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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC20-806

v. The Florida Bar File Nos.:
2018-70,119(11C-MES)
SCOT STREMS, 2019-70,311(11C-MES)
2020-70,440(11C-MES)
Petitioner/Respondent. 2020-70,444(11C-MES)

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SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

Pet.	=	The Florida Bar's Petition for Emergency Suspension, dated June 5, 2020.
Pet. Exh.	=	Exhibits to The Florida Bar's Petition for Emergency Suspension.
TFB Exh.	=	The Florida Bar's exhibit from final hearing.
ROR	=	Amended Report of Referee, dated November 6, 2020.
T.	=	Transcript of final hearing before Referee on September 8-16, 2020.
MT.	=	Transcript of hearing on Respondent's Motion to Dissolve Order of Suspension Dated June 9, 2020, before the Referee on July 7, 8, and 10, 2020.

STATEMENT OF THE CASE AND FACTS

In her report, the Referee made the insightful observation that "'[t]he education provided by law schools today does not typically include training to run a successful law practice.'" (ROR 48). This statement goes a long way towards explaining how, over a matter of weeks, Respondent went from operating a successful statewide firm to the Bar seeking his suspension on an emergency basis. But it does not tell the whole story. In addition to the challenges of managing a statewide practice suing insurance companies on behalf of homeowners, Respondent also faced the efforts of the insurance lobby who coordinated with the Bar in order to reduce Respondent's effectiveness as an adversary. (T. 2073-75, 2089, 2092-94). Respondent recognized his organizational deficiencies and instituted meaningful reform efforts with a view toward implementing best law firm practices. (ROR 48-50).

The record before this Court reflects that Respondent successfully defended against all allegations of deliberate wrongdoing. However, when it came to issues with client communication, discovery violations, and timely compliance with court orders, Respondent repeatedly and remorsefully admitted he had fallen short of making certain the firm's infrastructure could meet the demands of the firm's large and accelerating case load. This did not go unnoticed by the Referee who

specifically found that Respondent was sincerely remorseful for any problems caused by his deficient policies and procedures. (ROR 50).

That context is critical for this Court's understanding of the chain of events leading up to Respondent's emergency suspension and its consideration of the Referee's report and recommended punishment.

A. Procedural History.

The Bar filed its Petition for Emergency Suspension ("Petition") on June 5, 2020. This Court entered its Order approving the emergency suspension on June 9, 2020 (the "Suspension Order"). On June 26, 2020, Respondent filed a motion to dissolve Suspension Order. On July 2, 2020, the Bar filed its response in opposition to the motion to dissolve the Suspension Order. With its response, the Bar filed 1,822 pages of supplemental materials.

The Bar's supplemental materials identified four additional matters as grounds for the emergency suspension of Respondent; however, the Bar did not amend its charging document. Two of the matters identified in the Bar's supplemental materials were trial court orders entered in Robinson v. Safepoint and Clay v. Safepoint, which the Referee did not find supported any violations. A third matter involved allegations in litigation involving McEkron v. Security First Insurance Company, which, at the time of the filing of the Petition, was being considered in an inquiry pending at staff level in the Bar's Tampa office in file

number 2020-70,406(6D). Ultimately; however, the Referee did not find the allegations in the McEkron filing included in the Bar's supplemental materials as a basis for a recommended rule violation. However, the fourth matter contained in the supplemental materials, a February 17, 2020 trial court order in Mojica v. United Property & Casualty Ins. Co., was relied on by the Referee to find Respondent violated Rule 4-3.4. (ROR 36). Respondent objected to consideration of Mojica. (MT. 217, 221; T. 1648, 1782). On July 6, 2020, the Bar filed 197 pages of supplemental material. The Referee did not base any rule violation recommendation on these additional materials.

The hearing on the Motion to Dissolve was held July 7-10, 2020. On July 15, 2020, the Referee issued her report recommending that the emergency suspension remain in place. On August 27, 2020, this Court approved the Report of Referee. Thus, Respondent remains suspended.

The final hearing was scheduled for September 8-16, 2020. On August 14, 2020, the Bar disclosed that it intended to call Ursula Sabada and Carlton McEkron to testify at the final hearing. Ms. Sabada and Mr. McEkron were both clients of the firm at the time Respondent was suspended, had not filed Bar complaints, and the Bar made no reference to their cases. (T. 678-79, 721, 810-11, 947). Respondent objected to their testimonies because consideration of uncharged allegations violated his right to due process. The motion in limine was denied. At

trial, Respondent renewed his objection to the testimonies of Ms. Sabada and Mr. McEkron. (T. 242, 8-9, 12). Ultimately, the Referee relied on Ms. Sabada's testimony as the basis for the Rule 4-5.1(a) violation and relied on uncharged allegations of lack of communication with Mr. McEkron to recommend a violation of Rule 4-1.4(a). (ROR 34).

On September 4, 2020, the Bar filed an exhibit list disclosing the August 25, 2020 trial court order in Mora v. United Property & Casualty Ins. Co., and the Respondent objected to consideration of this order because consideration of uncharged allegations violated his right to due process. (T. 1773). Ultimately, the Referee relied on Mora in recommending violations of Rules 4-3.1, 4-3.3(a), 4-3.3(b), 4-3.4 and 4-8.4(c). (ROR 34-36, 38). The same exhibit list also disclosed documents related to Lockhart v. Citizens Prop. & Cas. Ins. Co., and Respondent objected to the consideration of these documents as well. (T. 170-71, 242). The Referee relied on Lockhart in recommending a violation of Rule 4-5.1(a).

The following orders were admitted into evidence during the final hearing and relied on by the Referee as a basis for her recommended Rule violations:

Case Style	**Order Date**	**Pleading**	**Exh.**	**ROR**
Laurent v. Federal National Insurance Co.	3/2/2016	Petition	14(a)	34, 36, 37, 39
Rodriguez v. Avatar Property & Casualty Ins. Co.	7/14/2017	Petition	14(g)	34, 36, 37, 39
Reese v. Citizens Property Ins. Corp.	7/28/2017	Petition	14(h)	34, 36, 37, 39

Santos v. Florida Family Ins. Co.	8/16/2017	Petition	14(e)	34, 36, 37, 39
Collazo v. Avatar Property & Casualty Ins. Co.	11/30/2017	Petition	14(l)	34, 36, 37, 39
Frazer v. Avatar Property & Casualty Ins. Co.	3/14/2018	Petition	14(m)	34, 36, 37, 39
Watson v. Homeowners Choice Property & Casualty Ins. Co., Inc.	4/2/2018 Order and 4/23/2018 Final Judgment	Petition	14(r)	35, 36, 37, 38
Ramirez v. Heritage Property & Casualty Ins. Co.	8/23/2018	Petition	14(n)	34, 36, 37, 39
Rodriguez v. American Security Ins. Co.	11/14/2018	Petition	14(o)	34, 36, 37, 39
Courtin v. Homeowners Choice Property & Casualty Ins. Co., Inc.	N/A	Petition	14(q)	35, 36, 37, 38
Mojica v. United Property & Casualty Ins. Co.	06/22/2020	TFB Response in Opposition	C	35
Mora v. United Property & Casualty Ins. Co.	8/25/2020	TFB's List of Documents	Comp. F	34, 35, 38

Respondent had no direct involvement in these cases. The Referee recommended a two-year suspension followed by a one-year probationary term with conditions.

B. Factual Summary.

1. The Strems Law Firm, P.A.

Respondent founded The Strems Law Firm ("SLF") in 2008. Approximately a year and a half later, Respondent added his first associate. (ROR 50, MT. 1115). At the time of the emergency suspension in June 2020, SLF had offices in Coral

Gables, Ft. Lauderdale, Orlando, Tampa, and Jacksonville, and employed approximately thirty (30) lawyers and one-hundred-twenty (120) support staff. (ROR 50). SLF exclusively represented policyholders in first party litigation in matters seeking coverage and payment for property damage from their insurance companies. (ROR 2, 36, 50; MT. 1112).

