IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

MARK P. STOPA,

Respondent.

_____/

Supreme Court Case No. SC16-1727

The Florida Bar File Nos.
2015-10,414 (6C); 2015-10,633 (6C);
2015-10,755 (6C); 2016-10,066 (6C).

Supreme Court Case No. SC17-1428

The Florida Bar File Nos.
2016-10,630 (6B); 2017-10,772 (6B).

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

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

On September 20, 2016, The Florida Bar filed a four-count Complaint against Respondent, Mark P. Stopa, Esq, which included Florida Bar File Numbers 2015-10,414 (6C); 2015-10,633 (6C); 2015-10,755 (6C); and 2016-10,066 (6C), and became Supreme Court Case No. SC16-1727. On July 27, 2017, The Florida Bar filed a separate two-count Complaint against Respondent, Mark P. Stopa, Esq, which included Florida Bar File Numbers 2016-10,630 (6B) and 2017-10,772 (6B), and

became Supreme Court Case No. SC17-1428. On December 14, 2017, The Florida Bar filed an Amended Complaint in Case No. SC17-1428. The Honorable Linda R. Allan was appointed as Referee in each matter pursuant to the Supreme Court of Florida's August 29, 2017 Order and the September 7, 2017 Order of the Honorable Jack Helinger, Acting Chief Judge of the Sixth Judicial Circuit.

Prior to trial, the Complaint and Amended Complaint were consolidated. Counts I and II of the Amended Complaint were and are referred to as Counts V and VI and the exhibits have been prepared in this manner. The Referee will accordingly make individual reference to Counts I, II, III, IV, V, and VI, which together comprise all of the six counts alleged in the two separate but consolidated Supreme Court case numbers, which collectively shall be referred to as the "Complaint." The trial was bifurcated, with the guilt phase conducted on March 19 through March 23, 2018, and the sanctions phase conducted on April 23 and 24, 2018.

During the course of these proceedings, Respondent was represented by Scott K. Tozian, Esq. The Florida Bar was represented by Matthew I. Flicker, Esq., and Katrina Brown, Esq. All items properly filed, including pleadings, transcripts, exhibits, and this Report, constitute the record in this case and are being forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT RE: TFB Nos. 2015-10,414 (6C); 2015-10,633 (6C); 2015-10,755 (6C); 2016-10,066 (6C), and TFB Nos. 2016-10,630 (6B); 2017-10,772 (6B).

A. Jurisdictional Statement

Respondent is, and at all times mentioned in the Complaint of The Florida Bar, was, a member of The Florida Bar, admitted on April 23, 2002, and is subject to the jurisdiction of the Supreme Court of Florida.

The Sixth Judicial Circuit Grievance Committee found probable cause to file this Complaint, pursuant to Rule 3-7.4, of the Rules Regulating The Florida Bar, and this Complaint has been approved by the presiding member of that committee.

B. Narrative Summary of the Complaint (Counts I-VI)

COUNT I

The Referee finds from clear and convincing evidence presented during the trial, including all permissible inferences derived therefrom, the following ultimate facts:

Paragraphs 3 - 9

As alleged in Paragraphs 3 through 9 of Count I, and supported by the credible testimony of Judge Sherwood Coleman, Respondent failed to appear before Judge Coleman in *Morequity, Inc. v. De La Cruz, et al.*, Case No. 51-2010-CA-003602-ES, a foreclosure matter in Pasco County. Respondent represented the primary defendant in *De La Cruz*.

On August 11, 2014, Judge Coleman issued an Order Setting Non-Jury Trial and Pre-Trial Conference (Ex. 1.B.), setting a non-jury trial for October 21, 2014.

On October 20, 2014, the day before the non-jury trial, Respondent filed a petition for writ of prohibition ("petition") with the Second District Court of Appeal ("Second DCA"). By order dated October 21, 2014, the Second DCA denied the petition. Judge Coleman's judicial assistant contacted Respondent's office to ensure that he was aware that the petition had been denied and that the matter was going forward.

Respondent failed to appear for the trial and failed to contact the court to explain his absence. The plaintiff's attorney appeared for the trial. At the time of his failure to appear in the case in front of Judge Coleman, Respondent appeared before a different judge in a different courthouse and case. Respondent previously advised The Florida Bar and testified at the hearing that he was unaware at the time of the trial that the Second DCA had denied the petition. Respondent admitted in his testimony that he should have advised the court in *De La Cruz* in advance of the filing of the petition and of his intent not to appear at the trial.

Paragraphs 10 - 15

As alleged in paragraphs 10 through 15, and supported by the credible testimony of Judge Sherwood Coleman, Respondent failed to appear before Judge Coleman in *Fed. Nat'l Mortgage Ass'n v. Gagnon, et al.*, Case No. 51-2013-CA-000176-WS, another foreclosure matter in Pasco County. Respondent represented the primary defendant in *Gagnon*.

On August 22, 2014, Judge Coleman issued an Order Setting Non-Jury Trial and Pre-Trial Conference, setting the pre-trial conference for October 30, 2014. Among other things, this Order directed counsel to attend the hearings in person and, in the event of settlement, to immediately notify the court, submit a stipulation for an order of dismissal, and submit a final disposition form. Prior to the pre-trial conference, Respondent's firm reached a settlement with opposing counsel. Respondent's firm then removed the pre-trial conference from Respondent's calendar. Contrary to the court's Order, Respondent failed to immediately notify the court of the settlement, which would have allowed any pending hearings to be canceled. On October 30, 2014, nine days after Respondent failed to appear before Judge Coleman in *De La Cruz*, discussed in paragraphs 3 through 9 above, Respondent failed to appear before Judge Coleman for the pre-trial conference in *Gagnon*.

Respondent testified that he failed to appear at the *Gagnon* pre-trial conference because it had been removed from his calendar once it was settled. He further testified that he failed to appear because he and the plaintiff's counsel agreed that the plaintiff's counsel would apprise the court at the pre-trial conference that the case had been resolved or was being resolved. Respondent also testified that at that time, neither the settlement agreement nor the plaintiff's counsel's agreement to appear was preserved in writing.

Paragraphs 17 – 22

As alleged in paragraphs 17 through 22, and supported by the credible testimony of Judge Nancy Donnellan and Attorney Amanda Vogel, Respondent represented the primary defendant in the foreclosure matter of *CitiMortgage, Inc. v. Baker, et al.*, Case No. 2012-CA-008976-NC, in the Twelfth Judicial Circuit, in and for Sarasota County, Florida, before Judge Donnellan. During a hearing held on November 25, 2014, Respondent acted in a disrespectful, disruptive, and belligerent manner in his interactions with Judge Donnellan. Respondent's improper behavior included loudly lecturing the Judge and opposing counsel on procedure, throwing his arms up when the Judge ruled contrary to Respondent's wishes, arguing with the Judge on multiple occasions, and turning his back on the Judge to make a proffer on the record after the Judge ruled against him. Because of the extent of the improper behavior, Judge Donnellan ordered Respondent removed from the courtroom.

Paragraphs 23 – 25

As alleged in paragraphs 23 through 25, and supported by the credible testimony of Judge Thomas Gallen and his bailiff, Deputy James O'Brien, Respondent represented the primary defendant in another case in the Twelfth Judicial Circuit, in and for Manatee County, Florida, before Judge Gallen. During a hearing held in that case, Respondent acted in a disrespectful, disruptive, and belligerent manner in his interactions with Judge Gallen. Respondent made

statements impugning Judge Gallen's character and had several loud outbursts in the courtroom. On one occasion, Judge Gallen ordered Deputy O'Brien to escort Respondent from the courtroom as a result of his behavior. Subsequently, Judge Gallen voluntarily removed himself from hearing any more of Respondent's cases.

COUNT II

The Referee finds from clear and convincing evidence presented during the trial, including all permissible inferences derived therefrom, the following ultimate facts:

Based on the credible testimony of Maria G. Said ("Said"), she retained Respondent on June 11, 2012, to defend her in her foreclosure matter, *Bank of America v. Said, et al.*, Case No. 2011-CA-011635-O, in the Ninth Judicial Circuit, in and for Orange County, Florida. Respondent charged and collected a $1,575 non-refundable yearly fee from Said for the representation in 2012, 2013, and 2014. Said signed an untitled document that will be referred to as the "Retainer Agreement." (Ex. 14). Throughout the time she was represented by Respondent, Said communicated to Respondent's firm that her goal was to remain in her home as long as possible.

