’s position impinges upon a lawyer’s right to challenge the motivations of a grievant who brings a complaint. The first questioned statement merely avers that he was “deeply concerned about the motives underlying this grievance” and had additional facts available to him to support that concern.¹⁶

The Bar also claims that the language at the beginning of the second paragraph (“we do not want to escalate this matter any

¹⁶ While Respondent did testify as to some of these examples, the Referee struck that portion of his testimony, and no further comment will be made regarding these examples due to that ruling.

further”) was some form of an improper threat. However, this passage can simply be read to mean, when taken as a whole with the rest of the sentence that the FEC civil penalty “would be the appropriate remedy and resolution” for the pending grievance. While the reference to an “escalation” could be interpreted that the Respondent was considering some form of litigation, it could also easily be read (as it was intended to be read) that the Bar proceedings could be escalated through a contested grievance process and later Referee proceeding.¹⁷

As to his lawyer’s letter (approved by the Respondent), the Referee found that the Respondent had violated R. Regulating Fla. Bar 4-8.1(c); 4-8.2(a) & (b); and 4-8.4(c) & (d).

R. Regulating Fla. Bar 4-8.1 governs conduct in Bar admissions and disciplinary matters however subsection (c) of this rule only applies to applicants and it reads as follows:

(c) commit an act that adversely reflects on the applicant’s fitness to practice law. An applicant who commits such an act before admission, but which is discovered after admission, shall be subject to discipline under these rules.

¹⁷ The issues raised in this letter pale in comparison to that found in *Fla. Bar v. Jacobs*, 2023 WL 3874681 (Fla. 2023).

Subsection (c) of the rule clearly does not apply, as this is not an admissions case.

Among other things, R. Regulating Fla. Bar 4-8.2 sets forth the guidelines on the extent of a lawyer's ability to criticize a member of the judiciary.¹⁸ The rule reads as follows:

(a) Impugning Qualifications and Integrity of Judges or Other Officers. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

(b) Candidates for Judicial Office; Code of Judicial Conduct Applies. A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Florida's Code of Judicial Conduct.

While the Respondent was clearly a judicial candidate for some of the matters referenced herein, as well as an applicant for

¹⁸ The Bar's complaint, violating due process, did not allege which subparts of this rule, and other alleged rule violations could have been violated. In fact, they did not do so until their closing argument and after seeing the Respondent's closing argument, convinced the Referee to be able to list subparts and even add a judicial cannon to attempt to secure another improperly plead rule violation.

judicial office and subject to the judicial canons, the Bar sets forth no claim of a violation of a judicial canon and as such there can be no violation of subpart (b). Post trial, post the submissions of closing arguments, the Referee allowed the Bar to contend which Judicial Canon, but the Respondent was unable to submit further argument on this point.

In order to secure a conviction of subpart (a) of this rule the Bar must first establish by clear and convincing evidence that a lawyer made a statement about a judge that “the lawyer knows to be false or with reckless disregard as to its truth” and that the statement concerned “the qualifications or integrity of a judge”. The Bar has not met that burden herein.

As is explained above, this Respondent relied upon information from a trusted source that was later found to be incorrect and was limited in this trial presentation on other matters that supported his factual assertions. Respectfully, he had an objective belief (somewhat based upon information that was later found not to be accurate) for the statements that were made in said letter.

While lawyers have been found to have violated this rule, it is

not the case herein. See for example, *Fla. Bar v. Ray*, 797 So. 2d 556 (Fla 2001), where a lawyer was publicly reprimanded on the following facts:

Ray frequently appeared before a certain immigration court judge in Miami. From February 1996 through August 1997, Ray wrote three letters to the Chief Immigration Judge in Virginia. In these letters, Ray made several statements which questioned the veracity and integrity of the immigration judge, as well as his fairness at a hearing for one of Ray's clients. Based on some of the statements made in these letters, the Bar filed a complaint of minor misconduct against Ray, alleging that he had violated Rule of Professional Conduct 4-8.2(a) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."). A referee was appointed and following a hearing on disputed factual and legal issues, the referee found that certain statements in the letters were false, and that Ray had made the statements with reckless disregard as to their truth or falsity:

The letters contained accusations which are utterly false and they were made in my way of thinking at a minimum - at a minimum - with reckless disregard for the truth.