Beginning in early 2016, SLF was sanctioned in several cases, primarily from failing to meet discovery deadlines. (ROR 7). Respondent was alarmed by and disappointed in any adverse order sanctioning SLF. (ROR 7). Christopher Aguirre, a former SLF attorney, testified on behalf of the Bar. His credibility was specifically noted by the Referee. (ROR 5). The Referee found:

> These sanctions orders were brought to the attention of Respondent who was unhappy when such orders were entered against SLF. Moreover, Mr. Aguirre testified that Mr. Strems would admonish and speak with the attorneys regarding sanction orders. *Id.* at 62:10–63:4 (Sept. 8, 2020). Mr. Aguirre was very clear that in the 2.4 years that he was at the firm, neither Mr. Strems nor any of the attorneys intentionally violated court orders. He was also clear that Mr. Strems never directed him or any other attorney to violate any Rule Regulating the Florida Bar. He was never instructed by Mr. Strems to file nor prosecute cases without proper authority. *Id.* at 141:3-143:9. The SLF attorneys who testified confirmed that Mr. Strems never asked them to violate the Rules Regulating the Florida Bar.

(ROR 7-8).

The Report identifies twelve (12) specific orders entered during the 2016 and 2018 time period as the basis of the recommended rule violations. (ROR 33-39). Respondent did not handle the litigation giving rise to any of these orders. (T.

1135-36). The Bar did not call any of the SLF clients or the insurance defense counsel involved in the litigation related to these orders. (ROR 3-5). Although Respondent's name appeared on the civil cover sheets in some cases, that document was generated by the Clerk's office, not SLF, based on the firm's central filing pleadings email associated with Respondent's name. (T. 1134-35). SLF attorneys filed pleadings utilizing their Florida Bar numbers. (T. 1135).

Between March 2, 2016 and to Respondent's emergency suspension, SLF handled approximately nine thousand (9,000) matters. (ROR 49; T. 1108, 1738, 2093-94). Every lawsuit filed on behalf of SLF clients named an insurance company as the defendant. The twelve (12) orders relied upon by the Referee were entered in response to motions for sanctions filed by insurance companies. First party litigation is aggressively defended by insurance companies seeking sanctions and dismissal for any lapse. (T. 476, 535). To assist the Referee in understanding the contentious nature of this litigation, Respondent presented the expert testimony of William Hager, Esquire. Mr. Hager described how the insurance industry compiled "dossiers" of negative rulings to distribute and utilize against plaintiffs' firms and he identified fifteen (15) articles written by the insurance industry targeting SLF. (ROR 12-13; T. 530-31). These articles and orders were widely circulated amongst defense counsel to assist the defense bar with bringing motions in different courts throughout the State of Florida. (T. 526).

Many of these insurance industry motions targeted discovery problems inherent in representing unsophisticated first party litigants who do not easily or readily have access to responsive documents. (T. 474-75, 533-34). The consumer insured's hiring of an experienced attorney does not turn these plaintiffs into well-oiled discovery machines. (T. 533, 551). This is in stark contrast to the sophisticated insurance industry, with professional adjusters and established systems for document retrieval and litigation productions. (T. 474, 534-35).

2. Respondent made extensive efforts to implement procedures to effectively manage SLF's case load.

Respondent took extensive and expensive efforts to better represent the firm's clients by adding new lawyers, creating better firm-wide policies, providing regular educational opportunities, lowering caseloads, and putting more senior lawyers in charge of difficult cases. (ROR 49-50). In 2016, Respondent opened offices in Tampa and Orlando, alleviating the need for attorneys from South Florida to travel across the state. (T. 1144). Contemporaneously with opening the Tampa and Orlando offices, Respondent addressed systemic issues with metrics to track discovery and deadlines. (T. 96-98, 2048). Respondent created a discovery department and purchased new phone systems, equipment, and software and continued to hire additional attorneys and staff. (ROR 48-50).

Creating a team-based approach to caseloads was a key structural revision. (ROR 5-6, 12). By 2017, the total number of litigation attorneys had increased to

eighteen (18). (ROR 6). The litigation attorneys were divided into teams, with a lead and associate attorney supported by paraprofessionals. (ROR 12). Initially, each team's caseload was approximately five hundred (500) but Respondent continued to retain new lawyers and staff to achieve teams with two (2) attorneys, as well as approximately five (5) paraprofessionals, including a paralegal, a discovery paralegal, a litigation assistant, and a scheduling assistant to handle a caseload of three hundred and fifty (350). (ROR 6, 12; T. 1278-79).

From 2016 through 2018, SLF added a significant number of lawyers and staff to reduce caseload. (T. 165-67, 196). In late 2016, Respondent recruited Hunter Patterson, Esquire, who worked in-house for Citizens Property Insurance Company. (ROR 11-12; T. 1461). During their discussions regarding Mr. Patterson's potential employment, Respondent shared with Mr. Patterson the struggles the firm had faced and emphasized how important it was to Respondent to improve the firm's infrastructure and meet its litigation obligations. (ROR 12).

Respondent promoted Mr. Aguirre to Managing Attorney of the Coral Gables office. (T. 174). The managing attorney of each SLF office did not carry a caseload. (T. 491). Mr. Aguirre managed the litigation department, reviewed the discovery department's deadline compliance daily, and monitored deadlines for acceptance of proposals for settlement. (T. 189). Mr. Aguirre proactively

conducted audits of litigation attorneys' cases and helped resolve problem cases and met directly with clients to address concerns. (T. 189-91).

Cecile Mendizabal, Esquire, joined the firm in October 2017 and was promoted to Managing Attorney of the Coral Gables office following Mr. Aguirre's departure from the firm. (T. 463). Prior to joining SLF, Ms. Mendizabal had extensive experience representing insurance carriers and defended first party and PIP cases. Ms. Mendizabal did not have a caseload but continued oversight of the litigation attorneys and became involved in difficult cases. (T. 491).

Respondent retained outside board-certified appellate counsel to be available after hours and on weekends to provide litigation and trial support to SLF attorneys. (T. 1064, 745-46). Appellate counsel also updated SLF attorneys on case law development. (T. 749-50).

Respondent encouraged continued learning and training among his lawyers and staff. (T. 1476-77, 1505, 2054, 2065-66). Respondent constructed a mock courtroom in the firm's Coral Gables office for litigation preparation. (T. 1305-06). Respondent arranged expert seminars for SLF attorneys to explain inspections procedures and describe types of damages they might encounter. (T. 266-67).

3. Respondent asked The Florida Bar for help.

In mid-2018, Respondent sought the assistance of the Law Office Management Assistance Service ("LOMAS") run by the Bar. (ROR 48-49; T. 200,

205; MT. 178). Respondent implemented the LOMAS recommendations. (T. 200-01, 1122-23, MT. 184-85). For example, Respondent created a separate Client Concierge Department. (T. 1123). SLF added multiple employees to this newly formed department whose sole job was communicating updates to clients. (T. 200-01).

4. *The Bar's evidence in support of its request to suspend Respondent on an emergency basis.*

i. The Courtin and Watson orders.

In addition to the twelve (12) sanction orders from the 2016-2018 timeframe discussed *supra*, the Bar presented the Referee with orders entered by two different trial court judges involving an affidavit signed by Respondent. The affidavit outlined pre-suit settlement negotiations between Respondent and in-house counsel for Homeowners Choice Property & Casualty Company. (Pet. Exhs. Q, R). Respondent's affidavit was used by attorneys at SLF to argue that summary judgment was not proper because Homeowners Choice had waived this requirement. Id.

In the Courtin and Watson cases, the insurer's motions alleged that Respondent's affidavit was false because it did not include all emails in an email string. (ROR 26-32). There was never an evidentiary hearing held on the veracity of those accusations. (MT. 199, 204). The initial oral statements made by the trial judge without an evidentiary hearing or explanation from Respondent were not

reduced to findings in a final order but referred the allegations to the Bar for investigation. (Pet. Exhs. Q-2, R). The trial courts did not impose sanctions in either matter. (MT. 197). The Bar did not offer any testimony from SLF or insurance defense attorneys involved in the Courtin and Watson matters to prove the accusation, and did not offer the Watson affidavit in evidence or for the Referee's consideration to prove the insurance company's allegations. (ROR 3-5). The Report of Referee did not make any independent findings that any "missing" emails impacted the veracity of the statements in Respondent's affidavit. (ROR 28-29). Most significantly, the Bar did not offer testimony from the employee of the insurer who, according to Respondent, waived the requirement for Ms. Courtin and Ms. Watson to sit for an examination under oath and provide a sworn proof of loss. In fact, Aaron Ames, Esquire, the in-house counsel who waived the policy requirements (according to Respondent), never provided sworn testimony to contradict the statements in Respondent's affidavit.

ii. Testimony from Ursula Sabada, Mary Lockhart, and Carlton McEkron.