On July 17, 2014, the court ordered Said to file an Answer within ten days and Respondent failed to do so. On August 12, 2014, opposing counsel filed a motion for default requesting the entry of an order of judicial default against Said.

On August 15, 2014, Respondent filed an Answer and Affirmative Defenses. On September 12, 2014, the court scheduled a non-jury trial for November 17, 2014. In October 2014, Respondent charged and collected an additional $3,500 fee for the trial from Said. On November 13, 2014, Bank of America filed a motion to continue the trial due to its extended review of foreclosure matters in order to comply with National Mortgage Settlement. Although the motion to continue was denied soon thereafter, Respondent failed to advise Said of this motion.

On or about November 13, 2014, counsel for Bank of America advised Respondent of its offer for a "cash for keys" settlement in the amount of $15,000 and a sale date extended by 120 days in exchange for Said's consent to entry of a final judgment. Also, by letter dated November 13, 2014 (Ex. 16), Bank of America wrote to Respondent regarding a modification proposal and attached information for him to provide to Said. The modification proposal included terms that reduced the principle balance of Said's loan from $508,824 to $299,500 and reduced her interest rate from 2.965% to 2.000%. In order to accept the offer, Said would have to make three monthly trial payments beginning December 1, 2014. Respondent never communicated this offer to Said. On November 14, 2014, counsel for Bank of America sent a follow-up email letter (Ex. 17) to Respondent's office regarding its offer to modify Said's home loan. Respondent's office again failed to contact Said to advise her of the modification offer. During this time period, Said had been trying

to contact Respondent because of the upcoming trial on Monday, November 17, 2014.

On the afternoon of Friday, November 14, 2014, Respondent contacted Said. Respondent told Said about the "cash for keys" offer and, although initially stating it was a $15,000 offer, subsequently referred to it as an $11,000 offer. Respondent did not explain that he intended to retain a $4,000 fee from these funds despite Said's recent payment of the $3,500 trial fee, a trial that would not occur if Said accepted the offer. Furthermore, Respondent did not communicate the "cash for keys" offer to Said on the day it was made. Rather, Respondent waited until the afternoon of the last business day prior to trial. Said asked for the reasonable time of two hours to consider the offer but Respondent refused to agree to that request. Instead, Respondent agreed to give her 30 minutes to consider the offer. Not having adequate time to consider the offer and not knowing that Bank of America had presented a loan modification offer, Said reluctantly accepted the "cash for keys" offer. Respondent's office then advised counsel for Bank of America that Said would proceed with the "cash for keys" offer and not the loan modification offer. On November 17, 2014, the court entered a final judgment of foreclosure.

Thereafter, Said made multiple requests to Respondent's firm for information regarding the settlement agreement. Respondent's firm failed to promptly and reasonably reply to these requests. During that time and based on the settlement

agreement, the court entered a Notice of Sale scheduling the foreclosure sale for January 20, 2015. Prior to the sale, Said communicated to Respondent's firm that she was terminating Respondent's representation. Once Respondent's representation was terminated, counsel for Bank of America began communicating directly with Said, at which time Said first learned of the loan modification offer. Said was able to work with Bank of America to receive another loan modification offer.

Counsel for Bank of America filed a motion to vacate the final judgment of foreclosure and thereafter, Respondent formally withdrew from representing Said. Bank of America and Said then entered into a loan modification agreement and Said remains in her home today complying with that agreement. The credible testimony of Bank of America's counsel, Tahirah Payne, also supports these findings of fact. Thus, contrary to Respondent's representation, Said wanted, accepted, and eventually completed a loan modification.

Respondent asserts that the reason his office did not advise Said of the loan modification offer was that Said previously indicated in communications that she was not in a financial position to successfully modify her loan. This speculation by Respondent was incorrect, as is clearly demonstrated by Said's successful loan modification. In making these findings of fact, the testimony of Respondent and his firm's employees, Cathy McKnight and Angela Schaefer, was also considered.

COUNT III

The Referee finds from clear and convincing evidence presented during the trial, including all permissible inferences derived therefrom, the following ultimate facts:

Based on the credible testimony of Rosalie A. Coyne ("Coyne"), on August 5, 2013, Coyne retained Respondent to defend her in her foreclosure matter, *Wells Fargo Bank, N.A. v. Coyne, et al.*, Case No. 12-012799-CI, in the Sixth Judicial Circuit, in and for Pinellas County, Florida. Respondent charged and collected a $1,575 fee for the first year of representation. As was Respondent's usual course of business, neither Respondent nor any other attorney initially met with Coyne to discuss with her the terms of representation or the contents of her "retainer agreement." (Ex. 46). In September 2014, Coyne gave Respondent six post-dated checks, each in the amount of $275, representing Respondent's fee for the following second year of representation. Coyne believed that Respondent's representation was to negotiate a loan modification on her behalf. However, Respondent did not attempt to negotiate a loan modification for Coyne. In fact, Respondent never met with nor spoke to Coyne during the course of his representation despite Coyne's repeated attempts to speak with him. Coyne stopped payment on the last two checks when she believed Respondent was not acting in her best interests.

In January 2015, Coyne communicated with a non-attorney in Respondent's firm. She told Respondent's firm that it was her intention to keep the property. At 4:45 p.m. on a Friday at a date sometime prior to the scheduled trial, someone in Respondent's firm contacted Coyne and told her that she needed to bring a check in the amount of $3,500 to Respondent's office no later than the following Monday morning at 9:00 a.m.; otherwise, Respondent would not represent her at trial. When Coyne indicated that she could not obtain that much money that quickly, Respondent's office told her that there is "no free lunch."

Unbeknownst to Coyne, on February 12, 2015, Respondent and attorney Christopher Hixson, who was working at Respondent's direction, contacted counsel for Wells Fargo Bank, N.A. ("Wells Fargo"), and agreed to settle Coyne's foreclosure case. The terms of the settlement agreement included waiving a deficiency judgment, extending the foreclosure sale date for 60 days, and a "cash for keys" payment of $1,500. Mr. Hixson instructed counsel for Wells Fargo that the $1,500 payment was to go to Respondent's firm and not to Coyne.

Respondent never communicated with Coyne about the terms of the settlement agreement. Respondent falsely advised Wells Fargo's counsel that Coyne agreed to the terms of the settlement agreement. Further, Respondent misrepresented to Wells Fargo's counsel that he was authorized to sign on Coyne's

behalf. On February 12, 2015, Respondent executed a Settlement Agreement and Consent to Entry of Foreclosure Judgment with Wells Fargo in Coyne's case.

Coyne was unaware of her upcoming trial scheduled for February 13, 2015. However, coincidentally, an acquaintance of hers was in the courthouse on a prior day, saw Coyne's name on a docket, and called to ask or tell her about it. Coyne stated she knew nothing of it and then called Respondent's firm to find out more information about it. Respondent's firm did not tell Coyne the time or date of her foreclosure trial. In fact, as was the practice of Respondent, his office staff advised Coyne not to appear at her foreclosure trial in spite of written court orders requiring that she must. Worried that she needed to attend, Coyne contacted a friend of hers, (the late) retired Judge Gerard O'Brien for help. Judge O'Brien was able to discover the date of the hearing and advised Coyne of where she should go to attend.

Counsel for Wells Fargo appeared at trial. Respondent did not appear. To the surprise of Coyne, who was seated in the courtroom, Wells Fargo's counsel advised the presiding judge that the parties had settled the case. At that point, Coyne discovered from Amy Drushal, counsel for Wells Fargo, that Respondent had settled her case without her authorization, and that she had 60 days to vacate her home. Coyne communicated to the judge that she rejected the "settlement agreement." The judge told her to contact Respondent, so she left the courtroom and immediately placed three calls to his office. No one answered the phone, so she left voice mail

messages. Contemporaneously, Coyne terminated Respondent's representation during the trial and proceeded to negotiate with counsel for Wells Fargo on her own. She obtained a more favorable term of time to remain in the home than that agreed to by Respondent.