Indeed, if there is one word that characterizes these letters, it is reckless.

. . . I have read that transcript and I have listened to the tape and there was nothing - nothing - that transpired in that hearing that would justify such outrageously false accusations. And I am utterly appalled that this kind of language would be used against anybody on evidence that barely qualifies as sketchy.

There are many instances of lawyers being disciplined for serious disrespect or repeated disparaging conduct directed to a judicial officer. See for example *Jacobs*; *Fla. Bar v. Morgan*, 938 So. 2d 496 (Fla. 2006); *Fla. Bar v. Wasserman*, 675 So. 2d 103 (Fla. 1996); *Fla. Bar v. Norkin*, 132 So. 3d 77 (Fla. 2013). This is not one of those cases.

In *Fla. Bar v. Patterson*, 257 So. 3d 56 (Fla. 2018), the Court held that the standard for this rule “is not whether the statement is false, but whether the lawyer had an objectively reasonable factual basis for making the statement.” Also see *Jacobs*. The uncontroverted testimony was that the Respondent relied upon information that was supplied by someone he trusted and at the time the statement he believed it to be true and had an “objectively reasonable” belief that said statement was true. As such there is no violation of this rule regarding the mistake made about a lawsuit

involving the complainant.

As is noted above the Bar also claims that some of the language in the October 9, 2019, letter should be considered a threat to impugn the integrity of a judge. The Bar, through the use of ellipses and removal of language in the letter, attempts to create an argument for such a violation. However, if we apply the same objective reasonableness test to this claim, it is objectively reasonable that a Respondent can respectfully question the motives of a complainant to the Bar (even if they are a jurist)¹⁹ and the addition of the language about escalation of the Bar proceeding does not establish a violation of this rule.

The Referee, as to the commentary about a lawsuit, also found the Respondent guilty of R. Regulating Fla. Bar 4-8.4(c) (lawyer shall not “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.) Ordinarily this is an intent rule, but this Court has also used this rule for negligent misrepresentation. As the Respondent, as admitted above, did negligently omit certain materials from his JNC application and Form 6s, this rule has been

¹⁹ Abreu’s trial testimony seemed to admit that the primary reason she filed the instant grievance was because the Respondent stayed in “her” race. TT1-233-234.

violated but it is a negligent violation and not an intentional one.

The last rule found by the Referee regarding the Respondent's lawyer's letter is Rule 4-8.4(d) which states in relevant part that a lawyer shall not "engage in conduct in connection with the practice of law that is prejudicial to the administration of justice." While it must be admitted that this general catch-all rule covers many topics, in order to find a violation, there must be conduct "in connection with the practice of law" and the conduct herein does not involve the representation of clients or the practice of law by the Respondent.

II. THE APPROPRIATE SANCTION IS SUSPENSION AND NOT DISBARMENT.

This Court has consistently held that it has a broad discretion when reviewing a sanction recommendation, because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. *Jacobs; Fla. Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). The Court should exercise its discretion in finding the Referee's proposed sanction of disbarment is legally unsupported and too harsh under the facts of this case.

The Florida Bar seeks the ultimate sanction herein - disbarment. Respectfully, this is not a case where disbarment is the appropriate sanction. The Supreme Court has consistently held that disbarment is an extreme measure of discipline that should be only used when that lawyer “has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards” and therefore there must be a showing that this person “should never be at the bar.” *Fla. Bar v. Moore*, 194 So. 2d 264, 271 (Fla. 1967). In a more recent decision cited by the Supreme Court on many occasions, the Court affirmed that disbarment is “the extreme measure of discipline” that should “never be decreed where any punishment less severe . . . would accomplish the end desired.” *Fla. Bar v. Shoureas*, 892 So. 2d 1002, 1006 (Fla. 2004).²⁰ The Florida Supreme Court has stated that disbarment is reserved for those individuals who are “beyond redemption.” *Fla. Bar v. Turk*, 202 So. 2d 848 (Fla. 1967). The

