IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

LARRY ELLIOT KLAYMAN,

Respondent.

_____/

Supreme Court Case No. SC23-1219

The Florida Bar File No. 2020-00,515(2A)
2020-00,515(2A)

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Complainant is referred to as The Florida Bar or the bar. The Respondent is referred to as Mr. Klayman.

The electronic record in this case is comprised of two filings docketed in this Court. The filings by the parties before the referee and the sanction hearing transcripts are included in a May 17, 2024, docket entry. Citations to this 4,907-page filing are referred to by "R:" followed by applicable page numbers. Exhibits were separately docketed on May 24, 2024. Citations to the parties' exhibits will refer to the applicable party and exhibit number (e.g. "TFB-Ex.1" or "R-Ex.1") as well as the applicable page numbers of the 3,597-page filing.

The report of referee is referred to as "ROR:", and the initial brief is referred to as "IB:".

NATURE OF THE CASE

This is a lawyer disciplinary case seeking reciprocal discipline after respondent was the subject of two suspension orders issued in the District of Columbia. In Count I, the bar seeks reciprocal discipline based on Mr. Klayman's representation of three clients despite known conflicts of interest. Specifically, he represented three clients who sued Mr. Klayman's former employer. In Count II, the bar seeks reciprocal discipline based on

several rules violated by Mr. Klayman in representing Elham Sataki. The rule violations in Count II were primarily due to Mr. Klayman's efforts to (1) publicize the case based on his selfish interest to benefit his professional reputation as a conservative activist; and (2) pursue a personal relationship with Ms. Sataki.

The referee relied on the findings of the District of Columbia suspension orders as conclusive proof of guilt, as authorized by binding case law from this Court. However, due to substantial aggravating circumstances, the referee recommends a stronger sanction of a two-year suspension from the practice of law.

On appeal, Mr. Klayman argues that this Court should reject the referee's findings, and by extension the District of Columbia suspension orders. He asserts the matter is time barred, he did not receive due process in either the District of Columbia or before the referee, and there was a paucity of proof supporting every rule violation found in the suspension orders. This brief will assert that none of these issues have merit and this Court should adopt the referee's report in full.

STATEMENT OF THE CASE AND FACTS

The misconduct at issue in this case had already been the subject of lengthy orders entered in the District of Columbia Court of Appeals on June

11, 2020, and September 15, 2022. (TFB-Ex.1 & 2, pg.3-45). On August 29, 2023, The Florida Bar filed a two-count formal complaint for reciprocal discipline against Mr. Klayman based on the suspension orders. (R:8-22).

I. In Count I, Mr. Klayman was suspended for 90 days in the District of Columbia based on three conflicts of interest.

Count I of the formal complaint is based on Mr. Klayman's misconduct at issue in the June 11, 2020, suspension order. Mr. Klayman engaged in misconduct—specifically, three conflicts of interest—in his representation of Sandra Cobas, Louise Benson, and Peter Paul in their causes of action against a conservative watchdog group called Judicial Watch. Mr. Klayman founded Judicial Watch and served as its general counsel from 1994 until 2003. (TFB-Ex.1, pg.4).

Before Mr. Klayman's representation of the three individuals, he either provided legal advice to Judicial Watch on the matters or was directly involved in the actions at issue. He never sought Judicial Watch's consent to the representation. (R:2299; R:2301). In the first matter, Mr. Klayman represented Ms. Cobas, the former director of Judicial Watch's Miami Regional Office. (TFB-Ex.1, pg.4). In 2003, Mr. Klayman provided legal advice to Judicial Watch regarding Ms. Cobas's allegations of a hostile work environment. *Id*., pg.4-5. After Mr. Klayman and Ms. Cobas ended their employment with Judicial Watch, Ms. Cobas filed a claim against her

former employer, which was dismissed. *Id*. Mr. Klayman entered an appearance on Ms. Cobas's behalf and filed a motion to vacate. *Id*. The court denied the motion, Mr. Klayman filed a notice of appeal and initial brief on Ms. Cobas's behalf, and the appellate court affirmed the ruling. *Id*.

In the second matter, Mr. Klayman represented Ms. Benson, who sought the return of $15,000.00 she had donated to Judicial Watch towards the purchase of a building that never took place. *Id*, pg.5. Mr. Klayman solicited her donation in his capacity as chairman and general counsel of Judicial Watch. *Id*. Other counsel for Ms. Benson filed suit against Judicial Watch in federal court in 2006, but it was dismissed on jurisdictional grounds. *Id*., pg.5-6. Ms. Benson filed a new lawsuit in the Superior Court of the District of Columbia, and Mr. Klayman filed an appearance as her co-counsel. *Id*. Judicial Watch requested his withdrawal as counsel because he was a material fact witness. *Id*. When Mr. Klayman did not withdraw, Judicial Watch moved the court to disqualify him, though the matter was not adjudicated because the parties stipulated to dismissal. *Id*.

In the third matter, Mr. Klayman represented Mr. Paul in a lawsuit against Judicial Watch regarding a breach of a representation agreement. As general counsel of Judicial Watch, Mr. Klayman drafted, edited, and approved the representation agreement and a modification in 2001. (*Id*.,

pg.6-7; R:2300-01). Judicial Watch later withdrew from representation of Mr. Paul in a lawsuit filed in California. (TFB-Ex.1, pg.7). Through other counsel, Mr. Paul sued Judicial Watch in the District of Columbia alleging breach of the representation agreement. *Id*. Mr. Klayman later filed an appearance in the case. *Id*. The federal court granted Judicial Watch's motion to disqualify Mr. Klayman. *Id*.

The referee's report incorporated these findings from the suspension order, as well as the finding that "the misconduct was not isolated and that Respondent acted vindictively and was motivated by animus toward Judicial Watch, with which he had developed an acrimonious relationship." (R:2662-65). In the suspension order, Mr. Klayman was found guilty of violating Rule 1.9 of the District of Columbia Rules of Professional Conduct (conflict of interest). (R:2683). The report of referee found that the order "serve[d] as conclusive proof of such misconduct in this disciplinary proceeding" under Rule 3-4.6. (R:2683-84).

II. In Count II, Mr. Klayman was suspended for 18 months in the District of Columbia based on seven rule violations committed in his representation of Elham Sataki.

Count II of the formal complaint is based on the September 15, 2022, suspension order. In 2009, Mr. Klayman met Elham Sataki, who told him that while working as a reporter for Voice of America, she was transferred

after reporting sexual harassment. (TFB-Ex.2, pg.17). Mr. Klayman agreed to represent Ms. Sataki on a contingent basis, receiving forty percent of any award. *Id*. Mr. Klayman later unilaterally increased his fee to fifty percent, though there is no written agreement memorializing the original terms or unilateral modification. *Id*.

Mr. Klayman's negotiations with Voice of America were unsuccessful. *Id*., pg.18. He encouraged Ms. Sataki to relocate from the District of Columbia to Los Angeles so she could transfer to the Voice of America office there. *Id*. Mr. Klayman paid her living expenses in Los Angeles. *Id*. They agreed he would be reimbursed out of any award Ms. Sataki won, in addition to the contingency fee. *Id*. Voice of America denied Ms. Sataki's transfer request, and Mr. Klayman filed a lawsuit against Ms. Sataki's alleged harasser and her supervisors. *Id*.

Ms. Sataki informed Mr. Klayman that she wanted her case to be "very quietly handled." *Id*. Though he initially respected her wishes, Mr. Klayman later pursued a strategy to draw media attention. *Id*. He filed a lawsuit against members of Voice of America's Broadcasting Board of Governors, which included prominent public figures, like then-Secretary of State Hillary Clinton. *Id*. Ms. Sataki did not agree to this second lawsuit and wanted to focus on her harasser and supervisors. *Id*. Mr. Klayman filed

motions to disqualify the district court judge assigned to both of Ms. Sataki's cases, arguing that the judge was politically biased. *Id*, pg.18-19. Mr. Klayman also wrote articles referencing Ms. Sataki's case and providing confidential information about her. *Id*., pg.19. Ms. Sataki was "completely against" the articles but relented when Mr. Klayman told her publicity would help her case. *Id*.

Beginning in April 2010, Mr. Klayman repeatedly expressed romantic feelings towards Ms. Sataki. She told him they could only be friends, but Mr. Klayman continued undeterred in expressing his feelings for several months, which made Ms. Sataki "very, very, very uncomfortable." *Id*. Mr. Klayman's correspondence to his client repeatedly acknowledged his feelings had "rendered me non-functional even as a lawyer," "It[']s very hard to be a lawyer and feel so much for your client," he had "not been able to function lately, because [he was] out there so far emotionally and got nothing back," and that Ms. Sataki would "get better legal representation with someone else … who does not have an emotional conflict and can keep his mind clear." *Id.*, pg.19-20.

In July 2010, Ms. Sataki directed Mr. Klayman to withdraw the second lawsuit against the Broadcasting Board of Governors. *Id*., pg.20. She wrote to an executive at Voice of America explaining that she had instructed Mr.