Respondent's claim that he had oral authority from Coyne to settle for "the best deal" that he could is inconsistent with all credible evidence. Respondent's claim that he had authority to settle her case because Coyne was told that she either had to file bankruptcy or settle her case and she chose not to file bankruptcy is also inconsistent with all credible evidence. There is no language whatsoever in Respondent's "retainer agreement" that gave him the authority to sign documents to resolve Coyne's case nor is there any other written document delegating this authority to Respondent. There is no credible evidence that Respondent had authority to settle Coyne's case without her knowledge of and agreement to the terms of the settlement.

The credible testimony of Coyne, Amy Drushal, and Christopher Hixson supports these findings of fact. The testimony of Respondent, mortgage foreclosure defense attorney Lee Segal, and Respondent's employee, Angela Schaefer, was also considered.

COUNT IV

Except as specifically noted, the Referee finds from clear and convincing evidence presented during the trial, including all permissible inferences derived therefrom, the following ultimate facts:

Based on the credible testimony of Process Server Michelle Howard ("Howard"), on March 31, 2015, April 1, 2015, and April 2, 2015, Howard unsuccessfully attempted to effectuate service of two subpoenas upon Respondent at his office in the matter of *Aurora Loan Services, LLC v. Decoursy, et al.*, Case No. 08-013349-CI, in the Sixth Judicial Circuit, in and for Pinellas County, Florida. While it was not proved by clear and convincing evidence that Respondent's office somehow failed to cooperate in facilitating the service, Howard believed that to be the case. For that reason, rather than returning to Respondent's office, Howard next, lawfully, attempted to serve Respondent at the Pinellas County courthouse on the afternoon of April 2, 2015.

On April 2, 2015, Howard asked the deputies at the courthouse to alert her when Respondent entered the building. When that occurred, Howard approached Respondent, identified herself, stated her purpose, and placed the service papers on top of a box that Respondent carried in his hands. Respondent was taken aback by this unexpected encounter and stated in a loud aggressive voice that Howard needed to learn the laws and could not serve him in a courthouse. The credible testimony of Howard and Deputy Nancy Campbell supports these findings of fact.

On May 26, 2015, Howard again attempted to serve Respondent at the Pinellas County courthouse with a summons and complaint directed to him as the corporate representative for Jupiter House, LLC, in the matter of *The Bank of New York Mellon v. Jupiter House, LLC, et al.*, Case No. 2014-CA-000658-WS, in the Sixth Judicial Circuit, in and for Pasco County, Florida. As a result of Howard's prior experience in attempting to serve Respondent, Howard wished to serve Respondent in the presence of witnesses and again enlisted the assistance of court deputies. On that day, a deputy alerted Howard that Respondent had entered the entryway of a courtroom. Howard approached Respondent and placed the summons and documents on top of Respondent's wheeled cart, which was carrying files. Respondent threw the documents in some fashion and stated in a loud aggressive tone that he was not a named party in the action and was unauthorized to accept service. The credible testimony of Howard and Deputy Jason Morena supports these findings of fact.

On June 9, 2015, Howard attempted to serve a subpoena upon Respondent at the Pinellas County courthouse in a third matter, *Nationstar Mortgage, LLC v. Goolsby, et al.*, Case No. 2013-CA-025292, in the Eighteenth Judicial Circuit, in and for Brevard County, Florida. On that date and time, Respondent was in the courthouse for a hearing before the (late) Honorable Ray E. Ulmer, Jr., in another matter. Howard enlisted the assistance of courtroom deputies to escort her into a

waiting area outside of Judge Ulmer's courtroom. Judge Ulmer was informed that Howard was waiting to serve Respondent. Judge Ulmer allowed a short recess. The courtroom deputy, Jared Moren, approached Respondent a total of three times to advise that someone was waiting to see him outside. However, Respondent did not leave his seat at counsel's table. On the third occasion that Deputy Moren approached Respondent, the deputy told him there was a lady outside to see him. Respondent asked if she was a process server and Deputy Moren said that he thought she was. Ultimately, Judge Ulmer allowed a courtroom deputy to escort Howard into the courtroom to complete service on Respondent. Upon being served, Respondent stated in a loud agitated manner that he could not believe that the courtroom deputy allowed Howard to serve Respondent in open court. The credible testimony of Howard, Deputy Jason Morena, and Deputy Jared Moren supports these findings of fact.

In making these findings of fact, the testimony of Respondent, Deputy Peterson, and Deputy Davis was also considered.

COUNT V

The Referee finds as follows:

On April 18, 2008, Wells Fargo Bank, N.A., initiated foreclosure proceedings against Nootan Patel and Shree Patel in the matter of *Wells Fargo Bank, N.A. v. Patel, et al.*, Case No. 08-CA-008480, in the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, wherein the lender sought to foreclose upon a promissory note and mortgage. Both Nootan Patel and Shree Patel executed the Mortgage for the subject property. At all times relevant, the subject property was occupied by Prakash Patel, who was Nootan Patel's former husband, and Yolanda Valdez. Shree Patel is the daughter of Nootan Patel and Prakash Patel. Prakash Patel was not a party in the foreclosure action, did not hold title to the subject property when the foreclosure action was initiated, and was not a signatory on the mortgage for the subject property.

Respondent testified at the hearing before the Referee. Nootan Patel and Shree Patel also testified at the hearing, although their credibility is questionable. Prakash Patel did not testify at the hearing.

It is clear from the evidence that Prakash Patel contacted Respondent regarding his representation in the foreclosure lawsuit. Respondent testified that he was hired and paid by Prakash Patel, who represented to Respondent that he wished to hire him on behalf of Nootan Patel and Shree Patel. While it is now clear that Prakash Patel had interests adverse to those of Nootan Patel and Shree Patel, it was not evident to Respondent when he began his representation. In fact, The Florida

Bar has withdrawn the allegation made in Paragraph 19 of the Amended Complaint that "Nootan Patel and Prakash Patel had adverse interests regarding the representation, and there was a substantial risk that the representation of one client would be materially limited by the lawyer's responsibilities to another client."

On or about October 27, 2008, Stephen K. Hachey, Esq. filed a Notice of Appearance on behalf of Nootan Patel. On or about October 18, 2010, Respondent filed a Notice of Appearance as purported counsel for Shree Patel and Nootan Patel. If Respondent had reviewed the case docket before he entered his appearance, as would be the best practice, he would have observed that Nootan Patel already had an attorney. About one year later, on September 6, 2011, a Stipulation of Substitution of Counsel was filed in the case substituting Henry Hicks, Esq. in the place of Stephen Hachey, Esq. as Nootan Patel's counsel.[1] On or about November 24, 2010, Respondent filed Notices of Appearance as counsel for Prakash Patel and Yolanda Valdez, the tenants of the property.

When Respondent filed his appearance as purported counsel for Shree Patel and Nootan Patel they were not, at that time, aware he had been hired to represent them. While it is the best practice for an attorney to speak with anyone he will be representing in advance, there was no evidence that it was wrongful for Respondent

[1] It seems that none of these attorneys were reviewing the docket or they would have discovered the conflicting representation.

to rely on the representations of Prakash Patel in undertaking to represent Nootan Patel and Shree Patel. Furthermore, although Respondent would have likely been aware that counsel already represented Nootan Patel if he had sufficiently reviewed the case, The Florida Bar has not alleged that Respondent's actions with regard to reviewing the case were unreasonable.

Some four years later, on or about September 23, 2014, Respondent sent a representation agreement addressed to Nootan Patel regarding Respondent's representation in the foreclosure proceeding going forward, and charging a $1,575 non-refundable fee. The September 23, 2014 representation agreement purportedly bears the signature of Nootan Patel, as well as Prakash Patel and Yolanda Valdez. Nootan Patel has testified that she did not execute her signature on this agreement. However, even if this is true, there was no evidence that Respondent had reason to know that it was not her signature on the document.