²⁰ There are punishments less severe. For an example a significant rehabilitative three-year suspension would provide a very serious sanction, yet still allow the Respondent, an opportunity to demonstrate rehabilitation to the extent that he could be reinstated to the practice of law.

record is clear, Respondent is not beyond redemption and in fact at page 49 of his Report, the Referee finds that:

Respondent presented mitigation in this matter that I have considered seriously. He has never been sanctioned in his eighteen (18) year career as a lawyer. Several witnesses testified to his good character, reputation, and volunteer works in the community. Respondent also twice previously has suffered other sanctions in connection with the allegations in this matter. First, the Florida Elections Commission investigated his campaign filings and entered into a Consent Judgment with Respondent for the payment of a \$2,000 fine. Next, once Judicial Qualifications Commission proceedings were commenced against Respondent, he resigned from his long-sought seat on the County Court. Indeed, it was this last factor, that Respondent stepped down from the bench, and the weight that this Court seemed to afford that factor in cases such as *Bar v. Fragakis* (f/k/a Santino), Supreme Court Case No. SC21-1122, 2021 Fla. Nexis 1341 (Fla. 2021), that convinced me to agree with the Consent Judgment in this case originally.

Fla. Bar v. Summers, 728 So. 2d 739 (Fla. 1999), rejected a referee's disbarment recommendation and noted that:

This Court has repeatedly stated that disbarment is an extreme form of discipline and should be reserved for the most egregious misconduct. See *Florida Bar v. Cox*, 718 So. 2d 788, 794 (Fla. 1998) (disbarment is appropriate where there is a pattern of misconduct and history of discipline); *Florida Bar v. Kassier*, 711 So. 2d 515, 517 (Fla. 1998) ("The extreme sanction of disbarment is to be imposed only in those rare cases where rehabilitation is highly improbable."); *Florida Bar v. Hirsch*, 342 So. 2d 970, 971 (Fla. 1977) ("Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings."). Although we do not condone Summers' behavior in this case, and we reprimand her for it, we conclude that it does not warrant disbarment. *Id.* at 742.

This Court rejected a disbarment recommendation and imposed a 60-day suspension in *Fla. Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010), because the precedent relied upon by the referee had no nexus to facts of the case before him. It is therefore important to discuss the two cases relied upon by the Referee in his sanction recommendation.

The first case, *Fla. Bar v. Orta*, 689 So. 2d 270 (Fla. 1997), was a disbarment case wherein the lawyer was already serving a three-year suspension from the practice of law and had previously been

privately reprimanded. *Id.* at 271. The suspension was predicated on a felony conviction for income tax evasion. *Id.* at 271. The new unethical conduct was:

Count II

In the 1992 reinstatement proceedings, Orta failed to state in his answers to the Bar's interrogatory that he owned Canadian property and had a Canadian bank account, even though the interrogatory called for him to list all property and bank accounts. Prior to a May 1993 deposition, Orta cooperated with the Bar's investigation by signing a waiver of privacy and confidentiality with regard to the Canadian assets and executing a general release authorizing the Canadian bank to release all documents to the Bar. However, he was not truthful about his ownership of the Canadian property when first interviewed by the Bar's investigator (Arthur Gill) regarding the pending petition for reinstatement. Orta did not accurately describe his foreign holdings until the May deposition, i.e., after he was caught lying.

Count III

Orta conceded that he improperly failed to disclose to the IRS the aforementioned Canadian assets and a Canadian safety deposit box. He also conceded that he falsely stated on his 1991 tax return that he had no foreign bank account. He was obligated by law to report the assets.

Count IV

Orta offered to the reinstatement referee and to a bank official arguably different

explanations as to the origin of the currency in his Canadian bank accounts. It therefore appeared he was not truthful in at least one of his statements.

Count V

Orta admitted that he failed to disclose to the United States Probation Office the existence of the Canadian assets even though he was required to complete financial statements and monthly supplements that solicited information about bank accounts and property.