The Bar called three (3) SLF clients[1] to testify during the final hearing: (1) Ursula Sabada, (2) Mary Lockhart, and (3) Carlton McEkron. (ROR 8-11).

[1] The testimony of these clients was received confidentially because all three clients who testified had pending civil matters and none had waived their attorney-client privilege.

Significantly, these witnesses were recruited[2] by the Bar to testify against Respondent (none of these clients had filed Bar complaints) and none of their cases were referenced in the Petition.

Regarding Ursula Sabada, the Referee found she was a “repeat client” and two of her three claims had settled. (ROR 9). The third claim was unsettled because Ms. Sabada was “unwilling to move out of her home temporarily for the repairs to be completed by the insurance company’s contractors in the third case.” (ROR 9-10). Ms. Sabada complained about communication, but the Referee noted Ms. Sabada had acknowledged issues with phone reception and problems with her ex-husband allegedly hacking her emails. (ROR 10).

Respondent was not involved in Ms. Lockhart’s matter. (ROR 8). Due to a calendaring error, a former SLF attorney failed to appear at a summary judgment hearing. (ROR 8-9). The trial court ruled on the merits of the motion and subsequently denied a motion to vacate explaining that the merits of the non-covered claim controlled the case outcome, which was affirmed on appeal. (ROR 8-9). Although summary judgment was not based on a failure to appear, Ms. Lockhart was offered compensation for the property damage. (T. 485-86).

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[2]Lead counsel for the Bar denied that its investigators recruited or initiated contact with these witnesses. However, each client testified independently that they had been approached by the Bar or its investigator, Thomas Reilly. (T. 947-49, 299-300, 397, 720-21).

Mr. and Mrs. McEkron were represented by SLF after their insurance company underpaid their claim for water damage. (ROR 10; T. 811-12). After years of contentious litigation and defending allegations that Mr. McEkron engaged in fraud, the case was tried, and the jury returned a verdict in favor of Mr. and Mrs. McEkron in March 2019. (ROR 11; T. 944-45). SLF's entitlement to attorney's fees is pending before the trial court. (T. 530, 1773). Neither client filed a Bar complaint against SLF. (ROR 11). Orlando Romero, a SLF attorney, represented Mr. McEkron at mediation and countered the insurance company's offer of $55,000.00 and attorneys' fees with a $365,000.00 settlement. (ROR 10). Respondent was not present and did not participate at the mediation. (ROR 10-11; T. 1184-86, 1189). Mr. Romero and another SLF attorney, Jelani Davis, represented Mr. McEkron at trial. (ROR 10-11; T. 1195-96). Respondent was not present and did not participate in trial. (T. 1195-96). The jury awarded Mr. McEkron $10,000.00. (ROR 11; T. 1199). Mr. McEkron thanked both SLF attorneys for giving him a voice. (ROR 11; T. 1200).

5. Respondent's lack of disciplinary history.

Respondent has practiced law for thirteen (13) years without any prior discipline. (ROR 45, MT. 111). The Referee found Respondent did not have a selfish or dishonest motive and instead based the majority of her recommendations

of guilt on Respondent's failure to ensure sufficient infrastructure to support the rapidly growing law firm. (ROR 48).

SUMMARY OF THE ARGUMENT

The Petition alleged Respondent engaged in a duplicitous filing scheme and fraudulent solicitation, directed his subordinate attorneys to violate the Rules of Professional Conduct, and cavalierly ignored sanctions imposed by the court. (Pet.). After the hearing, the Referee found these allegations had no merit. (ROR 32-33). Instead, the Referee determined that Respondent's law practice grew substantially between 2016 and 2020, and although he took extensive and expensive measures to hire attorneys and paraprofessionals to reduce caseload, improve phone, docketing, communication, and discovery protocols, these improvements were insufficient. (ROR 2-3, 49-50).

But the Referee erred in imposing an unprecedented and sweeping standard of strict liability finding that if a subordinate commits a rule violation, the law firm owner automatically commits the same rule violation regardless of the owner's direction, ratification, or knowledge of the subordinate's misconduct. (ROR 36-38). The Referee's findings to support that Respondent violated Rule 4-5.1(c) were limited to the fact that Respondent supervised his firm's practice and reviewed sanction orders. These findings are wholly insufficient to support a violation of Rule 4-5.1(c) for imposing responsibility for another lawyer's rule violations.

(ROR 36-38). The Referee relied upon trial court orders entered in cases handled by subordinate lawyers as the primary evidence that Respondent violated the charged rules. (ROR 33-39). There was no other evidence or findings regarding any subordinate lawyer's violation of the rules or Respondent's knowledge of each matter leading to the sanction order at a time when he could avoid or mitigate the consequences of the misconduct.

The Referee further erred in relying on *dicta* comments made by trial court judges in Watson and Courtin which were not incorporated into final orders to find Respondent's affidavits violated Rules 4-3.3 and 4-8.4(c). (ROR 35, 38). The Referee did not make required findings of actual knowledge (Rule 4-3.3) or intent (Rule 4-8.4(c)).

The Referee violated Respondent's due process rights by relying upon facts pertaining to Mojica, Mora, McEkron, Sabada and Lockhart to support rule violations because these facts were not charged in the Bar's Petition and the Bar did not amend its charging document. (ROR 33-39). Without consideration of these uncharged matters, there are no findings to support recommended Rule 4-1.4, 4-3.1, 4-3.3(b), and 4-3.4 violations. (ROR 33-34, 35, 35-36).

The Bar acknowledged a lack of case law sanctioning supervising lawyers for failing to ensure sufficient law firm infrastructure. (T. 2185-87). A firm's deficient management resulting in two (2) adverse orders in matters handled by

subordinates previously resulted in diversion. (T. 2168-70). A non-rehabilitative suspension, imposed *nunc pro tunc* to the date of the effective date of the emergency suspension, is the appropriate sanction.

ARGUMENT

I. Respondent agrees he violated Rules 4-5.1(a) and (b).

Under Rule 4-5.1(a), a partner in a law firm "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct." Rule 4-5.1(b) imposes the same obligation on a lawyer with direct supervisory authority. During his testimony, Respondent acknowledged the challenges in creating a sufficient infrastructure to meet the needs of a busy litigation practice. (T. 2018, 2020-22). The Referee noted that Respondent expressed remorse over the insufficient infrastructure and that Respondent undertook concrete and substantial remedial efforts to improve the practice. (ROR 45-50). There is also no dispute that these issues impacted a small percentage of cases given the high volume of matters handled by the firm. (T. 1138). However, especially during the 2016 to mid-2018 timeframe, the existing procedures contributed to scheduling errors, hearing coverage limitations, and difficulties in communicating with clients, opposing counsel, and judges. (ROR 2-3). Therefore, Respondent does not challenge the

Referee's determination that he violated Rules 4.5-1(a) and (b) and remains remorseful for lack of oversight.

II. Respondent is not guilty of violating Rule 4-5.1(c).

In contrast to Rule 4-5.1(c), a lawyer violates the supervisory provisions of Rules 4-5.1(a) and (b) without "direction, ratification, or knowledge of the violation." Respondent understands that the Referee's finding that the improvements he implemented were insufficient to support the Referee's determination that he violated Rules 4-5.1(a) and (b). However, the Referee's recommendation that Respondent is guilty of violating Rule 4-5.1(c) imposes a clearly erroneous strict liability standard, finding Respondent guilty of violating rules related to adverse trial orders arising in cases in which he was not involved. (ROR 33-39). In addition, it conflicts with the Referee's finding that Respondent did not direct attorneys to violate any rules. (ROR 7-8, 48).

The "standard of review for a referee's recommendation of guilt is that the referee's factual findings must be sufficient under the applicable rules to support the recommendation of guilt." Fla. Bar v. D'Ambrosio, 25 So. 3d 1209, 1216 (Fla. 2009). The Referee incorrectly determined that as sole owner of SLF and because he oversaw its management and reviewed sanction orders, Respondent ratified every action of his subordinate attorneys and should be responsible for any rule violation committed by his subordinates. (ROR 2, 33-39). These findings do not

support the Rule 4-3.1(c) standard to impose vicarious responsibility for a subordinate's violations of Rules 4-1.4(a) and (b), 4-3.1, 4-3.2, 4-8.4(d), 4-3.3(b) and 4-3.4.