On December 10, 2014, Respondent filed an Answer and Affirmative Defenses on behalf of Nootan Patel and Shree Patel. The testimony conflicts as to whether Respondent spoke with Nootan Patel prior to filing the document. Respondent does not recall if he spoke to her but says he may have. Nootan Patel testified that she did not speak with Respondent about the Answer and Affirmative Defenses and that she did not authorize them to be filed. However, Nootan Patel

previously admitted in a deposition that she spoke to Respondent in November 2014, which would have been during the relevant time period.

It is not uncommon for attorneys to file documents in cases that their clients do not have prior knowledge of or specifically "authorize," the term used by The Florida Bar. However, attorneys have an obligation to ensure that the statements in documents they prepare are truthful and accurate. In this case, the Answer and Affirmative Defenses contained fact-specific defenses, including references to conversations between Respondent, Nootan Patel, Shree Patel, and their mortgage lender. The following two inaccurate assertions were made in the Answer and Affirmative Defenses:

In paragraph 23, the Seventh Affirmative Defense states: "Plaintiff's claims are barred in whole or in part by the doctrine of estoppel. Specifically, and without limitation, Plaintiff is barred from procuring a foreclosure when it represented to Defendants that the only way to be considered for a loan modification or short sale was to default, yet Plaintiff refused to give the desired modification or short sale after the alleged default."

In paragraph 24, the Eighth Affirmative Defense states: "Specifically, and without limitation, Plaintiff and its agents called Defendant(s) repeatedly in attempt to collect this debt, often at odd hours of the day, despite knowing Defendants are represented by counsel."

These inaccurate statements are repeated later, in the February 9, 2015 filing of the Motion for Summary Judgment and Notice of Filing Affidavits Regarding Summary Judgment. The Affidavits contained the purported notarized signatures of Nootan Patel and Shree Patel, who have consistently disputed that they signed the documents. The Notary Public involved was not called as a witness. But, even if it is true that neither Nootan Patel nor Shree Patel signed the documents, there is no evidence that Respondent knew that their signatures were false.

The Referee also heard the testimony of Adam Diaz, Esq., ("Diaz"), counsel for U. S. Bank, which was the substituted plaintiff in the underlying foreclosure case. Diaz believed the Affidavits filed in support of the Motion for Summary Judgment conflicted with allegations in a bankruptcy case filed by Nootan Patel. Diaz also believed that it was apparent from the face of the documents that the allegations were inaccurate because his client, the substituted plaintiff, could not have committed the alleged acts as they were not the lender at the time that the acts would have had to occur. Diaz also testified that he has litigated against Respondent in approximately 50 cases, so he had previous knowledge of pleadings filed by Respondent in other cases.

Based upon his beliefs about the Affidavits and the practices of Respondent, Diaz filed Plaintiff's Verified Motion to Strike Defendant's Affidavits and for Sanctions for Fraud on Court ("Motion to Strike") in the underlying foreclosure case.

(Ex. 104 J.) The Motion to Strike complains of the same conduct as is alleged in Count V of the Complaint before the Referee. On November 9, 2015, Hillsborough Circuit Judge Perry Little held a two-hour hearing on the Motion to Strike, which was then continued to Tuesday, September 13, 2016, for an additional almost four-hour hearing. At the conclusion of that hearing, Judge Little denied the Motion to Strike.

In the hearing before the Referee, Diaz testified that he disagreed with Judge Little's ruling. Subsequent to the denial of the Motion to Strike, Caren Brown filed a complaint with The Florida Bar, which constitutes Count V of the Complaint. Brown is employed by Truman Capital, the substituted plaintiff (U.S. Bank, as trustee for Truman Capital) in the underlying foreclosure case before Judge Little, and the client of Mr. Diaz. The complaint filed by Brown is based on the same actions and conduct that Judge Little heard and ruled on.

Judge Little considered the issues before him under the lesser standard of preponderance of the evidence. Here, the Referee is considering the issues under the higher standard of clear and convincing evidence. While Judge Little's ruling does not have a legal effect on the Referee, it is evident from reading the transcript of the hearing and the comments he made that he viewed the case in a similar way as the Referee. Specifically, it appears that Respondent is using some sort of "form" affirmative defenses that he files in foreclosure cases, which is not a good practice.

But, because of the conflict-filled testimony of Nootan Patel, who is not a credible witness, it is unclear whether she was consulted regarding the affirmative defenses, which substantially formed the basis of the affidavits. Thus, The Florida Bar did not prove by clear and convincing evidence that Respondent advanced unmeritorious claims or made false statements of fact to a tribunal.

COUNT VI

The Referee finds from clear and convincing evidence presented during the trial, including all permissible inferences derived therefrom, the following ultimate facts:

Respondent represented Kathryn W. Milliken ("Kathryn Milliken") and Robert B. Milliken ("Robert Milliken"), the defendants in the mortgage foreclosure matter titled *DiTech Financial, LLC v. Milliken, et al.*, Case No. 14-CA-001000, in the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida. Pursuant to the Residential Foreclosure Amended Order Setting Non-Jury Trial and Directing Pre-Trial Procedures ("trial order"), all counsel and parties were required to be present before the court at the pretrial and trial. In fact, Paragraph 5 of the trial order specifically stated that "[a]ll counsel and parties shall be present before the Court at the pretrial and trial."

Respondent has acknowledged that his office received the subject trial order prior to trial, as indicated by his testimony at the grievance committee's live hearing in this matter on June 20, 2017:

> Q: Now, paragraph 5 of this trial order reads that "All counsel and parties shall be present before the court at the pretrial and the trial pursuant to Rule 1.200(c) of the Rules of Civil Procedure. On failure of a party and counsel to attend the conference, the court may dismiss the action, strike the pleadings, limit proof of witnesses."
>
> Do you recall specifically reading that early in the case?
>
> A: I mean, as I sit here today, do I have a specific recollection of having read that language in the order? No. Did I review the order at some point after it came in? Yes.

A non-jury trial was set in the case for April 10, 2017. On April 10, 2017, Respondent, Kathryn Milliken, and Robert Milliken appeared at the courthouse for the trial. Shortly after the trial began, Respondent moved to disqualify the presiding judge, Gregory P. Holder. Judge Holder gave Respondent 15 minutes to prepare a written, verified motion. Respondent prepared that motion by hand. It was then verified and executed by Kathryn Milliken. Judge Holder denied the motion and the trial proceeded.

During the trial, plaintiff's counsel, Victor Veschio, Esq., called Kathryn Milliken as a witness. Respondent then advised Judge Holder that Kathryn Milliken was not in the courtroom and that he did not know whether either she or Robert

Milliken were within the courthouse, as indicated by the following exchange between Respondent, opposing counsel, and the court at the trial on April 10, 2017:

> MR. VESCHIO: I'd like to call Mrs. Milliken.
>
> THE COURT: Mrs. or Mr.?
>
> MR. VESCHIO: Mrs. Milliken.
>
> THE COURT: Mrs. Milliken.
>
> MR. VESCHIO: Mrs. Kathryn Milliken.
>
> MR. STOPA: Judge, she's not in the courtroom; and my understanding, from communicating with her, she was not under subpoena. So, if they didn't subpoena her, then I don't see how they can call her in their case.
>
> THE COURT: They can certainly call her. If she's present in the courthouse, present on this floor, they can call her.
>
> MR. VESCHIO: I'm concerned because I think the Millikens actually signed your Verified Motion to Disqualify.
>
> MR. STOPA: I'm not -- I'm not sure where they are at this point, Judge. I'd ask for a brief recess.

Thus, as set out above, Respondent argued that since Kathryn Milliken was not under a subpoena, she could not be called to testify. And, in response, Judge Holder replied that Kathryn Milliken could certainly be called to testify if she was "present in the courthouse, present on this floor." In reply, Respondent stated that he wasn't sure where she was and asked for a brief recess, which the Court granted.

Deputy James Idell ("Idell"), the bailiff during the trial, offered credible testimony in the case. He stated that he immediately walked out into the hallway to find Kathryn Milliken once the recess was called to see if she was still there. Idell

stated that he knew who Kathryn Milliken was from observing her outside of the courtroom and talking to Respondent earlier. As soon as he found Kathryn Milliken in the hallway immediately outside the courtroom, he approached to tell her that she was requested in the courtroom. Idell stated that Respondent, who was "ten seconds" behind him in exiting the courtroom, immediately stated to Kathryn Milliken "something along the lines of, 'you don't have to be here. You are not under subpoena. You can go if you would like.' Something along those lines."