One of the more crucial factors in disbaring Orta was the Court's finding that they were:

. . . 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. *Id.*

In the case at hand there is no prior felony conviction, no prior three-year suspension, no denied reinstatement, and no prior private reprimand. Further, the dishonest acts, as found by this Referee, respectfully pale in comparison to those found in *Orta* and as the Court significantly noted that: “. . . Orta committed these offenses while still under suspension for similar misconduct. These circumstances constitute considerable aggravation.” *Id.* at 273.

The second case referenced in the Report of Referee was *Fla. Bar v. Berthiaume*, 78 So. 3d 503 (Fla. 2011), which was decided after the Court began its trend to harsher sanctions. This was a 91-day suspension case, which does not support the recommended disbarment. However, it is important to note the misconduct in *Berthiaume*, which was:

On September 25, 2004, Respondent signed and served by United States mail a document entitled "Subpoena Duces Tecum" on Pelican Bank. The purported subpoena directed the bank to produce the records of Respondent's client, specifically seeking information regarding checks that the client had written to Respondent from the client's account at the bank. Previously, the bank had not honored the checks. The fraudulent subpoena stated: "If you fail to produce these records and the above requested information as described, you may be held in contempt of court, punishable by a fine or incarceration or both." There was no pending case and the purported subpoena was not authorized by law. The bank refused to honor the false subpoena, and a lawyer for the Bank filed a Bar complaint regarding Respondent's conduct.

The referee found by clear and convincing evidence that Respondent was responsible for the language in the fraudulent subpoena, including the language threatening incarceration and contempt. Respondent designed the purposefully misleading subpoena to cause the bank to produce the

records, even though she did not have any legal authority for the subpoena. Further, Respondent knowingly and deliberately sent the false subpoena.

Based on these factual findings, the referee recommended finding Respondent guilty of violating Rule Regulating the Florida Bar 4-8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice). The referee accurately noted that all members of the legal profession must conduct themselves responsibly and professionally to preserve the integrity of our system. As the referee stated, it is unacceptable for a member of The Florida Bar to knowingly and deliberately utilize a fraudulent subpoena to threaten a third party with incarceration or mislead them to produce documents. 505-506

As this Court will note, *Berthiaume* included a significant element of misconduct not found in this case – abuse of process and the misrepresentation made it appear to the recipient of the fraudulent subpoena that they could be held in contempt if they did not comply.

A variety of mitigating factors were established during this proceeding, and they can be found in Standard 3.3. Mitigation is described, in subsection (a) of Standard 3.3, as “any factor that justifies a reduction in the degree of discipline to be imposed.”

Some mitigating factors are more compelling than others. For example, the first mitigating factor is very compelling – the lack of a prior disciplinary history over an eighteen-year legal career. Standard 3.3(b)(1). RR49.

Also, of a very compelling nature is Standard 3.3(b)(11) – the imposition of other penalties or sanction. The Respondent’s unchallenged testimony was that he resigned from the bench as a direct result of the matters referenced in the Bar’s complaint. RR49.

The Florida Supreme Court in *Davey* stated that:

Where a judge admits wrongdoing and expresses remorse before the Commission, this candor reflects positively on his or her present fitness to hold office and can mitigate to some extent a finding of misconduct. *Id. at 405.*

Further, it is uncontroverted that the Respondent settled the FEC complaint and that he paid a \$2,000.00 civil penalty to the FEC. See Resp. Ex. C. RR49. The Respondent also testified that the pending charges and the attendant publicity has hurt his ability to be employed by other law firms. TT3-90-91.

The next compelling mitigation factor was an otherwise excellent character or reputation in the legal community. Standard 3.3(b)(7). The Referee heard from the following character witnesses

each of whom knew the Respondent for a long period of time, several of them prior to the time that he was a lawyer. These witnesses included Christina Golobardes, a lawyer admitted in Spain (TT3-46-50); Rogelio del Pino, Esq., a 44-year member of the Bar (TT3-57-64); Annette Bigles, a realtor and family friend since she was 12 years old (TT3-64-70); Ernestina “Gisela” Valencia, a pro-bono client, and now longtime friend and someone who helped in Respondent’s election campaigns (TT3-75-80); Isabel Martina, a member of the Venezuela Bar and who actively conducts civic service with the Respondent (TT3-80-85); and Marisol Ravelo, who served as Respondent’s judicial assistant when Respondent served as a county court judge (TT3-70-75).