Klayman to withdraw any and all civil actions that he filed on her behalf because he was no longer representing her. *Id*. Mr. Klayman received a copy of this letter. *Id*. Nevertheless, he did not dismiss the lawsuit and continued to act on Ms. Sataki's behalf by filing a motion to reconsider a dismissal order. *Id*.

In November 2010, Ms. Sataki wrote another letter to Mr. Klayman reiterating his termination as her counsel. *Id*. Mr. Klayman testified that he did not receive it. *Id*. Ms. Sataki wrote him another letter in January 2011 again stating that he was "not representing [her] in any way or shape." *Id*. In his reply, Mr. Klayman implied she had not written the e-mail and that he "[could not] allow her legal rights and obligations to be compromised or lost altogether." *Id*., pg.20-21. Without client authorization, Mr. Klayman filed a notice of appeal challenging the dismissal of the second lawsuit against the Broadcasting Board of Governors. *Id*.

In this reciprocal discipline proceeding, Mr. Klayman denied any romantic intentions toward Ms. Sataki, contested the existence of an oral contingency fee agreement, and asserted that he consulted with Ms. Sataki about his actions in the case. (R:2669). He acknowledged his client's initial reluctance to pursue publicity but asserted that Ms. Sataki agreed to the strategy. *Id*.

The report of referee noted that in the 2022 suspension order, the Court of Appeals in Washington, D.C. found that Mr. Klayman violated seven District of Columbia Rules of Professional Conduct, addressed *infra*. (R:2683-84). The Florida Rules of Professional Conduct contain the same provisions with substantially similar language.[1]

III. Based on the violations at issue and the aggravating factors, the report of referee recommends Mr. Klayman's two-year suspension from the practice of law.

The referee held a two-day sanction hearing, during which Mr. Klayman asserted that the referee should not render findings of guilt based on the two suspension orders. The referee's report found that Mr. Klayman's arguments regarding the lapsing of the statute of limitations, lack of notice, a paucity of proof, and other grave reasons not to accept foreign judgments as conclusive proof of guilt were without merit. (ROR:12-17). The referee held that Mr. Klayman briefed these arguments in the District of Columbia cases, received adverse rulings, and relitigated every issue in this reciprocal case because he did not receive an order containing

[1] The respective Rules of Professional Conduct governing members of the bars of the District of Columbia and Florida generally follow the model rules published by the American Bar Association. Chapter 4 of the Rules Regulating The Florida Bar contains the Rules of Professional Conduct. Both jurisdictions use the same numbering scheme, though the Florida Rules include the chapter number beforehand (e.g., this state's equivalent of Rule 1.2 of the District of Columbia Rules of Professional Conduct is Rule 4-1.2 of the Florida Rules of Professional Conduct).

the level of specificity he desired. (ROR:17). The referee held that this was an insufficient basis to reject the two suspension orders. *Id*.

Though the bar recommended an 18-month suspension from the practice of law in conformity with the 2022 suspension order, the referee found this was a rare case justifying a stronger sanction. (ROR:28). Instead, the referee recommends a two-year suspension and payment of the bar's costs. (ROR:29). Mr. Klayman challenges every finding of guilt already adjudicated in Washington, D.C., and he alternatively argues that his conduct only warrants a public reprimand. This answer brief asks this Court to accept the referee's report in full.

SUMMARY OF THE ARGUMENT

Due to Mr. Klayman's exhaustive efforts to relitigate every rule violation already adjudicated in the District of Columbia, this reciprocal disciplinary proceeding has been grossly over-litigated. Unfortunately, these exhaustive efforts continue on appeal. Reciprocal discipline is a straightforward matter obviating the need for multiple days of a final hearing on guilt. Regarding Count II alone, Mr. Klayman participated in a six-day final hearing on guilt, unsuccessfully appealed the matter, then filed an unsuccessful lawsuit based on fraud on the court. Both suspension orders are final and conclusive proof of the misconduct at issue under Rule 3-4.6.

Binding case law limits the litigable issues in a proceeding seeking reciprocal discipline. But even after these orders became final and the appeals had concluded, Mr. Klayman took no responsibility or accountability for his conduct. Instead, he disparaged opposing counsel, judges, and generally any court that did not rule in his favor. This Court's case law states that orders of foreign courts imposing discipline on lawyers licensed in Florida are conclusive proof of guilt. Case law provides a very limited right of respondents to challenge findings of guilt imposed by a foreign jurisdiction. Mr. Klayman did not meet his heavy burden, and the aggravating factors in this case warrant the referee's recommendation of a two-year suspension.

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

This is an original proceeding filed under this Court's exclusive jurisdiction "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const.

1. Findings of Fact

The procedural posture of this case is different than a more typical lawyer disciplinary proceeding. When a foreign jurisdiction imposes discipline on a lawyer licensed in this state, this Court retains jurisdiction to discipline the lawyer for the same conduct. Rule 3-4.6(a). In a typical

disciplinary proceeding, a review of a referee's findings of fact is limited and will not be reweighed if supported by competent, substantial evidence in the record. *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016). In reciprocal proceedings, a final adjudication by another jurisdiction "makes such a foreign judgment of guilt conclusive proof of such misconduct in a disciplinary proceeding in this state." *The Florida Bar v. Wilkes*, 179 So. 2d 193, 197 (Fla. 1965).

This Court has held that "[p]roof of guilt of the acts of misconduct adjudicated in the sister state is accomplished by simply proving the entry of the foreign judgment." *Wilkes*, 179 So. 2d at 197. Such action "eliminates any necessity to retry the bare issue of guilt and makes unnecessary the production in Florida of testimony and evidence on this issue." *Id*.

The referee did not conduct a final hearing on guilt, because Mr. Klayman's guilt was already conclusively proven. To the extent the initial brief challenges findings of fact by the referee, the material inquiry is whether the finding of fact was stated in the Washington, D.C. suspension orders. A foreign judgment imposing discipline is conclusive unless the respondent meets the burden of showing one of three deficiencies in the foreign judgment:

(1)The attorney had no notice or opportunity to be heard;

(2) There was such an infirmity or paucity of proof that the court could not accept the judgment as final; or

(3) Some other grave injustice would result in relying on the foreign judgment as conclusive proof of guilt.

Wilkes, 179 So. 2d at 198. "It is not enough for the opposing party merely to assert that an issue does exist." *The Florida Bar v. Mogil*, 763 So. 2d 303, 307 (Fla. 2000) (quoting *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979)).

2. Recommendation of Discipline

In reciprocal discipline proceedings, this Court is free to impose more severe punishment than the punishment imposed by the sister state. *The Florida Bar v. Hagendorf*, 921 So. 2d 611 (Fla. 2006). The referee's recommendation of discipline is subjected to greater review by this Court because of this Court's ultimate responsibility to make that decision. See *The Florida Bar v. Altman*, 294 So. 3d 844, 847 (Fla. 2020).

This Court has given notice to the members of the bar that it is moving toward stronger sanctions than in the past. See *The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015); see also *Altman* at 847. As a result, case law prior to 2015 needs to be examined carefully to make certain that the application of sanctions in these earlier cases comports with current standards.

3. Consideration of Mitigating and Aggravating Factors

A referee's findings on mitigating and aggravating factors are treated like any other finding of fact:

> [A] referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See The Florida Bar v. Summers*, 728 So. 2d 739, 741 (Fla. 1999). This standard applies in reviewing a referee's findings of mitigation and aggravation.

The Florida Bar v. Arcia, 848 So. 2d 296, 299 (Fla. 2003).

The burden of demonstrating that the findings in aggravation or mitigation are clearly erroneous lies with the party challenging the findings. *See The Florida Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997) (holding that the burden of disproving a referee's findings of fact or recommendations as to guilt is upon the party challenging those findings).

Once the factors of mitigation and aggravation are found to exist, they are applied to "justify" an increase or a reduction in the "degree of discipline to be imposed." *Florida Standards 3.2(a), 3.3(a)*. This process of balancing the positive and negative factors is a mixed question of fact and law. It is part of the ultimate decision to impose a sanction.

ARGUMENT

I. Regarding both suspension orders entered in the District of Columbia, Mr. Klayman was afforded notice and an opportunity to be heard, and he fully exercised those due process rights at trial and on appeal.

As stated *supra*, it was Mr. Klayman's burden to demonstrate one of three infirmities in the District of Columbia suspension orders. The first infirmity is whether the attorney had notice and opportunity to be heard in the foreign jurisdiction. *Wilkes*, 179 So. 2d at 198 (Fla. 1965).

In this reciprocal case, Mr. Klayman moved into evidence the Specification of Charges filed against him regarding his representation of Ms. Sataki, which led to the 2022 suspension order. (See R-Ex.4, pg.252-63). Mr. Klayman submitted six volumes of hearing transcripts held in the District of Columbia. (R-Ex.24, pg.981-1523). The transcripts demonstrate that Ms. Sataki testified extensively from May 30, 2018 through June 1, 2018. The transcripts also demonstrate eight other witnesses, including Mr. Klayman, testified. This hearing resulted in the following:

(1) A 183-page report and recommendation of the Ad Hoc Hearing Committee issued in July 2019 recommending a 33-month suspension from the practice of law (R-Ex.5, pg.266-450);

(2) A 34-page report and recommendation of the Board on Professional Responsibility recommending an 18-month suspension instead (R-Ex.6, pg. 452-85);

(4) An initial brief filed by Mr. Klayman in the District of Columbia Court of Appeals challenging the recommendation (R-Ex.26, pg.1633-1728);

(5) The 30-page suspension order summarized *supra* (TFB-Ex.2, pg.16-45); and

(6) A November 2023 complaint filed in the Superior Court of the District of Columbia, in which Mr. Klayman sued Ms. Sataki, the hearing committee, the bar prosecutor, and other entities in an unsuccessful effort to set aside the order. (R-Ex.13, pg.664-780).