"[A] lawyer is responsible for another lawyer's violation of the Rules of Professional Conduct," pursuant to Rule 4-5.1(c), only if the Bar proves:

> (1) the lawyer orders the specific conduct or, with knowledge thereof, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The commentary recognizes Rule 4-5.1(c) imposes additional elements:

> Professional misconduct by a lawyer under supervision could reveal a violation of subdivision (b) on the part of the supervisory lawyer even though it does not entail a violation of subdivision (c) because there was no direction, ratification or knowledge of the rule violation.

R. Regulating Fla. Bar 4-5.1(*cmt*) (*emphasis added*).

The Referee did not find that Respondent was involved in the litigation resulting in the adverse orders. The Referee found that Respondent did not direct his subordinates to violate the rules. (ROR 7-8). The Referee did not make any factual findings explaining how or even if the subordinate attorney violated a rule in each of the discrete trial court orders. (ROR 33-39). The Referee further failed to find whether or when Respondent directed, ratified, or knew of any violations of

his subordinates regarding each individual order. Id. The Bar offered minimal, if any, testimony regarding the facts pertaining to each order, the client's perspective, the extent of the dispute as to the underlying facts, the identities of the lawyers involved in the litigation, each lawyer's personal knowledge of the underlying facts, each lawyer's good faith pursuit of the case, and Respondent's knowledge of the facts involved and the reliability of the lawyers' presentations.

In contrast to Fla. Bar v. Parrish, 241 So. 3d 66, 70 (Fla. 2018) (finding Parrish could not "blame others" for misconduct because the client believed Parrish was his attorney and his fee agreement stated that Parrish would be "primarily responsible" for the representation), the evidence did not show Respondent was "primarily responsible" for any of the litigation related to the adverse orders. The Referee found Respondent guilty of violating Rule 4-5.1(c) because the sanction motions were brought to Respondent's attention and so, according the Referee, Respondent was guilty of any subordinate's misconduct described in those motions. (ROR 7, 36-38). That is wholly insufficient to support a finding that Respondent is guilty of violating Rule 4-5.1(c). First, Rule 4-5.1(c) requires knowledge and there was no evidence or finding that Respondent had knowledge of any conduct related to any sanction motion. (ROR 38). Second, while Respondent generally told subordinates to bring sanction motions and orders to his attention, the Referee did not make specific findings if and when each

motion was given to Respondent. Id. ***Third, and most significant, there was no evidence whatsoever or any finding made that even if each sanction motion was given to Respondent, that Respondent had knowledge of the alleged underlying misconduct related to each specific motion, at a time when consequences of the conduct could be mitigated or avoided***. Id. The evidence does show that Respondent took corrective actions by implementing processes designed to eliminate potential issues. (ROR 48-50). Accordingly, the Bar did not prove the requisite elements of Rule 4-5.1(c) and as discussed more fully in Issue III, Respondent should not be held responsible for any subordinate attorneys' rule violation related to each trial court order.

III. The Referee erred in holding Respondent vicariously responsible for subordinate attorneys' conduct leading to trial court sanction orders when the findings of the trial court orders did not rise to level of Rule violations and when Respondent did not direct the subordinate lawyer's actions or know of any misconduct at a time when consequences could be avoided.

The Referee's finding that Respondent violated Rules 4-1.4(a) and (b), 4-3.1, 4-3.2, 4-8.4(d), 4-3.3(b) and 4-3.4 are each based on the erroneous theory that Respondent, as SLF's sole owner, is guilty of any subordinate lawyer's rule violations even though Respondent did not direct or ratify the specific conduct and had no knowledge of the conduct at a time when consequences of the misconduct could be avoided. (ROR 33-39). The Referee further recommended violations of

Rules 4-8.4(c) and 4-3.3(a) based partially on matters in which Respondent was not involved. (ROR 35, 38).

The Bar relied primarily on the trial court's orders to prove that: (1) the lawyer handling the matter committed the rule violations; and (2) Respondent should be vicariously responsible for the subordinate's rule violations. (Pet.). Consideration of trial court orders is appropriate when evaluating rule violations; however, this must be weighed against lower burden of proof in civil trial matters. Fla. Bar v. Gwynn, 94 So. 2d 425 (Fla. 2012); Fla. Bar v. Rosenberg, 169 So. 3d 1155 (Fla. 2015). The Referee acknowledged reliance on the trial court orders and the lesser evidentiary burden in the cases where the orders were entered. (ROR 22). However, regardless of the standard of proof, the findings in the individual sanction orders that the Referee relied upon were still insufficient to prove a subordinate's rule violations. That is because every order was silent regarding Respondent's knowledge of any issue and participation in each of the matters. Contra Gwynn (specific federal court findings regarding Gwynn's "campaign of vexatious conduct"); Rosenberg (specifically describing Rosenberg's conduct including his refusal to comply with court orders assessing sanctions against him).

A. Communication; Rules 4-1.4(a) and 4-1.4(b).

The Referee erroneously found Respondent violated Rule 4-1.4(a) based on "the failure of SLF's attorney to explain to Mr. McEkron relevant settlement

offers, counter offers, and the benefits and liabilities pertaining to them." (ROR 34). Even if the subordinate's conduct violated Rule 4-1.4(a), there was no evidence or findings that Respondent directed or ratified the conduct or was aware of any insufficient communication or explanation. (ROR 10-11).

1. *The Referee's factual findings describe a Rule 4-1.4(b) violation, which was never charged by The Florida Bar and factual allegations related to McEkron were not specifically referenced in the Petition.*

Rule 4-1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation." However, the Petition only accused Respondent of violating Rule 4-1.4(a). During the hearing, the Bar utilized facts that might have been relevant to a purported violation of Rule 4-1.4(b) and used that evidence to argue to the Referee that Respondent was guilty of violating Rule 4-1.4(a). As a result, Respondent was denied due process in connection with the Referee's recommendation of guilt for of violating Rule 4-1.4(b). "[U]nder our case law, specific findings of uncharged conduct and violations of rules not charged in the complaint are permitted where the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint." Fla. Bar v. Fredericks, 731 So. 2d 1249, 1253 (Fla. 1999). The Court further explained that "[c]onversely, we have held that a finding of an uncharged rule violation based on conduct that is not within the scope of the specific allegations of the complaint

is a violation of due process." Id. fn1 (citing Fla. Bar v. Vernell, 721 So. 2d 705 (Fla. 1998)).

Insufficient communication with Mr. McEkron was not alleged in the Petition. Prosecuting uncharged violations unsupported by probable cause does not adhere to Rules 3-7.3, 3-7.4 and 3-7.5, and consideration of any McEkron allegations violated due process.

2. The record evidence does not support the finding that subordinate lawyers failed to communicate with Mr. McEkron.

The threshold issue of due process aside, there is insufficient evidence to support the rule violation. (ROR 34). Mr. McEkron's recollection of events, even aided by his paper file, was not "precise and explicit" and he was not "lacking in confusion as to the facts in issue" as required by the clear and convincing standard. In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). Mr. McEkron acknowledged speaking with his attorneys but could not provide details and repeatedly stated that he could not say whether specific issues were discussed with him. (T. 835-36, 838-41, 844-45, 847-50, 855, 858, 861-62, 870, 872, 906, 908, 924-25, 929, 931-32, 942-44, 953). Mr. McEkron was also unsure whether he attended two depositions or two mediations. (T. 906, 917). He testified that subordinate attorneys helped him prepare for his deposition and that Mr. Romero was attentive at the mediation. (T. 855). Mr. McEkron indicated the insurance company left the mediation without a

counteroffer to his lawyer's settlement proposal and confirmed the insurance company did not explain that attorney's fees and costs would be deducted from the proceeds of the insurance company's offer. (T. 857-58).

Mr. Romero testified regarding extensive settlement communications with Mr. McEkron who understood the actual funds he would receive after subtraction of fees and costs if he accepted the insurance company's offer and decided to proceed to trial. (T. 885, 1188-91, 1203). The Referee's findings did not show Respondent vicariously violated the rule through the actions of his subordinate. Further, Rule 4-1.4(b) violations should not be proven through hindsight consideration of the disparity between a settlement offer and a jury award.