Also uncontroverted by the Bar is the fact that, as to the campaign finance reports, he took remedial action to correct same. See Standard 3.3(b)(4) [timely good faith effort to make restitution or to rectify the consequences of the misconduct]. Respondent initially had an outside accountant helping him and then replaced that person with Jhanet Garcia and her firm J. Garcia and Associates. Together they amended the campaign finance reports and while not perfect at the outset, made the amendments when

they discovered the mistakes. Resp. Ex. A. No one else had the bank records, and no one would have known of the situation but for the remediation taken by the Respondent and Garcia.

Closely related to the preceding Standard is Standard 3.3(b)(10) [interim rehabilitation]. The Referee heard the testimony from Jose Riesco, CPA, who the Respondent retained to assist in the filing of his 2020 campaign finance reports because Mr. Riesco is recognized as an expert in this field. TT3-50-57. While the Bar was able to nitpick, the early reports compared to banking statements prior to Mr. Riesco's retention, there was no finding anywhere that the reports were not properly amended to correct any errors.

At the outset of Respondent's testimony, he candidly admitted that he made mistakes on his campaign finance reports and that his JNC application and related financial disclosure forms had unintentional omissions from these documents. The dispute in this case is not about what was missing from these documents, but whether there were intentional omissions, rather than negligent ones. Notwithstanding this factual disagreement, the Respondent was able to initially settle this disciplinary action and executed a

Consent Judgment admitting to rule violations and accepting a suspension from the practice of law. The Supreme Court's decision to reject same brought us to trial, but it does not change the fact that the Respondent cooperated with the Bar during its investigation and in trying to resolve this case. See Standard 3.3(b)(5) [full and free disclosure to the bar or cooperative attitude toward the proceedings].

During the sanction hearing (and during his direct testimony) the Respondent expressed his heartfelt remorse for his errors and discussed the personal impact of these events that has led him to seek counselling. TT3-98-101. See Standard 3.3(b)(12) [remorse].

While not blaming his omissions on anyone but himself, the Referee heard testimony concerning Respondent's mother passing away in March of 2020, his medical struggle to overcome malignant cancer from May 2020 through November 2020 and that he was divorced in the summer of 2020. TT2-69-70; TT3-87. Further, the Respondent testified about his difficult and life-threatening sojourn with COVID, which he caught while on the Bench, from February 2021 through December 2021 and a recurrence from January 2022 until March 2022. TT2-21; TT3-90. Standard 3.3(b)(3) [personal or

emotional problems] was therefore established on the record.

A comment should also be raised about Standard 3.3(b)(9) [unreasonable delay in the disciplinary proceedings if the respondent did not substantially contribute to the delay and the respondent demonstrates specific prejudice resulting from that delay]. At the outset of the proceedings the Respondent filed a Motion to Dismiss (included with his Answer to the Complaint) which set forth the following timeline for the prosecution of this grievance:

The initial grievance in this matter was received by The Florida Bar on May 14, 2018, and the Respondent timely responded to same on June 8, 2018. The Florida Elections Commission March 1, 2019, Consent Order was shared with the Bar shortly after that date. While there were long periods of no record activity in the matter, there was a Finding of Probable cause by a Grievance Committee dated December 4, 2019. The Respondent was elected to the Miami-Dade County Court on or about August 19, 2020. From December 4, 2020, through the time frame that they lost jurisdiction over the Respondent due to his becoming a member of the Judiciary on or about January 4, 2021, the Bar failed to file its Formal Complaint in this matter. They had more than a two and a half year period of time to resolve this Complaint but failed to take any action to resolve this matter. The instant matter could have easily

been resolved, mitigated investigated or litigated prior to Respondent taking the Bench. Respondent resigned from the bench on April 20, 2021, and jurisdiction was once again confirmed upon the Bar. The Florida Bar confirmed they were once again investigating this matter by letter dated June 18, 2021. On July 27, 2021, the Bar forwarded a document described as an Amended Notice of Grievance Committee and two months later, on September 24, 2021, the Bar sent a Second Amended Notice of Grievance Committee Review to the Respondent. More than 22 months after initially entering a Finding of Probable Cause, the Bar forwarded a document styled Amended Notice of Probable cause which was dated October 18, 2021. On October 26, 2021, the Bar, some 30 months after the matter was first received by The Florida Bar, the Bar filed its Formal Complaint in this matter.