Mr. Klayman did not offer into evidence the same number of documents regarding Count I. This may be because Mr. Klayman did not challenge the findings that he repeatedly violated Rule 1.9 of the District of Columbia Rules of Professional Conduct (conflict of interest). (See TFB-Ex.1, pg.8). However, the final order of the District of Columbia Court of Appeals references the same legal process before a hearing committee, followed by the Board on Professional Responsibility, and finally a contested appeal resulting in a 90-day suspension. (See generally TFB-Ex.1, pg.3-15).

In *The Florida Bar v. Tipler*, 8 So. 3d 1109 (Fla. 2009), this Court held that disciplinary proceedings in a foreign jurisdiction were not deficient in due process because the attorney was afforded a full opportunity to be heard in the prior proceedings, was represented by competent counsel, and was afforded appeals to contest his discipline in the foreign jurisdiction.

Similarly here, the referee found that this case did not involve either a lack of notice or opportunity to be heard based on Mr. Klayman's participation in the D.C. proceedings. (R:2638).

II. The statute of limitations does not bar licensure action against Mr. Klayman's privilege to practice law in this reciprocal discipline matter.

Under the last two prongs of the test set forth in *Wilkes*, 179 So. 2d 193, 197 (Fla. 1965), Mr. Klayman argues (1) the lapsing of the statute of limitations constitutes a grave reason making it unjust to accept the foreign judgment as conclusive proof of guilt; and (2) there was a paucity of proof in the District of Columbia proceedings. Intermixed in both arguments are various due process issues asserted by Mr. Klayman. Subsection A of the bar's argument on this issue contains its primary assertion; specifically, the choice of law provision in Rule 3-4.6(b) required the referee to apply the law of the foreign jurisdiction, and the District of Columbia imposes no time limitation for lawyer disciplinary proceedings. Subsections B through D argue in the alternative that (1) the bar complied with the time limitation in Rule 3-7.16 to the extent it applies in this case; (2) the doctrine of laches is not an additional defense available to Mr. Klayman; and (3) Mr. Klayman did not demonstrate prejudice based on an unreasonable delay regarding the District of Columbia proceedings.

A. In a reciprocal discipline case, the choice of law provision in Rule 3-4.6(b) states that the laws of the foreign jurisdiction apply. Since the rules governing members of the bar in the District of Columbia state that no statute of limitations applies to lawyer discipline proceedings, this matter is not time barred.

The statute of limitations does not bar reciprocal discipline. Under Rule 3-7.16, a complainant must make written inquiry to the bar within six years from the time the misconduct was discovered or, with due diligence, should have been discovered. But this rule does not apply. The bar's formal complaint cited to Rule 3-4.6 in support of its assertion that the suspension orders constituted conclusive proof of guilt. (R:20). Subpart (b) of this rule is a choice of law provision stating that the rules of the foreign tribunal apply to the misconduct. As a member of the bar in the District of Columbia, Mr. Klayman was bound by its rules. At hearing, the referee noted that in Washington, D.C., there is no statute of limitations applicable to lawyer disciplinary proceedings. (R:2639-40). Rule 19.1 of the Washington, D.C. Board Rules governing members of the bar states, "Investigations, petitions, and the application of sanctions are not subject to any statute of limitations."

The referee held that no statute of limitations applied. (R:2639-40). In further support of this holding, the referee relied on *Merkle v. Robinson*, 737 So. 2d 540 (Fla. 1999). In that case, a plaintiff sued the estate of a

deceased doctor, alleging that the negligent provision of pre-natal obstetrical care to her mother caused her medical issues. The court dismissed the complaint as time barred. On appeal, the plaintiff argued that because she was born in West Virginia—which is where the cause of action accrued—the statute of limitations in West Virginia should govern. This Court held that when a tort action involves multiple states, "all substantive issues should be determined in accordance with the law of the state having the most 'significant relationship' to the occurrence and the parties." *Id*. at 542 (citing *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980)). The statute of limitations constituted a "substantive issue" under this significant relationship test. *Id*. at 542 (quoting *Bates v. Cook, Inc.*, 509 So. 2d 1112, 1114 (Fla. 1987)). Therefore, this Court found that the statute of limitations under West Virginia law applied.

The referee found the contrary opinion of Mr. Klayman's expert witness, Robert Klein—who is now serving as his counsel on appeal—did not address the choice of law provision and whether it applied to the statute of limitations.[2] (R:2645). The initial brief attempts to remedy this gap in

[2] The initial brief blurs the line between the dual roles of Mr. Klein as a witness before the referee and a legal advocate on appeal. The initial brief bolsters its assertions by citing Mr. Klein's expert testimony and his affidavit. (IB:28-29). This is somewhat ironic given that both counts of the complaint involve conflicts of interest. Given Mr. Klein's current role as a

testimony with legal argument. The brief asserts *Merkle* is only applicable to tort actions. (IB:15). But the choice of law provision codified in Rule 3-4.6(b) leads to the same result as *Merkle* regardless. There is no statute of limitations in this case due to Washington, D.C. Board Rule 19.1, which applies to this case by virtue of Florida's choice of law provision in Rule 3-4.6(b).

The initial brief alternatively asserts that under the significant relationship test stated in *Merkle*, Florida law should govern. (IB:15). This assertion is based on the fact that this reciprocal proceeding was conducted in Florida and will result in licensure action in Florida if upheld. Such an interpretation would render the choice of law provision in Rule 3-4.6(b) a nullity.

Mr. Klayman's argument falls short of establishing that Florida had a more significant relationship to Mr. Klayman's conduct than Washington, D.C. Of the three conflict of interest cases in Count I, only Ms. Cobas's case involved a proceeding in Florida, while the others involved proceedings in Washington, D.C. (See TFB-Ex.2, pg.4-7). Regarding Count II, Mr. Klayman's rule violations all related to his representation of Ms.

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legal advocate, the expert testimony should be viewed as argument of counsel. Argument of counsel does not constitute evidence. *Kunsman v. Wall*, 125 So. 3d 868, 870 (Fla. 4th DCA 2013).

Sataki in Washington, D.C. (R-Ex.4, pg.254). The underlying misconduct in Count II has no meaningful connection to Florida.

The plain language of Rule 3-4.6(b) states that "if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction will be applied to the conduct." Most of the conduct occurred in the District of Columbia. No statute of limitations defense applies in this case, pursuant to the rules in the District of Columbia.

B. Even if the six-year time limitation in Rule 3-7.16 applies to this proceeding, in whole or in part, the bar complied with this rule once it became aware of Mr. Klayman's suspension orders.

The bar's alternative responses to Mr. Klayman's arguments on the statute of limitations and doctrine of laches need not be considered. The remaining argument in this section is made in the alternative, should this Court find that Rule 3-7.16 applies in whole or in part.

Even if the six-year statute of limitations in Rule 3-7.16 applied, the suspension orders in Washington, D.C. were entered in 2020 and 2022. This reciprocal proceeding was initiated well within the six-year statute of limitations. In asserting otherwise, Mr. Klein, in his then-role as an expert witness, agreed that it is "generally true" that in a case involving reciprocal discipline, the bar does not operate under Rule 3-7.16. (R:2521). He also agreed the bar's pursuit of reciprocal discipline based on suspension

orders issued in 2020 and 2022 would be within the six-year statute of limitations. (R:2539).

However, he asserted that this case should not be treated as a reciprocal discipline case under Rule 3-4.6. (R:2533). Instead, he asserted the statute of limitations began to run in 2011, when Ms. Sataki filed her updated grievance form against Mr. Klayman in Washington, D.C. Specifically, Ms. Sataki submitted a handwritten complaint against Mr. Klayman with the Washington, D.C. Office of Disciplinary Counsel dated November 2, 2010. (R-Ex.7, pg.487). She wrote "No" next to a question asking if she filed a complaint about this matter anywhere else. *Id*. She later submitted an updated, typed complaint in October 2011. (R-Ex.7, pg.489). This updated complaint stated, "Complaint also filed in Pennsylvania and Florida." *Id*. Based on this one line, Mr. Klein assumed as true that (1) Ms. Sataki submitted her complaint to The Florida Bar in 2011; (2) the bar would have investigated her complaint; (3) Mr. Klayman would have been advised if The Florida Bar had found probable cause; and (4) since Mr. Klayman was never advised of such, this necessarily meant the bar determined there was insufficient cause for discipline. (R:2525-26).