Idell then went back in the courtroom and told Judge Holder that she (Kathryn Milliken) was out in the hallway but that Respondent was telling her she could leave if she wanted to. Judge Holder told Idell to "go get her, that she was ordered into the courtroom," which he did, and then Kathryn Milliken followed him back into the courtroom. (Tr. pp. 413-15).

When the hearing resumed, Judge Holder asked Respondent whether he had just walked outside and instructed his client to leave the courthouse. As the transcript of the hearing states, Respondent replied as follows:

> No, Judge, I told them that it was their choice, whether they wanted to stay or leave because they weren't under subpoena. . . The attorney-client privilege should prevent any questions about what I told them. But, that said, I'm willing to clarify that I told them it was their choice whether to stay or leave because they were not subpoenaed or ordered. They have no obligation to be here.

(Ex. 123 A., pp. 02445-46).

Respondent continued by arguing to Judge Holder that his actions in ordering the Millikens into the courtroom were wrong and required his disqualification. Thereafter, the hearing continued and Kathryn Milliken submitted to examination by the plaintiff. Kathryn Milliken then testified at trial that she had reviewed the trial order prior to appearing at the trial and acknowledged that her appearance was required.

As discussed above, immediately prior to Respondent advising Kathryn Milliken that she was under no obligation to testify absent a subpoena and could leave, Judge Holder had informed Respondent in open court that Kathryn Milliken could certainly be called to testify if she was present in the courthouse. By advising his client that that she was under no obligation to testify absent a subpoena and could leave, Respondent violated Judge Holder's trial order, as well as his stated directives at trial. [2] The credible testimony of Kathryn Milliken, Judge Holder, and Attorney Victor Veschio also supports these findings of fact.

Respondent defends his conduct by first offering evidence that Judge Holder is biased in favor of lending institutions because of his prior work as a civil attorney in representing clients involved in the financial industry. Respondent submitted the supporting testimony of Court Reporter Kathryn Machol regarding this position.

[2] Although Respondent was not charged with additional rule violations, Respondent's conduct could have subjected his client to punishment by the court had she chosen to leave the courthouse after Respondent told her that she was not under an obligation to remain.

Respondent also defends his conduct on the basis of Judge Holder's perceived personal animosity toward him and, in support, submitted the testimony of one of his clients, John Trimm. While these witnesses were sincere and appeared truthful, nothing about this evidence acts as a defense to Respondent's conduct.

III. RECOMMENDATION AS TO GUILT

I recommend that Respondent be found guilty of violating Rule 3-4.3, of Rules of Discipline of The Florida Bar; and Rules 4-1.2, 4-1.3, 4-1.4, 4-3.4, 4-3.4(c), 4-4.4, 4-8.4(c), and 4-8.4(d), of Rules Professional Conduct, as more specifically set out below.

A. Count I

I recommend that Respondent be found guilty of violating Rules 4-3.4(c) and 4-8.4(d), of Rules Professional Conduct.

1. Violation of Rule 4-3.4(c)

   The clear and convincing evidence is that Respondent violated Rule 4-3.4(c), Rules Regulating The Florida Bar, regarding "Fairness to Opposing Party and Counsel" by knowingly disobeying an obligation under the rules of a tribunal by failing to appear for scheduled hearings or to explain his absence.

2. Violation of Rule 4-8.4(d)

The clear and convincing evidence is that Respondent violated Rule 4-8.4(d), Rules Regulating The Florida Bar, regarding "Misconduct" by engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice by acting in a disruptive and disrespectful manner.

B. Count II

I recommend that Respondent be found guilty of violating Rules 4-1.2, 4-1.3, and 4-1.4, of Rules Professional Conduct.

1. Violation of Rule 4-1.3

   The clear and convincing evidence is that Respondent violated Rule 4-1.3, Rules Regulating The Florida Bar, regarding "Diligence" by failing to act with reasonable diligence and promptness in representing his client.

2. Violation of Rules 4-1.2 and 4-1.4

   The clear and convincing evidence is that Respondent violated Rules 4-1.2 and 4-1.4, Rules Regulating The Florida Bar, regarding "Objectives and Scope of Representation" and "Communication" by failing to abide by his client's decisions concerning the objectives of representation and failing to reasonably consult with his client as to the means by which they were to be pursued.

3. Violation of Rule 4-1.4

The clear and convincing evidence is that Respondent violated Rule 4-1.4, Rules Regulating The Florida Bar, regarding "Communication" by failing to promptly inform his client of the full circumstances of both of the settlement offers as his client's informed consent was required regarding the offers.

C. Count III

I recommend that Respondent be found guilty of violating Rules 4-1.2, 4-1.3, 4-1.4, 4-8.4(c), and 4-8.4(d), of Rules Professional Conduct.

1. Violation of Rules 4-1.2 and 4-1.4

   The clear and convincing evidence is that Respondent violated Rules 4-1.2 and 4-1.4, Rules Regulating The Florida Bar, regarding "Objectives and Scope of Representation" and "Communication" by failing to abide by his client's decisions concerning the objectives of representation and failing to reasonably consult with his client as to the means by which they were to be pursued.

2. Violation of Rule 4-1.3

   The clear and convincing evidence is that Respondent violated Rule 4-1.3, Rules Regulating The Florida Bar, regarding "Diligence" by failing to act with reasonable diligence and promptness in representing his client.

3. Violation of Rule 4-1.4

The clear and convincing evidence is that Respondent violated Rule 4-1.4, Rules Regulating The Florida Bar, regarding "Communication" by failing to promptly inform his client of any decision or circumstance with respect to which his client's informed consent was required.

4. Violation of Rule 4-8.4(c)

The clear and convincing evidence is that Respondent violated Rule 4-8.4(c), Rules Regulating The Florida Bar, regarding "Misconduct" by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation during his representation of his client.

5. Violation of Rule 4-8.4(d)

The clear and convincing evidence is that Respondent violated Rule 4-8.4(d), Rules Regulating The Florida Bar, regarding "Misconduct" by engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice by engaging in unauthorized conduct.

D. Count IV

I recommend that Respondent be found guilty of violating Rule 3-4.3, of Rules of Discipline of The Florida Bar; and Rules 4-4.4 and 4-8.4(d), of Rules Professional Conduct.

1. Violation of Rule 3-4.3

The clear and convincing evidence is that Respondent violated Rule 3-4.3, Rules Regulating The Florida Bar, regarding "Misconduct and minor misconduct" by his loud and agitated reaction to the service of process in the courthouse.

2. Violation of Rule 4-4.4

The clear and convincing evidence is that Respondent violated Rule 4-4.4, Rules Regulating The Florida Bar, regarding "Respect for Rights of Third Persons" by reacting to a third person, the process server, in a loud and aggressive manner in the presence of others so as to embarrass her and by refusing to meet with her to accept process thereby delaying or burdening her.

3. Violation of Rule 4-8.4(d)

The clear and convincing evidence is that Respondent violated 4-8.4(d), Rules Regulating The Florida Bar, regarding "Misconduct" by engaging in conduct that is prejudicial to the administration of justice by disparaging and humiliating the process server by reacting loudly and aggressively to her and by loudly stating that she could not serve process on Respondent in the courthouse.

E. Count V

I recommend that Respondent be found not guilty of violating Rules 4-3.1 and 4-3.3, of Rules Professional Conduct.

1. Rule 4-3.1

   The Florida Bar has failed to prove by clear and convincing evidence that Respondent violated Rule 4-3.1, Rules Regulating The Florida Bar, regarding "Meritorious Claims and Contentions" pursuant to the allegations in Count V.

2. Rule 4-3.3

   The Florida Bar has failed to prove by clear and convincing evidence that Respondent violated Rule 4-3.3, Rules Regulating The Florida Bar, regarding "Candor Toward the Tribunal" pursuant to the allegations in Count V.