During the hearing on the Motion to Dismiss (which was denied) the Respondent introduced documentation to confirm this timeline. The Standard requires a specific finding of “prejudice from the delay.” A prejudice finding is problematic as the Respondent did not lose a witness or document merely due to the passage of time, but the long-drawn-out pendency of these matters did cause him to seek counselling, which he continues through today. Further, it was the Respondent’s uncontroverted testimony that he was unable to find employment in the legal field for a

significant period of time due to the pendency of these charges.

One can also look to *Fla. Bar v. Wolf*, 930 So. 2d 574 (Fla. 2006), where this Court used, as mitigation, the delay between the time of an audit by the Bar and the ultimate filing of a formal complaint. In *Wolf* there was a one-year delay in filing a formal complaint as compared to the completion of an audit by the Bar. *Id.* In the case at hand there was an almost two-year delay between the initial finding of probable cause and the ultimate filing of a formal complaint.

While this case is a bar disciplinary proceeding, an examination of Judicial Qualifications Commission proceedings (with later Bar discipline) provides some guidance on how to secure an appropriate sanction in this case.

This Court removed a county court judge in *Inquiry Concerning Santino*, 257 So. 3d 25 (Fla. 2018), for misconduct related to her successful campaign wherein the Court noted that:

Candidate Santino, individually, and through her campaign manager, made statements about Mr. Lerman's integrity, with reckless disregard of the truth. . . . It was a calculated, tactical decision to ensure that Santino won her election for a judgeship. While she disclaims her role in this process,

Judge Santino was reckless in delegating decision-making to her campaign manager, without supervision, and permitting him to speak and act on her behalf continuously even after the filing of the JCPC complaint (October 25, 2016), when she believed she had been misled. *Id.* at 30 (footnote omitted).

After she was removed from the bench, there was also a Bar proceeding, wherein the parties entered into a Consent Judgment which approved a 90-day suspension. *Fla. Bar v. Fragakis (f/k/a Santino)*, Supreme Court Case No. SC21-1122, 2021 Fla. Lexis 1341 (Fla. 2021).

In *Fla. Bar v. Aven*, 317 So.3d 1095 (Fla. 2021), decided several months prior to *Fragakis*, but after the JQC proceeding in *Santino*, a lawyer who unsuccessfully sought election to the Bench received a public reprimand when that lawyer “attempted to impugn” a judge’s:

. . . integrity, citing his record in criminal cases presided over, while repeatedly implying that Respondent was biased in favor of state prosecutors and law enforcement. *Id.* at 1096.

There are multiple public reprimand cases similar to the conduct found in *Aven*. See for example, *Fla. Bar v. Hotusing*, 121

So. 3rd 1038 (Fla. 2013); *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Fla. 2003).

In 2017 the Florida Supreme Court publicly reprimanded and suspended for 90 days a sitting judge for misrepresenting that she had received a newspaper's endorsement that year, when in fact it was an endorsement from a prior year. *Inquiry Concerning Shepard*, 217 So. 3d 71 (Fla. 2017). As the judge remained on the bench, there was no follow-up prosecution by the Bar.

In a different Bar action, a lawyer, who unsuccessfully campaigned for a judicial position, was publicly reprimanded for personally soliciting campaign contributions in violation of the Canons of Judicial Conduct. *Fla. Bar v. Williams-Yulee*, 138 So. 3d 379 (Fla. 2014).

Earlier this year, this Court approved a consent judgment in *Inquiry Concerning Blumstein*, 354 So. 3d 511 (Fla. 2023), wherein the judge received a public reprimand for misleading campaign advertisements.