Mr. Klein has never seen a complaint filed by Ms. Sataki with The Florida Bar. (R:2521). Nevertheless, he stated as fact that "there have been

other proceedings that could have and/or should have been initiated if there were grounds to move forward in Florida a long time ago." (R:2533). Regarding whether he could confirm the filing of a complaint with The Florida Bar in 2011, Mr. Klein stated, "I can only go by what I read." (R:2535). His initial brief takes an even stronger stance that the evidence on this issue "was conclusive." (IB:82, ft.24).

In the District of Columbia disciplinary proceeding, Mr. Klayman claimed, "[I]t says that simultaneous complaints were being filed with my other two bars, Florida and Pennsylvania. ***I responded to all three at the same time***. Florida and Pennsylvania ultimately were dismissed. They didn't find anything." (R-Ex.24, pg.998). This contradicted his later testimony before the referee, in which he offered no claim that he ever responded to a grievance in Florida, but instead stated that "[t]here's a presumption it was received by the Florida Bar, which they did not act upon and/or dismiss." (R:2378).

At the conclusion of the hearing, the referee rejected the litany of baseless assumptions made by the expert witness and Mr. Klayman in reaching this conclusion as follows:

> There is no indication of what address it was sent to, whether it was sent to the proper place. It could have been sent to the governor. It could have been sent to the legislature. It could have been sent to the local 7-11, for all the referee knows.

> There's a paucity of evidence for it actually being sent to The Florida Bar. Accordingly, the referee finds that the matter is untimely.

(R:2643).

Mr. Klayman continues to assert that one line on a grievance form in another state is irrefutable proof of Ms. Sataki's filing of the complaint with the bar. (See IB:26-27). To bolster the insufficient language on the 2011 complaint, Mr. Klayman argues that the form indicated that it was filed in Pennsylvania, and the Pennsylvania Bar confirmed its receipt. (IB:28). Mr. Klayman asserts that if Ms. Sataki transmitted her complaint to one bar, then "she should have been presumed to have been able to do so successfully to Florida, as well." *Id*.

The referee rejected this argument, finding that this circumstantial evidence did not establish Mr. Klayman's assertions by either a preponderance of the evidence standard or a clear and convincing evidence standard.[3] (R:2642). As additional circumstantial evidence, Mr. Klayman asserts that Ms. Sataki's subsequent counsel filed a motion

[3] At hearing, the referee expressed uncertainty regarding the applicable burden of proof when a respondent facing reciprocal discipline argues that the foreign jurisdiction's order should not be followed. (R:2364). The bar argued at trial, and now argues on appeal, that even though case law addressing reciprocal discipline cases has not definitively stated the respondent's burden of proof, the burden should be based on a clear and convincing evidence standard, as this is the burden of proof applicable in disciplinary proceedings in Florida, generally. (R:2617).

referencing the filing of her disciplinary complaint in Florida. (IB:28). This misinterprets the content of the filing. The motion to dismiss referenced a claim in the complaint filed by Mr. Klayman, which based on the legal standard for a motion to dismiss, must be accepted as true; it was not offering a statement of fact by Ms. Sataki. (See R:2098). The referee rejected Mr. Klayman's argument as follows:

> No, that's not what he said. If you look at what they actually wrote, it was a motion to dismiss. And a standard on a motion to dismiss is viewing the evidence—viewing the pleadings as true—they're not conceding that they are true, then the defendant still prevails as a matter of law. That's what they said. They said Mr. Klayman alleged in his complaint that she did it. Therefore, if that is true, then it is time-barred.

(R:2760-61).

Further, the referee found that under Rule 3-7.3(c), all grievances filed against members of The Florida Bar must be signed under penalty of perjury. (R:2641). Ms. Sataki's complaints filed in Washington, D.C. did not comply with this rule. (R-Ex.7, pg.487-93). Such noncompliance may have precluded an investigation until the complainant submitted a corrected complaint. The initial brief does not meaningfully assert otherwise, as it only notes that the form contains a statement that the complaint is true and correct to the best of Ms. Sataki's knowledge. (IB:26-27).

Based on the finding that Mr. Klayman produced insufficient evidence to conclude that the bar was placed on notice of the misconduct at issue in 2011, the referee held that even if the six-year statute of limitations in Rule 3-7.16 applied, this reciprocal disciplinary proceeding was timely. (R:2639). The referee found that the six-year statute of limitations would not begin to run until Mr. Klayman provided notice to the bar of his two suspension orders entered in 2020 and 2022, and therefore this disciplinary proceeding was not time barred. *Id*.

C. Mr. Klayman's reliance on the doctrine of laches as a basis for dismissal is misplaced.

Mr. Klayman argues the doctrine of laches precludes discipline in this case. Despite arguing Florida law should govern Mr. Klayman's misconduct even though most of the misconduct took place in Washington, D.C., the initial brief argues the applicability of a disciplinary case decided in the Virgin Islands. (IB:18-19). Mr. Klayman asserts that there was an unreasonable delay in the disciplinary proceedings brought in Washington, D.C. and Florida, which violated his due process rights and warrants dismissal.

This Court has already addressed the impact of an unreasonable delay on a lawyer disciplinary proceeding in *The Florida Bar v. Wolf*, 930 So. 2d 574 (Fla. 2006). In *Wolf*, this Court stated that an unreasonable

delay resulting in prejudice to the respondent is a mitigating factor that may warrant a downward adjustment in the sanction to be imposed. *Id*. at 578. However, even though this Court found that the respondent in *Wolf* established this mitigating factor, the unreasonable delay did not result in dismissal, but in a two-year suspension rather than a three-year suspension.

In arguing that Florida case law supports dismissal based on an unreasonable delay, the initial brief cites *The Florida Bar v. Rubin*, 362 So. 2d 12 (Fla. 1978), a 46-year-old opinion regarding the bar's failure to promptly file a report of referee with this Court until 14 months after its original issuance. At the time, it was the bar's duty to file reports of referee with this Court, which the bar did not do because it intended to consolidate the matter with a forthcoming disciplinary recommendation. *Rubin* also involved the bar's violation of a confidentiality rule by releasing a press statement. In determining dismissal was warranted, this Court evaluated "the purpose for our procedural requirements, the severity of their breach, and the gravity of the consequences for the accused attorney whose rights are thereby abridged." *Id*. at 15.

The bar's actions in *Rubin* publicized a matter that should have remained private, violated a requirement to provide timely notice regarding

the bar's intent to seek review, and were found to be antithetical to a rule requiring prompt filing of a report recommending public reprimand. Dismissal was a sanction for the bar's conduct in *Rubin*. Here, The Florida Bar was not the cause of the delay, did not withhold a report of referee, did not violate confidentiality, and did not leave Ms. Sataki's grievance "sitting on a shelf" since 2011. (See IB:11).

Mr. Klayman's only complaint regarding The Florida Bar's actions on the delay issue—outside of his unproven assumptions—is that reciprocal discipline should have been brought sooner. The suspension orders were entered in 2020 and 2022. Mr. Klayman notified the bar of the 2022 suspension via a letter dated October 18, 2022. (R-Ex.10, pg.569). The bar filed a formal complaint ten months later. This is not the type of "delay" warranting dismissal.

Mr. Klayman asserts that the bar's conduct in this case is similar to *Rubin* because it did not pursue reciprocal discipline for his 2020 suspension order until after the second suspension. He asserts that the bar unlawfully stacked two suspension orders to seek a harsher sanction, like the conduct in *Rubin*. (IB:31-32). But Mr. Klayman's assertions are readily disproven by the relief sought in this case. Mr. Klayman was subject to a 90-day suspension and an 18-month suspension. The bar did not stack

these orders, as it requested that Mr. Klayman be suspended for 18 months. The referee, *sua sponte*, recommended a stronger sanction. Further, Mr. Klayman was not inflicted with an "agonizing ordeal" by "having to live under a cloud of uncertainties," like the respondent in *Rubin*. (See IB:32-33). He repeatedly claimed ignorance that the matter was still pending in the District of Columbia, and he claimed that The Florida Bar previously closed Ms. Sataki's complaint in 2011. (R-Ex.24, pg.1377, pg.1448).

Mr. Klayman relies on *The Florida Bar v. Walter*, 784 So. 2d 1085 (Fla. 2001) to assert that in Florida disciplinary proceedings, the doctrine of laches additionally applies to unjustifiable delays in attorney discipline matters. He asserts this affirmative defense may be raised *in addition to* arguments that the bar failed to comply with the six-year time limitation in Rule 3-7.16. (See IB:25). But Mr. Klayman misconstrues the holding. First, *Walter* is neither a reciprocal discipline matter nor does it reference the doctrine of laches at all. More importantly, this Court only held that Rule 3-7.16 did not apply to some of the misconduct at issue in the case because the rule was not codified until *after* the misconduct.[4] *Walter* found that the bar failed to proceed with litigation within a reasonable time after it obtained

[4] Mr. Klayman's reliance on *Rubin* is additionally misplaced, as it was also decided before the effective date of Rule 3-7.16.

jurisdiction, which was the legal standard applicable in lawyer disciplinary proceedings before Rule 3-7.16 was codified. *Walter*, 784 So. 2d at 1087. This legal standard has been superseded by the more specific six-year time limitation codified in Rule 3-7.16, which took effect in 1995. *Id*. Even if Rule 3-7.16 bore any applicability to this case despite the referee's contrary finding, the doctrine of laches is not an additional defense in this matter. Instead, this Court only considers an unreasonable delay in the disciplinary proceeding a mitigating factor if the respondent demonstrates specific prejudice. See Standard 3.3(b)(9).