B. Meritorious Actions; Rule 4-3.1.

The Referee found that Respondent violated Rule 4-3.1 based on a subordinate's handling of Mora. (ROR 34; TFB Comp. Exh. F). The Referee's recommendations should be rejected because consideration of the Mora order violates due process, Mora is still pending appellate consideration, the facts do not prove that the subordinate lawyer violated Rule 4-3.1, and Respondent should not be found vicariously responsible for violations when he had no knowledge of or participation in Mora. (T. 1000-01; ROR 24).

1. Consideration of Mora violates due process because The Florida Bar did not reference Mora in its Petition, did not amend its charging document, and added the order as an exhibit one business day before the final hearing.

Mora was not referenced in the Petition. Rule 3-5.2(b) states, "A petition for emergency suspension will also constitute a formal complaint" and that "respondent will have 20 days after docketing by the Supreme Court of Florida of its order granting the bar's petition for emergency suspension in which to file an answer and any affirmative defenses to the bar's petition." Respondent filed his Answer on June 29, 2020. Rule 3-5.2(l) states, "the referee will hear the matter after the lawyer charged has answered the charges in the petition for emergency suspension or interim probation or when the time has expired to for filing an answer." The Bar did not amend its charging document.

Mora was not investigated through Rules 3-7.3 or 3-7.4 grievance committee proceedings and probable cause determinations were not made by a grievance committee or by the Board of Governors pursuant to Rule 3-7.5. Instead, the Mora order was simply listed as a Bar Exhibit on September 4, 2020, four (4) calendar days and one (1) business day before the final hearing. (TFB Comp. Exh. F). This violates due process under Fredericks. See *supra* at 23-24. Four (4) days did not even provide sufficient time to file an Answer prior to the final hearing even if the Bar were permitted to amend its charges through its Exhibit List.

2. *Consideration of Mora trial court findings is premature because an appeal is pending.*

Had Mora been investigated through Rules 3-7.3 or 3-7.4, Respondent would have requested deferral of the grievance proceedings pending the appellate outcome pursuant to Standing Board Policy 15.55 ("Deferral of Disciplinary Investigations during Civil, Criminal and Administrative Proceedings"), in order to avoid inconsistent outcomes if the trial court findings are reversed. This is especially appropriate here because the disciplinary findings are entirely premised on lower court rulings pending appellate review.

This danger is highlighted by Robinson, referenced in the Petition, paragraph 14(d). Pet., pp. 9-10. The Bar relied on the Robinson trial court order and conceded this order was reversed by the Third District Court of Appeal. However, the Bar did not disclose that the evidentiary hearing on remand had already been held three and a half months before the Petition was filed. As in Mora, Robinson pertained to allegations of fraud by the plaintiffs. On remand, the Robinson trial court found insufficient evidence to make a finding of fraud. (See Respondent's Notice of Supplemental Memorandum Supporting Respondent's Motion to Dissolve).

Similarly, Mora could be reversed and the ramifications to Respondent caused by premature reliance on the trial court findings would be immeasurably destructive even if there were some process to set aside the disciplinary findings. Given the non-final nature of the Mora case, as well as the absence of procedural

due process safeguards, the Referee's recommendations related to Mora should be rejected.

3. Mora trial court findings do not show that the subordinate attorney violated Rule 4-3.1.

In Mora, the trial court considered the insurance company's allegations that the claim was precluded under the existing condition exclusion in his policy coverage documents. The trial court determined that the Plaintiffs "made materially false statements and/or intentionally concealed or misrepresented material facts when they denied and/or concealed prior interior damage." (TFB Comp. Exh, F, p. 3). The trial court further found that "Plaintiff's counsel also knew or should have known that the damage existed prior to the inception of the policy" and that "Plaintiffs' and their counsel knew or should have known that the Plaintiffs' claim presented no justiciable question and [it] was so devoid of merit on the face of the record that there was little to no prospect it would succeed." Id. pp. 4-5.

These findings do not rise to a Rule 4-3.1 violation. The commentary to Rule 4-3.1 explains that an action is not "frivolous even though the lawyer believes that the client's position ultimately will not prevail." Further, the Referee noted that the "standard of proof for sanctions is considerably lower than the standard of proof in The Florida Bar disciplinary cases." (ROR 4-5).

The lawyers in <u>Mora</u> argued there were justiciable issues because the plaintiff had two experts on damages and that the defense expert did not entirely disagree with the plaintiff's experts. (T. 991-94, 1085). There were also photos for the prior claim supporting the good faith theory of new damage and it appeared the trial court had erred in weighing the plaintiffs' credibility when the court had previously denied a motion raising similar allegations finding that the arguments should be considered by a jury. (T. 991, 1083).

4. There is no evidence supporting the Referee's finding that Respondent should be responsible for a subordinate attorney's violation of Rule 4-3.1.

There is no evidence or finding that Respondent was involved in or had any knowledge regarding any issue in <u>Mora</u>. (T. 998). There is no basis to find Respondent responsible for any misconduct by the subordinate attorney who handled <u>Mora</u>. Further, the sanctions motion was argued after Respondent was suspended on an emergency basis and Respondent was not involved in the hearing. (TFB Comp. Exh. F; T. 997).

<u>C. Expediting litigation and conduct prejudicial to the administration of justice; Rules 4-3.2 and Rule 4-8.4(d) violations are not supported.</u>

The Referee does not make any findings as to each discrete trial court order supporting the recommended Rule 4-3.2 or 4-8.4(d) violations but instead generally refers to any order imposing sanctions based on <u>Kozel</u>. (ROR 35, 39). The Referee identified eight unrelated <u>Kozel</u> orders that were entered between

March 2016 and November 2018, which are discussed separately below. (ROR 17-19). The Referee correctly found that Respondent was not the attorney of record in the litigation leading to any of these orders. (ROR 18).

Laurent: In Laurent, the trial court struck pleadings due to failures to comply with discovery deadlines. (Pet. Exh. A). In pertinent part, the court found, "[t]he Plaintiff attorney's conduct was not a result of neglect or inexperience and the Plaintiff was personally involved in not cooperating in the discovery process." Id. at 3. Given the finding of an uncooperative plaintiff and no evidence that the subordinate attorney was not diligently attempting to obtain the information or failing to expedite the matter or that Respondent had any knowledge regarding the facts of this particular representation, there is insufficient evidence to support the recommended Rule 4-3.2 or 4-8.4(d) violation.

Santos: In Santos, the trial court initially dismissed the complaint but reconsidered and instead struck exhibits and reset the case, issuing a new trial order. (Pet. Exh. E). Although Mr. Aguirre handled this case, the Bar did not elicit any testimony from Mr. Aguirre regarding this matter and whether the discovery violations were due to a lack of diligence or issues with the plaintiff. (T. 66-221). The Bar did not ask Mr. Aguirre whether Respondent was involved in the litigation or otherwise aware of the circumstances leading to the sanctions order. (T. 66-221). The Bar did not meet its burden of proving that Mr. Aguirre failed to

expedite the litigation or that Respondent had any involvement in or knowledge of these issues. Nor did the Bar even attempt to obtain from Mr. Aguirre any admission to his own breach of professional responsibilities. (T. 66-221). To the contrary, Mr. Aguirre testified clearly and without hesitation that he was not aware of professional rules violations at SLF. (ROR 7). There is no basis to find Respondent violated Rule 4-3.2 or 4-8.4(d) based on Santos.

Rodriguez v. Avatar: In Rodriguez v. Avatar, the trial court imposed the ultimate sanction of dismissal after the plaintiff chose not to appear at his deposition and instead, traveled out of the country to visit a sick relative. (Pet. Exh. G). Respondent had no direct involvement in the case and, in fact, trial court identified a lawyer other than Respondent as "lead counsel" noting that lawyer's decade-long experience in the practice of law. Id. at 5. This matter pertained to Avatar's attempt to schedule the plaintiff's deposition and representations by a subordinate in a motion for protective order stating that the plaintiff would not return from travel outside the country until after Labor Day. Id. at 2-3.

The Bar offered no evidence whether the plaintiff had provided incorrect information to counsel regarding his travel dates or when counsel learned his client would not be attending the deposition. It is clear from the trial court's order that lead counsel had advised the plaintiff of the court's order. Id. at 4-5. There is no evidence Respondent was involved in any manner regarding this representation. Id.

at 8. The Bar did not prove in this matter that the subordinate attorney violated Rule 4-3.2 or 4-8.4(d) or that Respondent should be vicariously responsible.