F. Count VI

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

1. Violation of Rule 3-4.3

   The clear and convincing evidence is that Respondent violated Rule 3-4.3, Rules Regulating The Florida Bar, regarding "Misconduct and Minor Misconduct" by engaging in conduct contrary to honesty and justice by

knowingly misstating his client's whereabouts and disobeying a tribunal's orders and directives.

2. Violation of Rule 4-3.4

   The clear and convincing evidence is that Respondent violated Rule 4-3.4, Rules Regulating The Florida Bar, regarding "Fairness to Opposing Party and Counsel" by advising the court that Respondent did not know the whereabouts of his client when Respondent knew she was in the courthouse and hence could be called to testify as requested by the opposing party.

3. Violation of Rule 4-8.4(d)

   The clear and convincing evidence is that Respondent violated Rule 4-8.4(d), Rules Regulating The Florida Bar, regarding "Misconduct" by knowingly disobeying an obligation under the rules of a tribunal and engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice by advising his client that that she was under no obligation to testify absent a subpoena and could leave despite the judge's trial order and stated directives at trial.

IV. CASE LAW

I considered the following case law prior to recommending discipline:

1. The Florida Bar v. Norkin, 132 So. 3d 77 (Fla. 2013) (disapproving the referee's recommended sanction of a 91-day suspension followed by an 18-month probation and instead requiring a two-year suspension and public reprimand where the attorney, *inter alia*, "demonstrated unprofessional behavior and demeanor during numerous hearings," engaged in conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d), had one prior disciplinary action of a similar nature wherein the attorney was publicly reprimanded for "disrespectful, accusatory, argumentative, and rude behavior" and was directed to attend ethics school in 2003, and engaged in a pattern of misconduct even though the attorney "truly believed he was acting on behalf of his client in a zealous and appropriate manner").
2. The Florida Bar v. Tropp, 112 So. 3d 101 (Fla. 2013) (Labarga, J., dissenting) (opining in dissent that rehabilitative suspension, as opposed to a public reprimand as approved by the majority, is appropriate where an attorney made a false statement because a "lawyer should never misrepresent a material fact, either by omission or commission, to the court").

3. The Florida Bar v. Ratiner, 46 So. 3d 35 (Fla. 2010), as revised on reh'g (Sept. 30, 2010) (disapproving the referee's improper alternate recommended sanctions for either disbarment or a two-year suspension and instead requiring a public reprimand, 60-day suspension, and two-year probation where the attorney was unprofessional and belligerent during a deposition, exhibited a pattern of misconduct, and committed multiple offenses but had no prior disciplinary history).
4. The Florida Bar v. Abramson, 3 So. 3d 964 (Fla. 2009) (disapproving the referee's recommended sanction of a public reprimand, a one-year probation, and attendance at a professionalism workshop and ethics school and instead requiring a 91-day suspension where the attorney was "disrespectful and confrontational with the presiding judge in an ongoing courtroom proceeding," "engag[ed] in a protracted challenge to the court's authority," and had two prior disciplinary actions of a similar nature).
5. The Florida Bar v. Morgan, 938 So. 2d 496 (Fla. 2006) (approving the referee's recommended sanction of a 91-day suspension where the attorney questioned a judge's unfavorable ruling in a loud angry manner while pacing back and forth, was found in violation of, *inter alia*, 4-8.4(d), and had two prior disciplinary actions of a similar nature but had served as a

role model and was "perceived by two judges and an attorney as an excellent and passionate advocate").

6. The Florida Bar v. Martocci, 791 So. 2d 1074 (Fla. 2001) (approving the referee's recommended sanction of a public reprimand and two-year probation where the attorney violated Rule 4-8.4(d) by engaging in the unprofessional conduct of belittling and humiliating the opposing party and her attorney throughout the proceedings in a family law action and physically threatening the opposing party's father during a recess in one hearing but the attorney had no prior disciplinary history).

7. The Florida Bar v. Wasserman, 675 So. 2d 103 (Fla. 1996) (approving the referee's findings of guilt in two cases and approving the recommended sanction of a six-month suspension in one case, but disapproving the referee's recommended sanction of a 60-day suspension and instead requiring a six-month suspension in the second case, where the attorney during a hearing shouted at the judge, waved his arms, hit the table, acted angry, and, in a separate incident, called another judge and his judicial assistant profane names, and the attorney had multiple prior disciplinary actions).

8. The Florida Bar v. Nunes, 734 So. 2d 393 (Fla. 1999) (disapproving the referee's recommended sanction of a one-year suspension and instead

requiring a three-year suspension where the attorney was found guilty of violations involving misconduct toward judges, opposing counsel, and former clients, and the attorney had four previous disciplinary actions for similar misconduct, including most recently, a 90-day suspension for client misconduct).

9. The Florida Bar v. Kaufman, 153 So. 3d 910 (Fla. 2014); The Florida Bar v. Englett, 153 So. 3d 910 (Fla. 2014); The Florida Bar v. Lynd, 153 So. 3d 910 (Fla. 2014) (approving the referee's report accepting consent judgment and recommended sanction of a public reprimand and ethics school for three partner attorneys who violated Rule 4-1.4 by failing to adequately communicate with clients (the majority of client communications were handled by non-attorney staff), clients had difficulty obtaining help and information from the firm, and all three of the attorneys had a prior disciplinary action for minor misconduct regarding advertising).

10. The Florida Bar v. Gass, 153 So. 3d 886 (Fla. 2014) (disapproving the referee's recommended sanction of a 60-day suspension and instead requiring a one-year suspension where the attorney violated Rules 4-1.3, 4-1.4, and 4-8.4(d) based on his failure to attend proceedings, failure to inform his clients of proceedings and case status, and failure to act

diligently on behalf of his clients where his failures resulted in harm to the clients in the form of a short incarceration; the attorney had prior disciplinary actions for violations of trust account rules and substantial experience in the practice of law even though he lacked a selfish or dishonest motive, "made timely, good faith efforts to rectify the consequences of his misconduct," cooperated in the disciplinary proceedings, was of good character or reputation, and exhibited remorse).

11. The Florida Bar v. Varner, 992 So. 2d 224 (Fla. 2008) (disapproving the referee's recommended sanction of a 91-day suspension and instead requiring a one-year suspension where the attorney failed to abide by his client's decisions and engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation by consenting to dismissal of a case knowing that the client neither knew of nor authorized the dismissal and then failed to inform the client of the dismissal; the attorney was found to have violated, *inter alia,* Rules 3-4.3, 4-1.2, 4-1.4, 4-8.4(c), and 4-8.4(d), and had one prior disciplinary action for similar misconduct, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law even though he had a good character or reputation).

12. The Florida Bar v. Glick, 693 So. 2d 550 (Fla. 1997) (approving the referee's recommended sanction of a 10-day suspension where the attorney

violated, *inter alia*, Rules 4-1.2, 4-1.4, 3-4.3, and 4-8.4(c) by failing to act with reasonable promptness, failing to keep his client informed about the status of the matter and to explain the matter, failing to abide by his client's decision regarding settlement, and engaging in dishonest conduct; the attorney had multiple offenses and substantial experience in the practice of law but no prior disciplinary record, good character and reputation, remorse, and interim rehabilitation).

13. The Florida Bar v. Burton, 396 So. 2d 705 (Fla. 1980) (approving referee's recommended sanction of disbarment where the attorney knowingly settled a client's claim without the client's authority, forged the client's signature, retained the full amount of the settlement, failed to inform the client of the settlement, failed to appear during the disciplinary proceedings, and had a past disciplinary record, so disbarment best served the interest of the public and the Bar).

Regarding the purposes of disciplinary proceedings:

14. The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992) ("[B]ar disciplinary proceedings must serve three purposes: first, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer; second, the judgment must be fair to the respondent,

being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.") (Emphasis omitted).

Regarding cumulative misconduct:

15. Abramson, 3 So. 3d at 969 (Fla. 2009) ("It is also well established that we view cumulative misconduct more seriously than an isolated instance of misconduct and that cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct.").