D. Mr. Klayman's arguments of due process violations due to an unreasonable delay should be rejected, consistent with the holdings of the two District of Columbia suspension orders.

Mr. Klayman argues that an unreasonable delay by this bar, the bar in the District of Columbia, or both, resulted in multiple due process violations. The initial brief asserts that these due process issues constitute infirmities of proof or other grave reasons not to accept the two suspension orders as conclusive proof of guilt. Specifically, Mr. Klayman argues that (1) his and his witness's memories faded; (2) documents and evidence were lost and destroyed; and (3) two material witnesses became unavailable due to death and illness. (IB:24). The referee in this case found that Mr. Klayman's defense in this reciprocal matter was largely comprised of efforts

"to rehear the underlying action." (R:2643). All of Mr. Klayman's assertions were considered and rejected by the District of Columbia Court of Appeals in its final order; the referee was not required to revisit these holdings.

On the first argument claiming memories had faded, in Count I, the District of Columbia Court of Appeals found that since a witness had trouble recalling events on material issues, the court resolved the issue *in favor of* Mr. Klayman. (See TFB-Ex.1, pg.12). Regarding Count II, the 2022 suspension order explicitly stated its agreement with the hearing committee's finding that neither Mr. Klayman nor Ms. Sataki displayed significant gaps in their memory of material facts. (TFB-Ex.2, pg.29). Mr. Klayman's argument on this issue is conclusory in nature and should be denied as such.

On the second issue asserting that documents were lost or destroyed, the referee in this case found as follows:

> As it relates to the laches, the referee will note that the Respondent was a member of the District of Columbia bar, which had no statute of limitations. As part of that, there is no, oh, I've thrown things away because I thought it was over. That's nonsense. You would be on notice in that jurisdiction. You'd have to hold onto that stuff forever anyway.

(R:2645).

On the third issue alleging unavailability of witnesses, the 2022 suspension order rejected Mr. Klayman's assertions that two *material*

witnesses were unavailable. Mr. Klayman failed to demonstrate that the expected testimony of either witness was material and irreplaceable. First, Mr. Klayman asserts that Professor Ronald Rotunda was unable to testify. (IB:24). Professor Rotunda was a potential expert witness who would have provided legal analysis on the delay issue. Professor Rotunda previously drafted a legal opinion, which was admitted into evidence. (TFB-Ex.2, pg.28). Mr. Klayman again submitted the opinion into evidence in this proceeding. (R-Ex.9, pg.561-67). His initial brief reargues its content. (IB:3). The expert opinion addressed a legal issue judges could analyze on their own, and the District of Columbia held that the "proper function of such testimony would have been limited at best." (TFB-Ex.2, pg.28). Further, the referee considered the opinion along with testimony of others and held that "as it relates to Mr. Klein, Mr. Caso, as well as the letter from Mr. Rotunda, none of them properly address the issue of the statute of limitations and the choice of laws." (R:2645).

The second unavailable witness referenced in the initial brief is Dr. Arlene Aviera. (IB:24). Mr. Klayman stated his belief that Dr. Aviera would testify, in her capacity as a psychotherapist, that Ms. Sataki was a difficult client, and her psychological problems were not caused by Mr. Klayman. (TFB-Ex.2, pg.28-29). The 2022 suspension order found that her expected

testimony would be insubstantial, and its absence was mitigated due to the availability of documentary evidence. *Id*.

Regarding Count I, Mr. Klayman argued that due process violations caused by the District of Columbia's delay in pursuing discipline "was further compounded the [sic] additional three-year delay which was apparently required before Florida saw fit to commence reciprocal discipline – a total of approximately fifteen years." (IB:31). But Mr. Klayman testified regarding this "additional three-year delay," and explained he first notified the bar of his 90-day suspension via e-mail in July 2020. (R:2808). In the e-mail, Mr. Klayman stated that he filed a petition for rehearing en banc and only intended to advise The Florida Bar of the status following disposition of his petition. (R:2810). Mr. Klayman did not recall whether the bar deferred the matter until resolution of his petition, or whether he notified the bar when the petition failed. (R:2812-13). Instead, he asserted that the bar should have independently monitored the status of his petition and taken more prompt action after it was denied. (R:2813). This testimony does not demonstrate a substantial delay solely attributable to the bar, yet the initial brief nevertheless labels the bar's actions an "inexplicable three-year delay." (IB:32).

III. Mr. Klayman did not meet his burden of establishing a paucity of proof regarding any of the rule violations found in the District of Columbia.

Mr. Klayman's next argument asserts that there was a paucity of proof in the District of Columbia suspension orders, mandating rejection of these orders. On this issue, the referee held that "Respondent is asking this referee to do exactly what Florida case law says it should not – to sit as a backup referee to rehear the underlying action." (ROR:15).

A. Mr. Klayman's violation of Rule 1.7(b)(4) (conflict of interest):

D.C. R. Prof. Cond. 1.7(b)(4) states that a lawyer shall not represent a client if the lawyer's professional judgment will be or reasonably may be adversely affected by personal interest. Mr. Klayman asserts that he competently and diligently represented Ms. Sataki. (IB:38-39).

The only relevance of Mr. Klayman's competence and diligence in this matter relate to the D.C. Court of Appeals' finding that his feelings for Ms. Sataki adversely affected his professional judgment. (See TFB-Ex.2, pg.35). The court based this finding on Mr. Klayman's own correspondence to his client, in which he stated that his "emotions [had] rendered [him] non-functional even as a lawyer." *Id*. Though Mr. Klayman may now dispute the veracity of his own words, the referee was not tasked with rehearing this issue.

Mr. Klayman argues in the alternative that Ms. Sataki waived any conflict when she requested his continued representation. (IB:39). But the D.C. Court of Appeals held that "[e]ven if the client consents, however, the lawyer must 'reasonably believe[] that the lawyer will be able to provide competent and diligent representation' to the client." (TFB-Ex.2,pg. 36). The court found that in addition to Mr. Klayman's written statement that his emotions rendered him non-functional as a lawyer, Ms. Sataki also testified that Mr. Klayman was not able to act professionally towards her, and his contact with her had become abusive. *Id*.

Next, Mr. Klayman asserts that Ms. Sataki's testimony on issues was impeached or contradicted by other evidence. (IB:34). But the D.C. Court of Appeals did not simply rely on her testimony. The court noted that the testimonies of both lawyer and client were impeached and contradicted on certain points, stating:

> For example, Mr. Klayman testified that he had no romantic intentions toward E.S., but the record contains numerous emails from him where he declared that he was in love with E.S., going so far as to state that she was "the only woman [he had] ever really loved." Similarly, Mr. Klayman testified that he was representing E.S. pro bono and did not have a fee arrangement with her. In an e-mail to E.S., however, Mr. Klayman said that "50 percent of any recovery is fair and that is what I require."

(R:55).[5] The court held that the hearing committee and the board acted reasonably in largely crediting Ms. Sataki's testimony over Mr. Klayman's. *Id*. To bolster his credibility, Mr. Klayman asserts that his testimony was supported by another witness. (IB:35). The referenced testimony only states that Ms. Sataki stated that she hired Mr. Klayman to represent her, and she and Mr. Klayman had several meetings. (IB:35-36). The initial brief offers no argument on how this testimony impacts a material finding in this case.

B. Mr. Klayman's violation of Rule 1.6(a)(1) (a lawyer shall not reveal a client's confidence or secret for the lawyer's advantage):

Mr. Klayman next asserts that there was a paucity of proof that he revealed client secrets in violation of D.C. R. Prof. Cond. 1.6(a)(1). Again, he relies on his own testimony and the testimony of co-counsel representing Ms. Sataki, Tim Shamble. (IB:40-41). Mr. Shamble admitted in

[5] Though Mr. Klayman was romantically interested in Ms. Sataki, the initial brief asserts the court never found Mr. Klayman's feelings were sexual or romantic. (IB:36). This issue may be marginally relevant to whether Mr. Klayman's personal feelings toward Ms. Sataki resulted in a conflict. The D.C. Court of Appeals held that Mr. Klayman's strong feelings adversely affected his professional judgment regardless of their nature. (TFB-Ex.2, pg.35). To the extent there is any remaining doubt regarding Mr. Klayman's romantic interest—and to the extent it is even relevant—this Court should review the correspondence attached to Ms. Sataki's grievance, and a letter Mr. Klayman wrote to Ms. Sataki's psychotherapist. (See R-Ex.7, pg.495, pg.532-42; R-Ex.4, pg.290-91).

his testimony that he recalls the subject of publicity was discussed, and he did not recall specifics. (R-Ex.24, pg.1278-79). In the District of Columbia proceeding, the parties litigated the issue of whether Mr. Klayman publicized his client's case without her explicit consent. Mr. Klayman testified inconsistently that his client "never said that" she did not want to publicize her case, only to immediately change his testimony when presented a writing by him contradicting that testimony. (R-Ex.24, pg.1395).