Reese: In Reese, Mr. Aguirre handled the representation, but the Bar did not elicit any testimony regarding the Plaintiff's failure to appear at court ordered depositions or the failure to file a response to a Motion to Strike Plaintiff's pleadings resulting in dismissal. (Pet. Exh. H; T. 65-221). There is no evidence that Respondent had any involvement in the representation or evidence supporting imposition of vicarious responsibility for any rule violation committed by Mr. Aguirre.

Collazo: In Collazo, the trial court order contained no factual findings but simply stated that the motion was "well taken" and that "[a]s explained on the transcribed record, all six factors of *Kozel* have been met." (Pet. Exh. L-2, p. 1). However, the transcript of the judge's oral findings was not considered by the Referee or introduced into evidence. There is no evidence that any subordinate lawyer violated Rule 4-3.2 or 4-8.4(d) and no evidence supporting Respondent's vicarious responsibility for any rule violation related to Collazo.

Frazer: In Frazer, the court identified "lead counsel" as someone other than Respondent. (Pet. Exh. M, para. 53, p. 9). The trial court did not otherwise identify Respondent as participating in the underlying action and there is no evidence that Respondent had any knowledge of the conduct referenced in the order at a time

when consequences could be avoided. Id. Even if those findings constituted a subordinate's failure to expedite, there no evidence supporting vicarious responsibility for a Rule 4-3.2 or 4-8.4(d) violation.

Ramirez: Ramirez pertained to a plaintiff's failure to comply with a court order compelling discovery. (Pet., para. 14(n)). The court does not identify the lawyer involved in the litigation but a lawyer other than Respondent is copied on the order. (Pet. Exh. N). The insurance company primarily asserted that the plaintiffs had failed to produce cell phone records and relied on plaintiff's deposition testimony contending he had not been asked to look for cell phone records. Id. at 2-3, 6-7. By the time the defense attempted to obtain the records directly from the cell phone company, the records no longer existed. Id. at 10. There is no evidence that Respondent was involved in communications with the plaintiff regarding these records, the production of documents, or any matter in this case. Accordingly, the evidence does not show that Respondent should be vicariously responsible for a Rule 4-3.2 or 4-8.4(d) violation.

Rodriguez v. American: Mr. Patterson testified extensively regarding his representation of the plaintiff in Rodriguez. (T. 1546-78). The Referee found Mr. Patterson to be credible and qualified. (ROR 12). No one else testified regarding this matter. The trial court order considered as a basis for the rule violations was entered after the court had granted the firm's motion to withdraw. (Pet. Exh. O).

After the firm withdrew, Ms. Rodriguez, acting *pro se* and responding to the defense's motion to hold her in criminal contempt, claimed she had not authorized SLF to represent her. Id. at 3. SLF did not have the opportunity to rebut these allegations to the trial court. (T. 1567-70). The plaintiff did not testify before the Referee.

Mr. Patterson described his multiple contacts with Ms. Rodriguez and a copy of her signed representation agreement, a copy of her driver's license she provided to the firm and an executed consent to represent was introduced. (T. 1569, 1571-72; MT. Exh 4). Ms. Rodriguez's accusations, as set out in the trial court order, when directly rebutted by Mr. Patterson's credible testimony which was corroborated by Ms. Rodriguez's executed documents authorizing SLF's retention does not meet the clear and convincing standard to prove Mr. Patterson violated Rule 4-3.2 or 4-8.4(d). In addition, there is no evidence to support Respondent's vicarious responsibility for any rule violation related to Ms. Rodriguez's representation.

The Holder Affidavit and The Barbas Affidavit: The Report of Referee cites affidavit excerpts of Judge Barbas and Judge Holder containing generalized statements and conclusory allegations unsupported by specific facts, that do not meet the clear and convincing standard. (ROR 13-17). These excerpts do not support Rule 4-8.4(d) violations. Respondent never appeared before Judge Holder

nor Judge Barbas. (MT. 7-8, 114, 194). Conclusory allegations have been defined as allegations "without supporting [facts or documents]." See Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979); K.E.L. Title Ins. Agency, Inc, v. CIT Technology Financing Services, Inc., 58 So. 3d 369, 370 (Fla. 5th DCA 2011). The Report of Referee cites one order by Judge Barbas, Ramirez (Pet. Exh. N), which was handled by a subordinate lawyer, to support the recommended rule violations. (ROR 19; see *supra* at 33). The Referee does not cite any order entered by Judge Holder. The trial judges' broad characterizations, without supporting facts, do not establish rule violations by clear and convincing evidence which requires the testimony to be "precise and explicit" as well as "lacking in confusion." In re Davey, at 404.

D. Candor to the tribunal; Rule 4-3.3.

The Referee relied on Mora, Courtin and Watson to support the Rule 4-3.3 recommendations. (ROR 35). Consistent with the evidence, the Report of Referee did not make necessary findings that Respondent personally had "actual knowledge" that any evidence was false or that SLF intended to engage in criminal or fraudulent conduct as required by Rules 4.3.3(a) and (b). The Rules explain that that the term "'knows' denotes actual knowledge of the facts in question [which] may be inferred from the circumstances." R. Regulating Fla. Bar, *Preamble*. In contrast, "'reasonably should know' when used in reference to a lawyer denotes

that a lawyer of reasonable prudence and competence would ascertain the matter in question." Id. Rule 4-3.3 does not use the phrase, "reasonably should know."

Rule 4-3.3 commentary further addresses the high standard of actual knowledge by explaining that even "a lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." R. Regulating Fla. Bar 4-3.3 (*cmt*) (*emphasis added*). The commentary states, "[t]he prohibition against offering false evidence only applies if the lawyer knows that the evidence is false." Id. (*emphasis added*).

Mora: As charged above, the Referee's consideration of Mora violates due process. See *supra* at 23-28. Further, the Mora findings and evidence do not support a Rule 4-3.3 violation by a subordinate or vicariously by Respondent. (ROR 35). The Referee relied exclusively on the trial court order which did not find actual knowledge by any attorney of the plaintiff's fraud. Id. Rather, the trial court interchangeably utilized "knew or should have known" with "knew" regarding the same factual findings. See TFB Comp. Exh. F at 3-5 (finding Plaintiff's counsel "knew or should have known that damage existed prior to inception of property" as well as "Plaintiff's counsel knew the property had pre-existing damage"; and finding "counsel knew that the Plaintiffs' claim presented no justiciable question" as well as "counsel knew or should have known that the Plaintiffs' claim presented no justiciable question.").

The trial court's findings that the attorneys handling Mora "should have known," while relevant to Florida Statutes, section 57.105, does not meet the actual knowledge standard of Rule 4-3.3, but rather equates with the "reasonably should know" standard that is inapplicable to Rule 4-3.3. Id. at 3-5; R. Regulating Fla. Bar, Preamble. The trial court's contradictory findings whether the attorneys handling the Mora case had actual knowledge of the plaintiffs' fraud or "should have known" about the fraud do not meet the clear and convincing standard which requires the evidence to be "precise and explicit" as well as "lacking in confusion." In re Davey at 404. Even if the Mora attorneys reasonably should have known that the plaintiffs were utilizing false evidence or otherwise committing fraud, the attorneys' reasonable belief without actual knowledge of fraud did not prohibit their presentation of the plaintiffs' case. R. Regulating Fla. Bar 4-3.3 (*cmt*).

The trial court's findings are silent regarding Respondent's involvement in or knowledge of any of the issues in Mora. (TFB Comp. Exh. F). There is no evidence supporting a determination that Respondent knew that Plaintiff Mora intended to engage or was engaging in criminal or fraudulent conduct. (ROR 35). Without these findings, there is not even a *prima facie* showing that Respondent violated Rule 4-3.3(a) or (b) by his subordinate's handling of Mora.