16. Norkin, 132 So. 3d at 92 (Fla. 2013) ("In rendering discipline, this Court considers the respondent's disciplinary history and increases the discipline where appropriate for cumulative misconduct. *See Fla. Bar v. Bern*, 425 So. 2d 526, 528 (Fla. 1982). Thus, the Court deals more harshly with cumulative misconduct than it does with isolated misconduct. *See Fla. Bar v. Heptner*, 887 So. 2d 1036, 1045 (Fla. 2004).").

V. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards, as recommended by The Florida Bar, prior to recommending discipline:

1. The duties violated by Respondent to clients.

a. Standard 4.4, Lack of Diligence, Florida's Standards for Imposing Lawyer Sanctions:

i. 4.42, Suspension is appropriate when:

a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

2. The duties violated by Respondent to the legal system.

a. Standard 6.1, False Statements, Fraud, and Misrepresentation, Florida's Standards for Imposing Lawyer Sanctions:

i. 6.12, Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.

b. Standard 6.2, Abuse of the Legal Process, Florida's Standards for Imposing Lawyer Sanctions:

i. 6.22, Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

3. The duties violated by Respondent as a professional.

   a. Standard 7.0, Violations of Other Duties Owed as a Professional, Florida's Standards for Imposing Lawyer Sanctions:

      i. 7.2, Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

VI. AGGRAVATING AND MITIGATING FACTORS

I considered the following factors prior to recommending discipline:

1. **Aggravation**: The Referee finds the following aggravating factors:

   a. Prior disciplinary offenses;

      Yes, Florida Supreme Court Case Number SC13-1886, The Florida Bar v. Stopa, 147 So. 3d 530 (Fla. 2014). On June 19, 2014, the Florida Supreme Court approved a referee's uncontested report that recommended Respondent be disciplined with a public reprimand, attendance at The Florida Bar's Ethics School, and receipt of a psychological evaluation to identify stress-related or any other issues. On December 12, 2014, the Board of Governors of the Florida Bar issued to Respondent a public reprimand.

b. Dishonest or selfish motive;

There is some evidence of selfish motive in the circumstances of the complaints involving Said (Count II) and Coyne (Count III). Said was not advised of the loan modification option. Rather, she was advised of a "cash for keys" payment of $11,000 when the actual payment was $15,000 but Respondent had directed the lender to make $4,000 payable to his firm. In Coyne's case, the settlement, which she did not approve, involved a $1,500 payment that Respondent directed the lender to make payable to his firm.

c. Pattern of misconduct;

There is a pattern of rudeness and belligerent speech with respect to certain members of the trial court judiciary as well as with respect to some attorneys for lenders. This behavior was also exhibited to a process server in the conduct before the Referee in Count IV.

d. Multiple offenses;

The consolidated cases involve multiple counts as well as multiple factual allegations within Count I.

e. Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

There is no evidence of this aggravating factor.

f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

There is no evidence of this aggravating factor.

g. Refusal to acknowledge wrongful nature of misconduct;

Respondent is resistant to acknowledging the wrongful nature of his conduct, particularly with respect to his angry and belligerent behavior toward members of the judiciary. He describes his conduct as "less than perfect," but continues to argue that the "bias" of the judges involved was the cause of his reactions.

h. Vulnerability of victim;

In Count III, Coyne is an elderly woman who testified that she had disabilities.

i. Substantial experience in the practice of law;

Respondent has been practicing law since 2002.

j. Indifference to making restitution;

There is no evidence of this aggravating factor.

k. Obstruction of fee arbitration award by refusing or intentionally failing to comply with final award;

There is no evidence of this aggravating factor.

l. Any other factors that may justify an increase in the degree of discipline to be imposed;

None considered.

2. **Mitigation**: The Referee finds the following mitigating factors:

a. Absence of prior disciplinary record;

Addressed as an aggravating factor.

b. Absence of dishonest or selfish motive;

While addressed as an aggravating factor, most of the conduct of Respondent that is at issue did not involve dishonest or selfish motive.

c. Personal or emotional problems;

Respondent testified that he intensely feels the stress in his representation of so many clients who are relying on him to keep them in their homes through his legal action. While no expert testimony was provided regarding Respondent's mental state, the Referee observed Respondent's emotional difficulties throughout the hearing of the case. While Respondent apparently does not recognize that he is in need of treatment for his emotional problems, it is clear to the Referee that Respondent is in great need of professional psychological help as further addressed below.

d. Timely good faith effort to make restitution or to rectify consequences of misconduct;

There is no issue of restitution in this case. While no apologies were made by Respondent specifically to the judges before whom he behaved badly in this matter, he did send a letter to all of the judges in Hillsborough County in which he expressed some regret regarding his conduct in court.

e. Full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

Respondent has not shown a cooperative attitude toward this proceeding. Within hours after the Referee released her initial report including findings of guilt, Respondent, demonstrating some of the mental health issues addressed in this Report, posted several statements on his Facebook page critical of the proceeding and of The Florida Bar. These statements included that the proceeding is a "conspiracy to 'take me down,'" that he is "likely to share the (frightening and unspeakable) details in an upcoming, tell-all book," that "No matter what, I was going to be punished for something" and, referring to The Florida Bar, that "It's a shame when those with all the power have to cheat, too." (The Florida Bar, Amended Sanctions Exhibit List, TFB#5).

f. Inexperience in the practice of law;

Respondent has been a practicing attorney since 2002 and thus, has substantial experience.

g. Character or reputation;

Respondent presented the testimony in person and by proffer of a large number of his current and former clients who hold him in extremely high regard. The Referee's courtroom was filled with clients of Respondent who wanted time to tell the Referee how much Respondent had helped them. Some of these people flew in from as far away as California for the opportunity to address the Referee on Respondent's behalf. Others drove hours for the same purpose. While these clients arrived for the 9:30 a.m. start of the hearing, none of them were called until late in the afternoon. Many of the clients waited in the courthouse approximately seven hours for the opportunity to tell the Referee how greatly Respondent helped them and how they would have nowhere to turn if he could no longer practice. Some clients testified that they learned of Respondent through other clients of his. They, in turn, referred others to Respondent because they were so pleased with his work. All of the clients presented by Respondent were credible. They told of Respondent's generosity in representing them or others

they knew free of charge. There was testimony that Respondent not only provided pro bono services to one disabled individual, but then also created a job for her in his firm that she could do from home so that she had enough income to subsist. There was testimony of Respondent holding a contest to give away a home to the neediest applicant.

In addition to Respondent's clients, the Referee heard testimony from four appellate judges regarding Respondent's excellent work in handling appellate matters. These judges agree that Respondent has been on the forefront of developing appellate law in the area of foreclosure. They testified that he is well prepared and enjoys a high reputation among them for his intelligence and diligence and that his demeanor has been appropriate at all times during his appellate arguments. The Referee also heard brief testimony from six circuit judges indicating that Respondent has behaved properly and professionally before them.

The Referee finds the substantial, extensive evidence of this mitigating factor, particularly with regard to Respondent's clients' testimony, to be highly significant and persuasive.

h. Physical or mental disability or impairment;

As stated in factor 2.c. above, Respondent clearly has an emotional problem. The Referee finds that this problem may rise to the level of a mental impairment. This potential impairment demonstrates itself in his inability to control his anger and in his exercise of very poor judgment in stressful situations in which he feels he or his client is being wronged by a judge he perceives to be biased. The prior discipline of Respondent in case number SC13-1886 required a mental health evaluation and obtaining any treatment recommended. The Referee was not provided with that prior mental health evaluation. However, over her past 40 years as an attorney and judge, the Referee has seen hundreds of mental health evaluations and has observed the mental health status of thousands of clients and parties. Currently, the Referee sits as a judge in the probate division where she daily handles matters dealing with mental health. This experience is sufficient to identify several of Respondent's potential psychological issues, some of which presented during the hearings in this matter, and may include, but are not limited to, narcissism, defensiveness, lack of self-insight, paranoia, and lack of impulse control. Regardless of whether Respondent has a mental impairment, there is no question that Respondent is in need of

mental health treatment and, in particular, anger management and impulse control therapy.

i. Unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from delay;

There is no evidence of this mitigating factor.

j. Interim rehabilitation;

Respondent testified that he has put in place several systems to insure all hearings are calendared and that his office operates with greater efficiency and responsibility to his clients.

k. Imposition of other penalties or sanctions;

There is no evidence of this mitigating factor.

l. Remorse;

Respondent expresses some remorse for the treatment his two clients, Said and Coyne, received. He continues to deny that his actions toward the judges complaining of him were improper.

m. Remoteness of prior offense(s);

The prior offenses took place in 2012 and 2013.

n. Prompt compliance with a fee arbitration award;

There is no evidence of this mitigating factor.

o. Any other factors that may justify a reduction in the degree of discipline to be imposed;

The many clients of Respondent who appeared before the Referee told of their difficulty in finding anyone to represent them in their foreclosure litigation for a fee they could afford. Each of these clients said they would not have counsel but for Respondent. As stated above, several of these clients traveled across states to appear before the Referee to make their feelings known of how desperate their situation would be if Respondent was not allowed to continue to practice law. The evidence regarding this factor is significant.