Mr. Klayman asserts that the D.C. Court of Appeals and the referee failed to acknowledge the testimony of Tim Shamble and Keya Dash on this issue. (IB:41-44). But the hearing committee considered this testimony in its report and recommendation. (R-Ex.5, pg.286). The committee determined that Mr. Klayman and Ms. Sataki "did not reach an agreement on the extent of Respondent's proposed publicity strategy or on the specific disclosures to be made." (R-Ex.5, pg.288). Mr. Shambles' testimony did not disprove this finding, nor did Ms. Dash's testimony. The D.C. Court of Appeals found that even though Ms. Sataki eventually consented to publicity, she did not give informed consent, but instead "acquiesced in Mr. Klayman's views on the topic without having the benefit of adequate advice from Mr. Klayman." (TFB-Ex.2, pg.38-39). Further, many articles written by Mr. Klayman were published after Ms. Sataki terminated his representation

in July 2010, and therefore Mr. Klayman did not have her informed consent on these later publications. *Id*.

C. Mr. Klayman's violation of Rule 1.2 (a lawyer shall abide by a client's decisions as to the objectives of representation) and Rule 1.16(a)(3) (a discharged lawyer shall withdraw from representation):

Mr. Klayman next argues a paucity of proof that he failed to abide by his client's wishes when he did not dismiss one of her lawsuits, in violation of D.C. R. Prof. Cond. 1.2 and 1.16(a)(3). (IB:44-48). His argument should be closely reviewed by this Court. He does not dispute he received an e-mail from his client in July 2010 directing him to withdraw the lawsuit. (IB:44-45). Instead, he argues he needed to speak with Ms. Sataki directly to confirm she wrote the e-mail. (IB:45). The basis for this suspicion was that he did not believe the language used in the e-mail comported with his client's poor written English. *Id*. Therefore, since Mr. Klayman's client did not speak to him on the telephone after she received several inappropriate e-mails from him, he instead filed a notice of appeal and a motion for reconsideration on her behalf. (IB:45-46). The District of Columbia reasonably did not credit this explanation by Mr. Klayman. (TFB-Ex.2, pg.37-38).

As an additional defense, Mr. Klayman asserts that he was vindicated when Ms. Sataki later filed an untimely notice of appeal herself. (IB:46).

The District of Columbia Court of Appeals found that this action "is not necessarily inconsistent with her desiring to dismiss the case at the time she instructed Mr. Klayman to do so." (TFB-Ex.2, pg.37). The initial brief's argument is simply relitigating failed arguments already considered and rejected in the 2022 suspension order.

D. Mr. Klayman's violation of Rule 1.5(b) (requiring a written agreement regarding representation) and Rule 1.5(c) (requiring a contingent fee agreement in writing):

Mr. Klayman next argues a paucity of proof that he did not obtain a contingency fee agreement in writing pursuant to D.C. R. Prof. Cond. 1.5(b). (IB:48-52). The 2022 suspension order found that Mr. Klayman and Ms. Sataki offered conflicting testimony on whether they orally agreed on a contingency fee agreement. (TFB-Ex.2, pg.41). Ms. Sataki stated that Mr. Klayman agreed to pay her relocation expenses, "but then he gets his money back when he gets his 40 percent." (R-Ex.24, pg.1004). Mr. Klayman asserts that Ms. Sataki's own admissions impeached her testimony on this point, quoting an exchange during her cross examination. (IB:50).

The brief omits her continued testimony immediately after this quoted excerpt, in which Ms. Sataki stated that maybe the exact percentage was not agreed on at first, but Mr. Klayman told her at the outset that they would

win because she had a strong case, and that Mr. Klayman was "going to collect your money at the end, that came up." (R-Ex.24, pg.1085). The court concluded that the board "reasonably credited E.S.'s testimony over Mr. Klayman's on this point, particularly given the email that Mr. Klayman sent demanding a contingent fee." (TFB-Ex.2, pg.41). Specifically, as the lawyer client relationship was deteriorating, Ms. Sataki sent an e-mail to Mr. Klayman stating, "PLEASE always remember YOU WILL GET %40 WHEN YOU FINISH THE CASE." (R-Ex.7, pg.495-96). Mr. Klayman responded by demanding 50% of the fee, based on the time and expense incurred to date. *Id*.

In furtherance of his argument of a paucity of proof regarding the absence of a written fee agreement, Mr. Klayman asserts that the 2022 suspension order did not make a finding that he violated D.C. R. Prof. Cond. 1.5(b). (See IB:48-49). The order did not find insufficient evidence of the violation; the order found that Mr. Klayman *did not dispute* the adverse finding by the hearing committee, *nor did he raise the issue on appeal*, and therefore the court saw no need to address the issue further. (TFB-Ex.2, pg.41).

E. Mr. Klayman's violation of Rule 1.4(b) (a lawyer shall appropriately explain the matter to the client):

Mr. Klayman next asserts a paucity of proof that he failed to explain matters to the client as required by D.C. R. Prof. Cond. 1.4(b). (IB:52-54). He asserts that the only specific example of a failure to explain matters was that he moved to disqualify a judge without consulting Ms. Sataki. *Id*. But this ignores the primary finding in the 2022 suspension order that Mr. Klayman's "barrage of communications with E.S. about his feelings for her were not 'the kind of communication . . . that a client ought to receive from her lawyer' and 'drowned out' any legitimate communications about E.S.'s case." (TFB-Ex.2, pg.40).

The initial brief avoids addressing that finding and focuses on whether respondent had some discussions with Ms. Sataki about moving to disqualify a judge. But even on this preferred issue, the hearing committee's report and recommendation noted that in a reply filed by Mr. Klayman, he asserted that he had implied consent to file the motion to disqualify "particularly with a client who is non-communicative at the point that the motion was filed." (R-Ex.5, pg.363). The hearing committee found this was a concession of a lack of communication when the motion was filed. *Id*. Further, the committee relied on Ms. Sataki's testimony that she did not want Mr. Klayman to reference political ideologies, out of concern

that a partisan stance would harm her reputation as a journalist. (R-Ex.5, pg.363-64). But the initial brief inserts an ellipsis that omits this inconvenient testimony from Ms. Sataki when offering an excerpt of her testimony. (Compare IB:53 & R-Ex.24, pg.1103-04). Mr. Klayman cannot establish a paucity of proof by simply ignoring evidence that does not conform to his viewpoint.

F. Mr. Klaymans' repeated violations of Rule 1.9 (conflict of interest):

Mr. Klayman next argues that even though he repeatedly violated D.C. R. Prof. Cond. 1.9 (conflict of interest) in representing three clients against Judicial Watch, the court determined that it was not left with serious doubt or real skepticism that Mr. Klayman can practice ethically. (IB:54). Mr. Klayman argues that he acted under advice of counsel in committing the rule violations. (IB:54-55). A defense of advice of counsel is not available to respondents in lawyer disciplinary proceedings unless specifically provided for in a rule or as mitigation. *The Florida Bar v. St. Louis*, 967 So. 2d 108, 118 (Fla. 2007). Lawyers cannot use the advice of other lawyers as a shield to insulate themselves from discipline.

The initial brief's remaining argument on this issue is that the presiding judge who disqualified Mr. Klayman as counsel offered "compelling testimony" in the District of Columbia that mitigated the rule

violations. (IB:57). Character evidence is not relevant to a finding of guilt or innocence. *The Florida Bar v. Whitney*, 237 So. 2d 745, 748 (Fla. 1970). Further, the judge only referenced Mr. Klayman's representation of Mr. Paul. Respondent committed three other violations in his representation of Ms. Cobas, Ms. Benson, and Ms. Sataki. The recommendation of the Board on Professional Responsibility found that Mr. Klayman's conduct at issue in Count I "was motivated by animus toward Judicial Watch." (R-Ex.6, pg.1800). Therefore, the value of the judge's testimony that Mr. Klayman's client lacked financial resources to hire alternative counsel was limited.

IV. Mr. Klayman did not demonstrate a deprivation of due process in the District of Columbia.

In the final argument in the initial brief challenging findings of guilt, Mr. Klayman asserts that at every stage of the proceedings, finders of fact were biased against him because he is a conservative activist. (IB:60-62). However, he asserts that "[m]erely being ideologically opposed to Mr. Klayman is not an issue." (IB:62). This Court should compare that statement to Mr. Klayman's course of conduct. He has gone to great lengths in this disciplinary proceeding to portray this case as a political witch-hunt even though there is not a single rule violation involving political activism. Mr. Klayman simply seeks to inject the issue into irrelevant proceedings and cry foul when a court rules against him. He offers only

conjecture that judges, bar prosecutors, and hearing officers are biased against him for his political views.