Courtin and Watson: Courtin and Watson are unique because the trial court judges' *dicta* statements reacting to the insurance company's allegations that

affidavits executed by Mr. Strems were false were not incorporated into the final orders. (Pet. Exhs. Q-2, R). Neither trial judge held an evidentiary hearing to consider these allegations. (MT. 199, 204). Respondent did not appear before either judge regarding this issue. Id. at 199, 203. Although the Watson affidavit is a basis for a rule violation, this affidavit is not in evidence in these proceedings and the Referee did not review the affidavit. The Bar's evidence in Watson was limited to the Watson trial court order. (Pet. Exh. R). Neither the Courtin nor Watson orders made findings regarding the falsity of the affidavits or whether Respondent intended to submit an incomplete or false affidavit. (Pet. Exhs. Q and R). Sanctions were not ordered in either matter. (MT. 197). The Bar failed to prove Respondent's affidavits were false and has not met its burden of proving clear and convincing evidence of fraud.

The Bar did not contradict Respondent's explanations. The Referee's reliance on the judges' initial oral reactions to reach dispositive conclusions is clearly erroneous. Judicial comments made during a proceeding are not judicial findings. Florida appellate courts have consistently noted:

> Trial judges may think out loud and then change their mind in the quiet of their study, just as appellate judges may see the light after oral argument contrary to the result that their questions in court might have suggested. There is no precedent for upsetting established rules of appellate review by giving undue weight to a trial court's oral comments.

State v. R.M., 696 So. 2d 449, 452 (Fla. 4th DCA 1997); see also Simpson v. In re Estate of Roosevelt Norton, 949 So. 2d 262, 265 (Fla. 3d DCA 2007) (trial court's oral statements that were not part of the trial court's order were considered dicta and appropriately treated as suggestions rather than trial court findings).

Although the Watson and Courtin judges reacted to the allegations regarding "missing emails," evidentiary hearings to evaluate the affidavits were not held and the judges' questioning of a subordinate lawyer who did not have personal knowledge regarding the preparation of the email attachment does not show clear and convincing evidence of Respondent's fraud. (MT. 199, 204; Pet. Exhs. Q and R.) Respondent was never given an opportunity to testify before the trial courts. Although Bar referral was requested, the Bar did not offer any evidence outside the allegations and the trial court's *dicta* reactions. The Bar did not elicit any testimony or otherwise contradict Respondent's explanations regarding Courtin and Watson and did not even introduce or present the Watson affidavit. The Referee's findings of fraud based on Courtin and Watson are clearly erroneous and cannot support a Rule 4-3.3 violation.

E. Fairness to Opposing Party; Rule 4-3.4.

Mora: As discussed above, consideration of Mora violates Respondent's due process rights. (See *supra* at 23-28). In addition, Mora pertained to the alleged misconduct of the plaintiff and made no findings that the SLF attorney handling

the litigation knew about a plaintiff's fraud. (TFB Comp. Exh. F). Without showing that the subordinate attorney engaged in misconduct, there is no support for finding a Rule 4-3.4 violation. (ROR 35-36). Further, there is no evidence that Respondent was involved in or had knowledge of these proceedings in any way and therefore, the Referee's recommendation of vicarious responsibility for Rule 4-3.4 should be rejected.

Mojica: As in Mora, consideration of Mojica violates due process because it was not referenced in the Petition and probable cause was not found by a grievance committee nor the Board of Governors. Respondent objected to the Mojica order, which was based on a sanctions hearing that occurred days before the Court issued its June 9, 2020 Order suspending Respondent. (TFB Resp. Opp. Comp. Exh. C. MT. 217, 221).

Further, Mojica does not support a Rule 4-3.4 violation. The trial court initially held on June 5, 2020 that there was insufficient evidence to sanction SLF because the attorneys were relying upon representations of its clients and acknowledged, "It may be negligence, at best, on behalf of Strems [Law Firm], but I don't find it reaches the level necessary for the Court to award sanctions against Strems for 57.105." (ROR 25). However, on June 22, 2020, the trial court *sua sponte* reconsidered its ruling and found that the SLF attorney "knew or should have known" the husband had not made the repairs and required SLF split the

payment of sanctions with the party plaintiff. (TFB Resp. Opp. Comp. Exh. C-2; ROR 25). This reconsideration was made after Respondent's emergency suspension and without any finding that Respondent was involved in the Mojica litigation or had any knowledge of any matter related to Mojica.

As the Referee notes, "standard of proof for sanctions is considerably lower than the standard of proof in The Florida Bar disciplinary cases." (ROR 22). Further, there is no evidence of any involvement by Respondent to support his vicarious responsibility for a Rule 4-3.4 violation. (ROR 25, 35-36).

F. Dishonesty; Rule 4-8.4(c).

Rule 4-8.4(c) prohibits attorneys from "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation." This Court has held, "[i]n order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent." Fla. Bar v. Lanford, 691 So. 2d 480, 480-481 (Fla. 1997). "Proof of element of intent is satisfied by showing that the attorney engaged in the conduct deliberately or knowingly." Fla. Bar v. Dupee, 160 So. 3d 838, 844 (Fla. 2015).

"Circumstantial evidence is often used to prove intent and is often the only available evidence of a person's mental state." Fla. Bar v. Marable, 645 So. 2d 438, 443 (Fla. 1994). However, "in order to be legally sufficient evidence of guilt, circumstantial evidence must be inconsistent with any reasonable hypothesis of

innocence." Id.; see also Fredericks, at 1251-52 ("circumstantial evidence alone may be insufficient to prove guilt unless it is inconsistent with any reasonable hypothesis of innocence").

In Marable, the attorney was recorded speaking with a Sheriff's office informant about the possibility of someone possessing pictures of the Sherriff using drugs and Marable stated, "She's got them. Get her address, you can break in there and steal them." Id. at 441. The Bar alleged this statement was sufficient to prove Marable violated 4-8.4(c). Id. The referee found that Marable's tone was serious and discredited Marable's contention that he was only kidding. Id. at 443. The Court disagreed finding that "'[k]idding is sometimes done in the 'deadpan' style" and that Marable's testimony constituted a "reasonable hypothesis of innocence not negated by the circumstantial evidence of his guilt." Id.

In finding Respondent guilty of Rule 4-8.4(c), this Referee relied on Mora, Courtin, and Watson, but did not make findings of intent regarding any of these matters. In Courtin and Watson, the Bar was required to prove that at the time Respondent executed the affidavits, he knew the affidavits were false. Because the trial courts did not hold a hearing and Respondent did not otherwise appear before the trial court, the only evidence of Respondent's intent was his testimony. (MT. at 199, 203, 204). Respondent testified that the emails he did not attach to his affidavit did not alter the meaning of the communication between opposing

counsel and Respondent or otherwise intentionally mislead. Id. at 200-04. This constitutes a reasonable hypothesis of innocence. Moreover, the Referee did not make any findings whether and how any omitted emails from either side were intended to create a misleading or false statement. (ROR 26-32). The evidence does not support a Rule 4-8.4(c) violation.

Regarding Mora, Respondent was not involved in the litigation and there was contradictory evidence whether the Strems Law Firm lawyers handling the Mora litigation had actual knowledge of any alleged fraud by the plaintiffs. (ROR 22). Without findings of actual knowledge of the plaintiff's fraud, there is insufficient evidence to prove the subordinate attorney's intention to be deceitful. Further, there is no evidence supporting Respondent's vicarious responsibility for any subordinate's violation of Rule 4-8.4(c) related to Mora.

IV. A two-year suspension is excessive and unsupported by existing case law.

The purposes of discipline as enunciated in Fla. Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992) (citing Fla. Bar v. Lord, 433 So. 2d 983 (Fla. 1983)) should be considered in evaluating the recommended discipline. These purposes are: (1) "the judgment must be fair to society . . . by protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer;" (2) the sanction "must be fair to the respondent," punishing for ethical breaches and yet encouraging reformation and rehabilitation; and (3) the sanction

"must be severe enough to deter others who might be . . . tempted to become involved in like violations." Id. A non-rehabilitative suspension fairly sanctions Respondent while encouraging the reformative practices that he had implemented before the emergency suspension. During the time frame in question, SLF handled well over 9,000 cases without issue. (ROR 49). A rehabilitative suspension only denies the public the services of an otherwise qualified lawyer and imposeS an excessive punishment utilizing a flawed vicarious liability standard.

A. Standards for Imposing Lawyer Sanctions, 6.2(c): Public Reprimand.

A "public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule and causes injury or potential injury to a client or other party or causes interference or potential interference with a legal proceeding." Respondent's negligence in failing to ensure his firm had appropriate infrastructures in place at the time to ensure adequate support for his attorneys potentially "cause[d] injury or potential injury to a client" or "cause[d] interference or potential interference with a legal proceeding."