Several lawyers have been suspended for one year for making significant misrepresentations. These cases include *Fla. Bar v. Rotstein*, 835 So. 2d 241 (Fla. 2002), where the misconduct

included neglecting a legal matter, allowing a statute of limitations to expire, failing to advise the client of that fact, and instead sending a backdated letter to the client to hide his error and then submitting this false document to the Bar, as well as three others during the disciplinary proceeding. In addition to these bad acts, Rotstein also engaged in two counts of conflict of interest, but more importantly had significant aggravating factors which included a prior disciplinary offense which is not found herein. *Id.* at 246. Further, another one-year suspension is found in *Fla. Bar v. Bischoff*, 212 So. 3d 312 (Fla. 2017). In *Bischoff*, the Court described the unethical activity in great detail including the lawyer's utter failure to participate in proper discovery practices, misusing that courts electronic filing system, misleading the court, failing to follow court orders and a specific finding of "a profound lack of respect for the court." *Id.* A lawyer was also suspended for one year in *Fla. Bar v. Dupee*, 160 So. 3d 838 (Fla. 2015). In *Dupee*, the Court provided a detailed description of how the lawyer allowed significant false financial information and testimony to be presented and the lawyer also had a trust account violation relative to his handling of disputed property (a coin collection). *Id.*

In *Fla. Bar v. Marrero*, 192 So. 3d 23, 25 (Fla. 2016), a three-year suspension case with specific harm, the Court noted that:

. . . Respondent violated rule 4-8.4(c) by: (1) drafting, executing, and witnessing a mortgage loan document containing the misrepresentation that the borrowers had the legal authority to encumber the subject property; (2) deliberately and knowingly failing to inform Gonzalez that the funds she provided were not being used in accordance with her agreement and failing to inform her of the delay in recording the loan and recording her interest in the property; and (3) failing to disclose the Gonzalez loan in the course of his handling of the Countrywide Bank loan. The Court also found that Respondent violated rule 5-1.1 by failing to dispense the funds provided by Gonzalez and held by him as escrow agent in accordance with terms of the agreement between Gonzalez and the borrowers.

A comment should also be made about two more recent three-year suspension cases to contrast them with the conduct herein. The first case is primarily a conflict-of-interest case, wherein the Court described the facts as follows:

With regard to the Lamborghini agreement, the referee found that the agreement was in writing and conferred a security interest in the Lamborghini in favor of Parrish's firm in the amount of \$30,000. Bergaoui was given ninety days to sell the vehicle for at least \$30,000, with \$30,000 to be paid to the firm for legal fees. If Bergaoui failed the sell the vehicle within ninety days, the firm would then have the right to market and sell the vehicle and

give Bergaoui a credit for current and future legal fees in the amount of the sale or in the amount of \$80,000, at the firm's discretion. The agreement, entered into evidence before the referee, required Bergaoui to "execute and sign over to PWL [Parrish's firm] title, in blank," to the car "to hold as security against the payment of fees." It further required Bergaoui to, within ninety days, "procure a purchaser for the vehicle for not less than \$30,000." Upon procurement of a purchaser, the agreement provided that the "parties will cooperate to close upon the vehicle" and payment "shall be made to PWL to be held in escrow." Upon receipt of payment, PWL agreed to "release the title to the purchaser," then "disburse \$30,000 to itself for payment of past and on-going legal fees and shall release any remainder to Bergaoui." If the vehicle was not sold in the ninety days, Bergaoui was required to "deliver the car to PWL" who then had the "right to market and sell the vehicle and apply the funds to Bergaoui's then legal fees or to future legal fees or to credit Bergaoui's account in the sum of \$80,000, at its discretion and sole option." *Fla. Bar v. Parrish*, 241 So. 2d 66, 72-73 (Fla. 2018).

In *Parish* the Court found only one mitigating factor, the absence of a prior disciplinary record, but in this case, there is much more mitigation, as is described more fully above. *Id.* at 80.