Specifically, Mr. Klayman maintained that his legal arguments were not considered, based on the lack of substantive analysis in adverse orders issued by the hearing committee in Washington, D.C. (R:2322). Instead, when the hearing committee ruled against him, Mr. Klayman asserted "that was an incorrect decision on their part based on their bias and prejudice." (R:2323). He stated that the bar counsel that sought his suspension from the practice of law were "all liberal and leftists and pro-democratic and they view me as somehow the Darth Vader of the right." (R:2349). He expressed a similar belief that bar counsel in Florida harbored a personal resentment of him for referring to the disciplinary proceeding in the District of Columbia as an "abortion." (See R-Ex.60, pg.2764). After extensive testimony and video evidence meant to show Mr. Klayman was "perceived to be an enemy of the left and the Democrats in Washington, D.C., the referee sustained a relevancy objection as follows:

> The objection is sustained. This is not MSNBC vs. Fox or Fox vs. MSNBC. The Court finds that the video, having now watched it in its entirety, it mentions nothing about the Sataki matter. It mentions nothing but [sic] the Judicial Watch matter. It mentions nothing about Bar disciplinary matters. It doesn't link in any way the Bar Disciplinary Committee to the Respondent. Accordingly, I find it to be irrelevant and the objection is sustained.

(R:2376-77).

Mr. Klayman maintained that his arguments were not "legitimately considered" and that the committee's adverse holdings show the case was not "legitimately litigated." (R:2343). When Mr. Klayman partially prevailed on certain issues in his appeal of the District of Columbia proceeding, he maintained the findings by the hearing committee were so outrageous that it was clear they were incorrect. (R:2331). Regarding adverse rulings, Mr. Klayman asserted that the court only addressed his argument "in a very backhanded and cursory way, say, oh, there was no prejudice, which obviously lacked foundation on their part." (R:2329). His initial brief levels the same allegations about the referee in this case. (See IB:47, ft.14; IB:33).

Similarly, when counsel for the bar in the District of Columbia did not pursue other disciplinary cases against Mr. Klayman, it is because disciplinary counsel "was a very honest man." (R:2384). But when other counsel pursued a meritorious case against Mr. Klayman, "It was retaliation because of what I was doing." *Id*. He also sued the Ad Hoc Hearing

Committee that recommended his suspension from the practice of law, calling one of its members a communist.[6] (R:2263; R:2335).

Simply put, Mr. Klayman's viewpoints on these issues consistently display his belief that when a court rules in his favor, it is correct. But when the court rules against him, it is only because the opposing lawyers are corrupt, and judges did not properly evaluate meritorious arguments. Mr. Klayman's results-based viewpoint only allows him to win on the merits or lose illegitimately. The default motive he attributes to opposing lawyers and judges who rule against him is to label them communists and leftists seeking to ruin his reputation. This inability to acknowledge the plainly wrongful nature of his conduct underscores the referee's recommendation to increase the sanction in this case.

The other claimed due process issues asserted by Mr. Klayman do not establish any basis to reject the findings in the two suspension orders. He asserts he was denied discovery before the hearing committee despite seeking to depose Ms. Sataki and her psychiatrist. (IB:62). In lawyer

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[6] The factual basis for labeling this attorney a communist was an excerpt from a book referring to the attorney as a "leading radical activist." (R:725). The referee found that Mr. Klayman's assertion was irrelevant and additionally noted that the excerpt did not identify the attorney as a communist. (R:2410-11). To bolster his claim, Mr. Klayman submitted a single piece of correspondence written by Fidel Castro to the lawyer in 1979. (R:728).

disciplinary proceedings in the District of Columbia, Board Rule 3.2 states that a party seeking to depose a non-party must file a written motion asserting a compelling need for the additional discovery. Mr. Klayman asserts the two depositions would prove he "acted properly at all times and even sought to get Ms. Sataki other counsel." (IB:63). The first half of that statement is too vague to establish a compelling need, and the second half is immaterial to any finding of guilt. The 2022 suspension order reasonably concluded that Mr. Klayman failed to articulate what information he would have sought from Ms. Sataki's psychotherapist. (TFB-Ex.2, pg.28-29). Instead, Mr. Klayman falsely asserted that no doctor-patient privilege existed in California between Ms. Sataki and her psychotherapist, only to change his testimony when shown the actual law. (See R:2603-04).

Mr. Klayman also asserts that he was "blind-sided at the last minute" when the prosecuting lawyer in the District of Columbia introduced evidence without having given Mr. Klayman a chance to review. (IB:63). Counsel for the bar in the District of Columbia stated that the evidence consisted of correspondence between Mr. Klayman and Ms. Sataki. (R-Ex.18, pg.795). The hearing committee also did not admit the documents into evidence immediately, but instead stated that the committee would not rule on the admissibility of all the documents at once, but instead exercise

discretion when those documents "come into play in the natural course of things." (R-Ex.18, pg.796).

Mr. Klayman argues that the Board on Professional Responsibility "[i]nexplicably" denied his request to supplement the record after the six-day final hearing. (IB:64). The basis for this ruling was not inexplicable; the board entered an order explaining it; Mr. Klayman's discovery of video evidence did not constitute extraordinary circumstances sufficient to permit supplementation of the record after the close of evidence. (R-Ex.20, pg.954). The initial brief asserts that the video showed Ms. Sataki publicized her own case in an interview, which undercut her contention that she did not want publicity. (IB:64). The board noted that this interview occurred "long after her legal representation with Respondent Klayman ended." (R-Ex.20, pg.954). Similarly, the referee held that "[t]he horse has already been out of the barn at that point." (R:2417).

The referee quashed subpoenas intended to be served on various lawyers involved in litigating or presiding over the disciplinary proceeding in the District of Columbia. The initial brief asserts this was a deprivation of due process, without offering any explanation on how their testimony would impact any finding in this case. (See IB:67-68). The orders of the hearing committee, the board, and the D.C. Court of Appeals speak for themselves.

See *United States v. Morgan*, 313 U.S. 409, 422 (1941) (a judge's thought process relevant to judicial decisions is not within the purview of an examination). Mr. Klayman also submitted into evidence the entire transcript of the final hearing held in Washington, D.C. regarding Count II. (See R-Ex.24).

Mr. Klayman asserts that the referee should have received the entire underlying record, and that the referee's ruling "is contrary to every other Court and jurisdiction considering the issue of reciprocal discipline." (IB:68). Mr. Klayman cites nothing in support of this bold claim. In a reciprocal discipline case, a referee may rely on the suspension orders themselves in making findings of guilt. See *The Florida Bar v. Kandekore*, 766 So. 2d 1004, 1008 (Fla. 2000). Mr. Klayman's legal assertion that every other court in the nation requires entry of the entire record from the foreign jurisdiction is not only completely unsupported, but also implausible on its face.

V. Based on the violations at issue, the Standards for Imposing Lawyer Sanctions, and relevant case law, this Court should accept the referee's recommendation of a two-year suspension from the practice of law.

A. <u>The applicable standards:</u>

The Standards for Imposing Lawyer Sanctions provide a baseline for determining the appropriate sanction for a lawyer's misconduct before

consideration of aggravating or mitigating circumstances justifying a departure from the sanction to be imposed. The referee found three separate standards uniformly supporting suspension. (ROR:25-26). Under Standard 4.2(b), the referee found that Mr. Klayman knowingly revealed information relating to the representation of a client, causing injury or potential injury to a client. Under Standard 4.3(b), the referee found that Mr. Klayman knowingly failed to avoid conflicts of interest, causing injury or potential injury to clients. Finally, under Standard 7.1(b), Mr. Klayman knowingly engaged in conduct that is a violation of a duty owed as a professional, causing injury or potential injury to the client, the public, or the legal system. The initial brief does not assert that the referee erred in these findings.

B. The aggravating and mitigating circumstances:

The appropriate sanction may be increased or decreased based on the presence of aggravating or mitigating factors. The referee found the following aggravators under Standard 3.2(b):

- Dishonest or selfish motive under Standard 3.2(b)(2);
- A pattern of misconduct under Standard 3.2(b)(3);
- Multiple offenses under Standard 3.2(b)(4);

- Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency under Standard 3.2(b)(5);

- Submission of false evidence, false statements, or other deceptive practices during the disciplinary process under Standard 3.2(b)(6);

- Refusal to acknowledge the wrongful nature of the conduct under Standard 3.2(b)(7); and

- Substantial experience in the practice of law under Standard 3.2(b)(9).

(ROR:29-30).

In mitigation, the referee found the following mitigators under Standard 3.3(b):

- Character or reputation under Standard 3.3(b)(7); and

- Remoteness of prior offenses under Standard 3.3(b)(13).

(ROR:30).

The initial brief does not argue that the referee lacked competent substantial evidence regarding the aggravating factors. Therefore, the bar will defer to the referee's report and the referee's ruling at hearing. (See R:2649-51). Regarding mitigation, the initial brief asserts that the referee should have (1) afforded more weight to a mitigating factor; and (2) found that Mr. Klayman established additional mitigating factors. (IB:72-73).

On the first issue, the referee afforded proper weight to Mr. Klayman's character and reputation. The initial brief falsely asserts that the referee "mocked character evidence" because Mr. Klayman used advertisements for his book to bolster his professional reputation. (IB:73, ft.23). The issue is not material because the referee afforded significant weight to this mitigating factor, stating that the recommended suspension period "probably would have been three years but for the excellent character references you did have lowered it." (R:2654-55).