There was no evidence of any refusal to comply with the terms of the sanction orders or any contention that Respondent was dilatory in the payment of assessed sanctions. (ROR 48). Contra Fla. Bar v. Rosenberg, 169 So. 3d 1155 (Fla. 2015)); Fla. Bar v. Fortunato, 788 So. 2d 201 (Fla. 2001). To the contrary, the Referee found Respondent to be sincerely remorseful because he took significant

action to improve his practice. (ROR 48-50). The Referee found Respondent's testimony was "corroborated by evidence of significant revisions to his practice, including obtaining the assistance of a LOMAS evaluation in 2018, law firm support and training, and implementation of procedures to reduce caseload and provide substantial paraprofessional assistance." (ROR 50). Although the Referee found the aggravating factors of multiple offenses and not being "fully candid" in a response on examination by the Bar that later he clarified during examination by counsel, a non-rehabilitative suspension is appropriate. (ROR 41-45).

B. A non-rehabilitative suspension is supported by the case law.

In evaluating a referee's recommended sanctions, the Court considers whether it has a "reasonable basis in existing case law and "the Standards for Imposing Lawyer Sanctions." Fla. Bar v. Temmer, 753 So. 2d 555, 558 (Fla. 1999). There are few reported cases addressing a lawyer's failure to supervise attorneys unless the conduct was ordered or ratified, which behavior is not present here. See Fla. Bar v. Hollander, 607 So. 2d 412 (Fla. 1992) (imposing a public reprimand for attorney directing associate to terminate a client and then enforcing an improper termination clause). The most factually analogous matter is a diversion disposition entered in Fla. Bar v. Sokolof, Florida Supreme Court Number SC13-2099 (June 13, 2014) that was approved by this Court. Although this is not a published decision, the Court has considered unpublished dispositions

indicating it "must keep in mind the facts and circumstances of each individual case and the purposes of Florida Bar discipline." Fla. Bar v. Kinsella, 260 So. 3d 1046, 1052 (Fla. 2018) (J. Pariente, dissenting).

In Case No. SC13-2099, a direct supervising attorney, practicing in a high-volume foreclosure firm, did not show the appropriate deference to the two trial court judges who had issued sanction orders against the supervising attorney's firm. As in the present case, the orders were not the result of his actions or inactions but showed he was unable to resolve problematic firm procedures. In evaluating the supervising attorney's role, diversion was appropriate.

Most disciplinary cases addressing derogatory findings in trial court orders pertain to the actions of the responding attorney. For example, the Referee relied upon Fla. Bar v. Broida, 574 So. 2d 83 (Fla. 1991), imposing a one-year suspension for Broida's litigation misconduct. In one case, Broida made misrepresentations to a judge to obtain an *ex parte* order, necessitating the opposing party to appellate intervention. Id. at 84-85. Two judges also recused themselves from Broida's cases finding, among other issues, Broida made repeated misrepresentations to the courts, disparaged lawyers, and pled claims with a "rambling discourse of narration." Id. at 86.

In Fla. Bar v. Vugin, Florida Supreme Court Case No. SC11-1786 (October 9, 2012), the respondent received diversion with conditions, even though he was

the subject of sanctions orders in two cases that were highly critical of his conduct. In the first matter, Vugin repeatedly failed to file a legally sufficient pleading and the last attempt was "untimely, disjointed, incomprehensible, nonsensical, contradictory" and "demonstrated that respondent had no standing, demanded relief in the alternative for claims not pled, and made sweeping conclusory allegations without factual support." Id. The action was deemed frivolous and Vugin was ordered to pay opposing counsel's fee of $89,766.25. Id. The second matter involved Vugin's failure to appear at least two hearings and failure to communicate with his client resulting in an order to show cause as to why he should not be held in contempt. The Court determined Vugin "did not understand what was going on" and found that the "court documents did not indicate a basic understanding of court procedure." Id. In contrast, the orders involving SLF subordinates did not involve Respondent's conduct and the findings were not as egregious as Broida or Vugin.

Other cases address the attorney's failure to comply with a sanction order rather than the underlying conduct leading to the sanctions order. For example, in Fla. Bar v. Rose, Florida Supreme Court Case No. SC10-1309 (October 5, 2010), the Court approved diversion for the attorney's refusal to pay a sanctions order. Similarly, Fla. Bar v. Fortunato, 788 So. 2d 201 (Fla. 2001), resulting in a 90 (ninety) day suspension for failing to respond to appellate orders, including an

appellate sanction order. Id. at 201. Fortunato gave "verifiably false, confusing, and deliberately misleading" testimony regarding her failure to act. Id. at 202. Rose and Fortunato do not address vicarious responsibility. Further distinguishing Respondent's case, there was never an allegation Respondent refused to pay a sanction.

While few cases address sanctions for failing to supervise attorneys; several cases address an attorney's failure to adequately supervise paralegals. Fla. Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994), considers serious misconduct. Lawless and his paralegal were paid over $12,000 for immigration paperwork that was never filed. The Court referenced precedent imposing public reprimands for similar failures to supervise paralegals. Id. at 1100.

The Lawless Court considered Fla. Bar v. Fields, 520 So. 2d 272, 272 (Fla. 1988) (public reprimand for a driving under the influence offense, charging improper interest and failing to supervise paralegals); Fla. Bar v. Armas, 518 So. 2d 919, 920 (Fla. 1988) (public reprimand for failing to supervise an office manager who mishandled trust funds); Fla. Bar v. Carter, 502 So. 2d 904, 905 (Fla. 1987) (public reprimand when Carter's office personnel maintained inadequate estate records). A ninety-day suspension was imposed in Lawless based on prior disciplinary record. Lawless at 1101.

More recently, in evaluating the supervisory role of a managing partner, the Court has approved an admonishment even when the failure to appropriately supervise non-lawyer staff led to substantial harm. For example, in Fla. Bar v. Alison B. Copley, The Florida Bar File No. 2014-31,274(10A), the attorney was admonished when her former employee stole approximately $110,000.00 from the trust account from 2009 through 2014.

In Fla. Bar v. Joseph E. Parrish, Case No. SC15-2305, 2016 WL 97790 (Fla. 2016), a consent judgment for a public reprimand and two (2) years of probation were approved where the attorney delegated responsibilities related to his trust account to a paralegal and the paralegal embezzled trust funds and forged the attorney's signature to commit insurance fraud.

Fla. Bar v. August J. Stanton, Jr., SC06-408 (July 17, 2007), is particularly instructive. In Stanton, the firm hired an employee comptroller to maintain the firm's bank accounts, including trust accounts. The employee stole approximately $1,200,000.00 from the firm and clients over a six (6) year period by forging signatures on firm checks, including trust account checks, primarily made payable to the employee and her creditors. Stanton failed to institute appropriate firm procedures and disregarded a suggestion by LOMAS to have an attorney open and review the firm's bank statements, which would likely have caused the thefts to be discovered much sooner. The Court approved the referee's findings, but imposed

an admonishment, a lesser sanction than the recommended public reprimand or the 90-day suspension sought by the Bar.

In contrast to Stanton, Respondent continually sought to improve his practice with “significant revisions to his practice, including obtaining the assistance of a LOMAS evaluation in 2018, law firm support and training, and implementation of procedures to reduce caseload and provide substantial paraprofessional assistance.” (ROR 50). Moreover, managing attorneys, who are obligated to adhere to the Rules of Professional Conduct, require less oversight and permit delegation of responsibility of firm files to experienced subordinate attorneys. Given all the circumstances, a non-rehabilitative suspension and probation is appropriate.

V. Conclusion.

Respondent respectfully requests this Court to reject the Referee’s recommended rule violations, with the exception of Rules 4-5.1(a) and (b), and impose a non-rehabilitative suspension, followed by a probationary term with the same conditions as outlined in the Amended Report of Referee.

Respectfully submitted,

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CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Initial Brief has been filed via eportal; and a true and correct copy has been provided by email John Derek Womack, Esquire, Bar Counsel, The Florida Bar, jwomack@floridabar.org; and Patricia Ann Savitz, Esquire, Staff Counsel, The Florida Bar, psavitz@floridabar.org.this 22nd day of December, 2020.

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