Fla. Bar v. Kinsella, 260 So. 2d 1046 (Fla. 2018) is another three-year suspension case, but the conduct is much more severe than that found herein in that the lawyer was charged with of grand

theft for stealing less than \$1,000.00 from a cash register where she worked and was able to resolve her criminal case by way of a plea to a misdemeanor. One of the significant factors in deciding against disbarment was that:

While her misconduct was inexcusable, Kinsella's theft did not involve client funds and was unrelated to the practice of law. Moreover, Kinsella cooperated with authorities in the aftermath of her crime. *Id.* at 1050.

A comment must also be made about *Jacobs* in that the Court, wherein the Court imposed a 91-day suspension for egregious repeated outrageous commentary about multiple members of the bench. In rejecting the Bar's request for a two-year suspension this Court compared *Jacobs* actions against other case law, especially the mitigation and aggravation that was present in each such case and highlighted the fact that *Jacob's* had no disciplinary record. *Jacobs*.

In the longer suspensions discussed above, the theme seems to be taking advantage of another by way of intentional dishonest acts, with many of those cases causing financial damage to a client or third party. The omissions at the core of the Bar's presentation do not cause anyone financial harm and as is noted above, the

complaining witness did not testify as to any harm to her because of these omissions. Her only claim to potential harm was that the temporarily misstated loan might have “scared” other candidates away from the race. Respectfully, that is not the harm contemplated by the Standards or existing precedent.

This Court in *Fla. Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), stated that in selecting an appropriate discipline certain fundamental issues must be addressed. They are: (1) Fairness to both the public and the accused; (2) sufficient harshness in the sanction to punish the violation and encourage reformation; and (3) the severity must be appropriate to function as deterrent to others who might be tempted to engage in similar misconduct. The Referee’s disbarment recommendation does not meet these criteria.

CONCLUSION

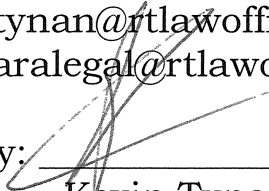
This is not a disbarment case, and the Referee should be reversed as to his sanction recommendation and his finding that the Respondent engaged in intentional misrepresentations by omissions, when the record before this Court clearly documents that these omissions were negligent and unintentional. A one-year suspension is the appropriate level of sanction for this case based

upon precedent discussed above and if the Court does find some of the conduct to be intentional the appropriate sanction would be no more than a three-year suspension.

WHEREFORE, Respondent, MIGUEL FERNANDO MIRABAL respectfully requests this Court reverse the findings of intentional conduct and impose a rehabilitative suspension of one year and for any further relief this Court deems reasonable and just.

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Co-Counsel for Respondent
8142 North University Drive
Tamarac, Florida 33321
Telephone: (954)721-7300
ktynan@rtlawoffice.com
paralegal@rtlawoffice.com

By: 
Kevin Tynan, Esq.
TFB No. 710822

Herman J. Russomanno, Esq.
Fla. Bar No. 240346
Herman J. Russomanno III, Esq.
Fla. Bar No. 21249
RUSSOMANNO & BORRELLO, P.A.
Co-Counsel for Respondent
150 West Flagler Street, Suite 2800
Miami, Florida 33130
Telephone: (305) 373-2101
hrussomanno@russomanno.com
herman2@russomanno.com

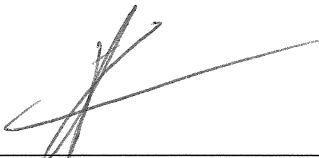
CERTIFICATE OF TYPE, SIZE AND STYLE, WORD COUNT

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Bookman Old Style font, that it does not exceed thirteen thousand (13,000) words and it excludes the content authorized to be excluded under the rule.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via the e-portal to: Jennifer R. Falcone, Esq., Bar Counsel, The Florida Bar, 444 Brickell Ave., Ste. M-100, Miami, FL 3313, (jfalcone@floridabar.org; nfronckowiak@floridabar.org), Patricia Ann Toro Savitz, Esq., Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399, (psavitz@floridabar.org); and Mark Lugo Mason, Bar Counsel, The Florida Bar, 651 East Jefferson St., Tallahassee, FL 32399-2300, (mmason@floridabar.org; mhowland@floridabar.org), on this 23rd day of June, 2023.

By: _____



Kevin Tynan, Esq.