VII. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED; COMMENTARY THEREON

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

A. One year suspension, *see* 3-5.1(e); and

B. Other sanctions and remedies, *see* Standard 2.8, to include:

1. Respondent will contact the Florida Lawyers Assistance Program to schedule a psychological evaluation, which is to be followed by a

minimum one year of mental health therapy emphasizing anger management and impulse control as appropriate;[3] and

2. Based upon the recommendations stemming from the psychological evaluation, attendance, ideally weekly, at individual or group counseling sessions as appropriate;[4] and

3. Respondent will undergo and cooperate with an administrative management review of Respondent's law practice operations from the Diversion/Discipline Consultation Service ("DDCS") of The Florida Bar. DDCS shall review Respondent's office procedures and record-keeping. The Referee recommends that DDCS also review and consider the conduct of Respondent, his scheduling of, and appearance at, court proceedings, his employees, and his office set out in Count I (paragraph 3-15), Count II, and Count III of the Report of the Referee. DDCS shall specifically make recommendations regarding documentation of client contact related to presentation of any offers of settlement, appropriate documentation of client approval of any settlements, and documentation of advising clients that they must obey all orders which require their appearance in court. Respondent shall

[3] The Referee acknowledges that the mental health treatment plan for Respondent is ultimately at the discretion of the treating mental health professional, but nonetheless recommends the sanctions as set forth in subsection VII.B.1. and VII.B.2.

[4] See supra note 3.

pay all fees and expenses of DDCS incurred or required in connection with the conduct of its analysis; and

4. After reinstatement, for a period of one year, Respondent's practice shall be limited to appellate court practice only and shall not include any trial court practice.

C. Costs in the amount of $26,106.95. *See* 3-7.6(q). A copy of The Florida's Bar's Affidavit of Costs is attached to this Report as Exhibit A.

D. **Commentary Regarding Recommended Sanctions:**

The Florida Bar has recommended disbarment as the appropriate sanction. The Referee understands this perspective, particularly in light of Respondent's persistence in blaming others and resistance to acknowledging the wrongful nature of his belligerent and angry conduct toward judges and others. However, the Referee believes that an attorney of Respondent's legal talent, intellectual abilities, and many well-served clients deserves a structured opportunity for rehabilitation. [5]

The Referee's recommended discipline includes a one year period of mental health treatment before Respondent can return to practice and a one year period after that in which he can practice only in appellate courts.

[5] There is growing acknowledgement of and enlightenment about mental health issues in the stressful practice of law and the importance of treatment. See, e.g., Chief Justice Jorge Labarga, *When lawyers need help, let's make sure they don't fear getting it*, The Fla. Bar News, May 1, 2018, at 1.

Under the Referee's recommended discipline, Respondent does not appear before trial judges for at least two years and only after he has had an extended period of mental health treatment and gained reinstatement by demonstrating rehabilitation. This restriction serves the dual purpose of punishing Respondent for his conduct before trial judges and readying him for success in the future.

The reason Respondent's inappropriate behavior does not present itself in his appellate practice is obvious: rulings made at the appellate level are written opinions the attorney reads from a distant location that come weeks or even months after oral argument. In contrast, at the trial court level, rulings are continuously and rapidly being made on objections during hearings, typically culminating in an oral pronouncement from the bench as to which party has prevailed. It is the trial court environment that presents behavioral challenges for Respondent and the Referee is recommending the proposed structure to address this circumstance.

The Referee understands that it may be difficult for some to accept that Respondent is capable of rehabilitation when he states that he doesn't believe his conduct has "crossed the line" in spite of being repeatedly removed from courtrooms by judges because of it. Yet, a common symptom of a mental health problem is for an individual to deny there is

any such problem. While this denial can be an impediment to treatment, experienced mental health professionals are trained to deal with it in their treatment plan.

Finally, in order to protect Respondent's clients and potential clients from unethical conduct, his discipline and rehabilitation must also include proof of safeguards that will prevent the circumstances that befell Said (Count II) and Coyne (Count III) from happening to anyone else. The Referee believes that these client service issues are best addressed by the work of the DDCS in its review and recommendations regarding Respondent's law practice operations, office procedures, non-attorney employee actions, and record-keeping.

In recommending this unique, structured opportunity for Respondent's discipline and rehabilitation, the Referee has considered The Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992), previously addressed in Section IV.14., which discusses the three purposes that Bar disciplinary proceedings must serve: fairness to society, fairness to the respondent, and deterrence.

VIII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

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

A. Personal History of Respondent:

1. Date of Birth: November 13, 1976

2. Date admitted to Bar: April 23, 2002

B. Aggravating Factors: Prior disciplinary offenses; dishonest or selfish motive (Counts II and III); pattern of misconduct; multiple offenses; refusal to acknowledge wrongful nature of misconduct; vulnerability of victim (Count III); and substantial experience in the practice of law.

C. Mitigating Factors: Absence of dishonest or selfish motive (Counts I, IV, and VI); personal or emotional problems; character or reputation; physical or mental disability or impairment; interim rehabilitation; remorse (Counts II and III); and the testimony provided by Respondent's clients.

D. The Potential or Actual Injury Caused By the Respondent's Misconduct: While the conduct of Respondent could have caused injury to former clients Said (Count II) and Coyne (Count III), information was discovered by each of them in time to forestall any actual injury. The potential injury to Said was great in that but for her becoming aware of the loan modification option that was available to her (but not relayed to her by Respondent), she would have lost her home.

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

I find the following costs were submitted to the Court by The Florida Bar through an Amended Motion to Assess Costs and accompanying Affidavit. Respondent, through electronic mail sent by his counsel, has waived any objections.

A. Referee Level:

1. Administrative costs pursuant to Rule 3-7.6(q)(1)(I)..... $1,250.00
2. Court Reporter's Fees.....$ 20,751.30
3. Bar Counsel Travel.....$ 741.59
4. Investigative Costs.....$ 3,082.65
5. Witness costs.....$281.41

Total: $ 26,106.95

B. Manner of Payment:

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

Dated this 25th day of May, 2018.

TRUE COPY

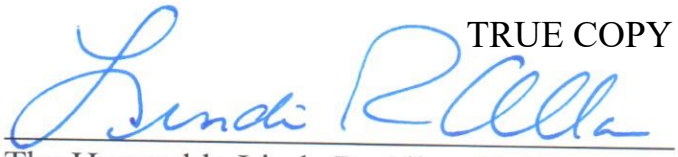
The Honorable Linda R. Allan, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been emailed to The Honorable John Tomasino, Clerk, Supreme Court of Florida, at e-file@flcourts.org, and mailed to The Honorable John Tomasino, Clerk, Supreme Court of Florida to 500 South Duval Street, Tallahassee, Florida 32399-1927; a copy has been emailed to: Matthew Ian Flicker, Bar Counsel, The Florida Bar, mflicker@floridabar.org, pmcbride@floridabar.org; Katrina S. Brown, Bar Counsel, The Florida Bar, kschaffhouser@floridabar.org; Scott Kevork Tozian, Counsel for Respondent, stozian@smithtozian.com, mrenke@smithtozian.com; Adria E. Quintela, Staff Counsel, The Florida Bar, aquintel@floridabar.org,

this 25th day of May, 2018.

TRUE COPY



The Honorable Linda R. Allan, Referee