Mr. Klayman argues that the referee should have found an absence of a prior disciplinary record, because he submitted a Certificate of Good Standing. (IB:72). This certificate does not demonstrate the absence of prior discipline. Mr. Klayman was publicly reprimanded in 2011 for failing to pay his former client $5,000.00 pursuant to a mediation agreement arising out of Mr. Klayman's alleged failure to provide services in the client's criminal case; he repeatedly failed to satisfy the obligation until the bar eventually filed a formal complaint. (TFB-Ex.7, pg.100-118). This Court imposed a public reprimand based on the uncontested finding that Mr. Klayman violated four bar rules. *Id*. The referee correctly found that the remoteness of the prior offense was a mitigating factor, but absence of a prior disciplinary record was not.

Mr. Klayman's arguments regarding other mitigating factors are conclusory. A referee's failure to find that an aggravating or mitigating factor applies carries a presumption of correctness and will be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007). Mr. Klayman asserts that he lacked a dishonest or selfish motive because one of his witnesses stated that he diligently and zealously represented Ms. Sataki. (IB:72). He also asserts that he had a cooperative attitude in the disciplinary proceeding because he stated once in a letter that he wanted to "work something out through settlement." (IB:72). Neither of these assertions establish that the referee's ruling was clearly erroneous or without support. Further, the applicability of both mitigators is substantially frustrated by the referee's holding at the sanction hearing:

> [T]he Court will note the filings of the Respondent in this hearing about tipping off the witnesses, running out the clock, and disparaging the counsel for the Bar with no such evidence to back that up.

(R:2650). Also, a mitigating factor "contemplates something above and beyond the normal cooperation expected of every member of the Bar. . . ." *The Florida Bar v. Herman*, 8 So. 3d 1100, 1109 (Fla. 2009).

After repeatedly asserting throughout his brief that he committed no rule violations, Mr. Klayman claims he made timely good faith efforts to

rectify the consequences of his misconduct. Specifically, he claims he has taken CLE courses on conflicts of interest, and he has since grown and learned to keep his personal and professional lives separate. (IB:73). The initial brief provides no citation to support those assertions. Further, this evidence would only provide discretion to the referee regarding whether to find the mitigating factor. Given Mr. Klayman's refusal to acknowledge wrongdoing, the referee's declination to find this mitigating factor was not clearly erroneous.

The initial brief does not specifically argue that the referee should have found as a mitigator that there was an unreasonable delay in the disciplinary proceedings under Standard 3.3(b)(9). Mr. Klayman also failed to demonstrate specific prejudice resulting from a delay—a delay not attributable to The Florida Bar. Therefore, the referee's report was not clearly erroneous in declining to find the mitigating factor. See *The Florida Bar v. Senton*, 882 So. 2d 997, 1002 (Fla. 2004).

C. The case law:

The referee cited 11 cases in further support of the recommended imposition of a two-year suspension. (ROR:26-28). Some of the cases are cited for broad legal principles rather than as comparators for the purposes

of determining appropriate discipline. This brief will limit itself to the case law addressed in the initial brief.

Mr. Klayman's representation of three clients in Count I and his representation of Ms. Sataki in Count II all involve conflicts of interest violating D.C. R. Prof. Cond. 1.7 and 1.9. Either Mr. Klayman failed to seek a waiver of conflict from Judicial Watch, or his desire for a personal relationship with his client impacted his professional judgment and necessitated his withdrawal as counsel. Mr. Klayman's representation of individuals against Judicial Watch was driven by his personal animus, not by an altruistic desire to aid destitute clients. Similarly, a review of Mr. Klayman's correspondence with Ms. Sataki clearly demonstrates that his legal representation was secondary to his personal interest in pursuing a relationship.

Based on these facts, the bar argued case law involving lawyers who prioritized their own interests over their clients' interests. In *The Florida Bar v. Rush*, 361 So. 3d 796 (Fla. 2023), this Court suspended the respondent for three years for pursuing litigation to maximize his attorney's fee, against the wishes of his client. The initial brief argues that *Rush* is inapposite, but it is not. (See IB:73-76). It also involved a lawyer who prioritized his selfish interests over the interests of his client. The conduct is more egregious

because the attorney attempted to frustrate a settlement after he was terminated as counsel. But *Rush* also involved misconduct in a single case, as opposed to the multiple offenses committed by Mr. Klayman. Further, the referee implicitly recognized that Mr. Klayman's conduct did not warrant as strong a sanction, which is reflected in the referee's recommendation of a two-year suspension as opposed to a three-year suspension.

Mr. Klayman next asserts that *Herman*, 8 So. 3d 1100 (Fla. 2009) is also distinguishable. (See IB:76-77). In *Herman*, the lawyer established a company that sold and leased aircraft parts, which was in direct competition with the business of the lawyer's client. The lawyer also hired his client's former salesman to run the company, the salesman later sold parts to customers of the lawyer's client, and the lawyer never disclosed the conflict. This Court suspended the lawyer for a period of 18 months.

Notably, this case was decided before this Court began imposing stronger sanctions for lawyer misconduct. See *Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015).[7] Mr. Klayman's conflicts of interests were equally as intentional as the conflict in *Herman*. Yet Mr. Klayman still asserts frivolous arguments, such as baseless theorizing he would not have been

[7] Given this Court's move toward imposing stronger sanctions and its broader scope of review in determining the appropriate sanction, this brief will not address case law from the Virgin Islands argued in the initial brief regarding the appropriate sanction. (See IB:81-83).

disqualified if he argued the doctrine of necessity authorized his representation of a destitute client notwithstanding the conflict. (See IB:58-59). Mr. Klayman's main distinction between his conduct and the misconduct in *Herman* is that he "never hid *anything* from *anyone*." (IB:77). The fact that Mr. Klayman committed blatant violations rather than surreptitious violations may be marginally relevant, but it is not a significant factual distinction. Like the respondent in *Herman*, he proceeded with his misconduct knowing it violated the Rules of Professional Conduct.

The initial brief next argues that *Tipler*, 8 So. 3d 1109 (Fla. 2009) is "completely distinguishable." (IB:78). The respondent in *Tipler* was disbarred for paying his client for sex. Mr. Klayman's misconduct toward Ms. Sataki involved his constant, unwelcome overtures followed by bitter condemnation of her rebuffs. Notably, these unprofessional communications were in the context of Mr. Klayman's representation of Ms. Sataki, who sought redress *as an alleged victim of sexual harassment*. His conduct was not criminal, but the more egregious nature of the misconduct in *Tipler* is already reflected in the referee's recommendation of a lesser sanction than disbarment.

Further, the initial brief asserts that *Tipler* was a reciprocal discipline case in which the respondent was entitled to more discovery than Mr.

Klayman. (IB:79). Mr. Klayman grossly overstates the circumstances of his District of Columbia disciplinary proceeding when he asserts that he was "denied discovery." He was not allowed to take some depositions. But he still engaged in exhaustive cross examination of Ms. Sataki, who testified for three days, and the court reasonably found that a deposition of Ms. Sataki's psychotherapist lacked probative value.

The only Florida case law argued by Mr. Klayman in support of his alternative argument that he should be publicly reprimanded is *The Florida Bar v. Glick*, 383 So. 2d 642 (Fla. 1980). The respondent in *Glick* incompetently handled a real estate matter and did not refund his client in one case, and in another case he failed to advise his client of a hearing, resulting in dismissal. This Court found that since the respondent had not been disciplined in his thirty-year career and did not engage in dishonesty or fraud, a public reprimand and a one-year conditional probation was an appropriate sanction.

Here, Mr. Klayman was publicly reprimanded in 2011—a fact that his initial brief does not reference. (IB:80). Instead, the initial brief artfully states that Mr. Klayman has not been accused of any violations of bar rules *since* the claims in Counts I and II were first advanced. (IB:84). Further, though the rule violations in this case do not involve dishonesty as an element of

the offense, the referee found as an aggravating factor that Mr. Klayman had a dishonest or selfish motive. (ROR:29; R:2650). Mr. Klayman also argues that his misdeeds "can hardly be equated as similar." (IB:80). In every case, Mr. Klayman knowingly represented a client despite a conflict of interest.

CONCLUSION

For the above stated reasons, The Florida Bar asks this Court to accept the referee's findings of guilt and recommendation that Mr. Klayman be suspended from the practice of law for two years and impose the costs recommended by the referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the original hereof has been e-filed with the Clerk of the Supreme Court of Florida, on this 23rd day of October, 2024 and a true and correct copy of the foregoing has been furnished via e-service to Robert M. Klein, Attorney for Respondent, at Robert.Klein@fmglaw.com.

Mark Lugo Mason, Bar Counsel

CERTIFICATE OF TYPE SIZE & STYLE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2)(B). The font is 14-point Arial. The word count is 12,982 words. It has been calculated by the word-processing system, and it excludes the content authorized to be excluded under the rule, but it includes any footnote.

Mark Lugo Mason, Bar Counsel