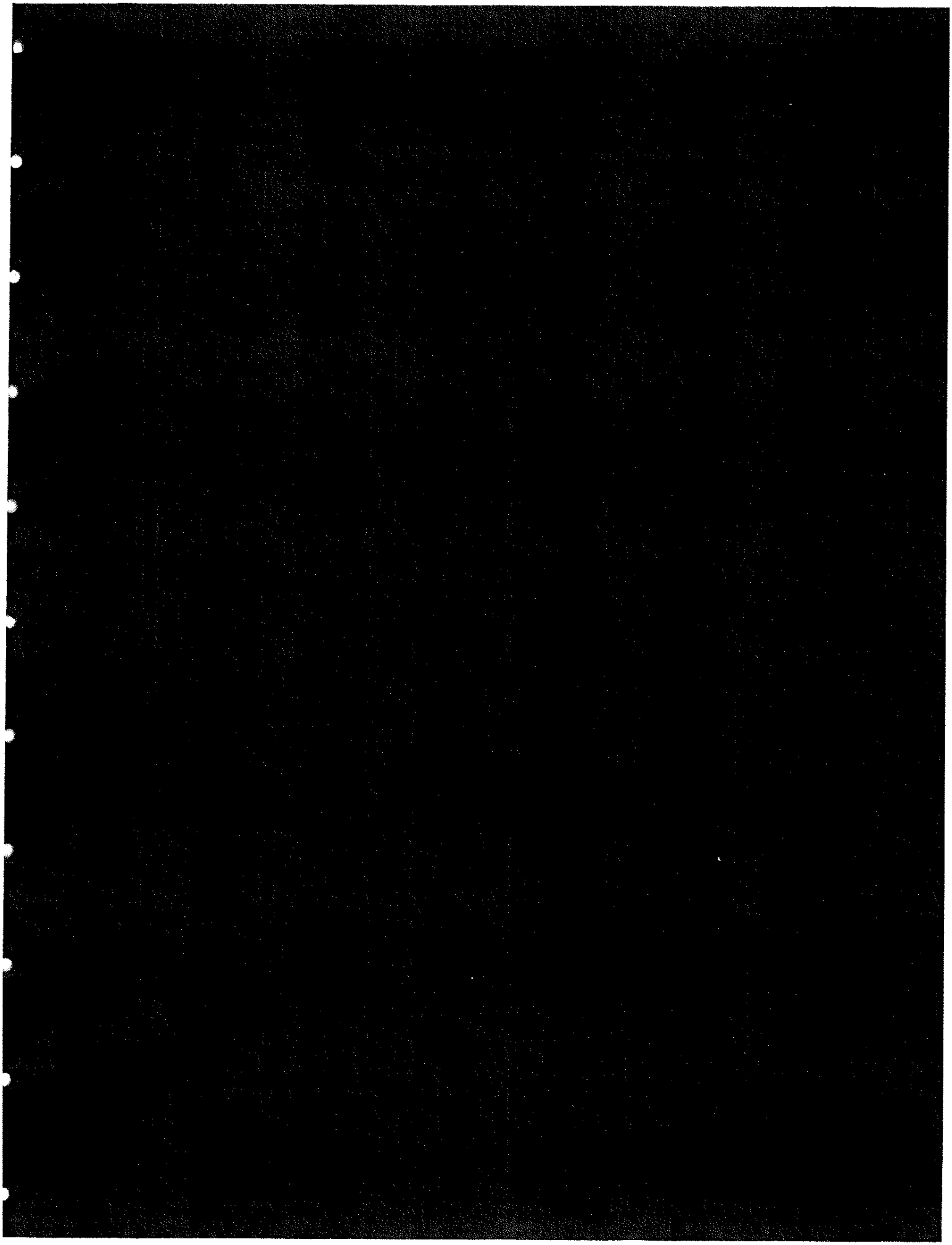

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1. Based on *Reiner's Case,* 152 N.H. 163 (2005) ("*Reiner I*"), the referee applied a "preponderance of the evidence" standard in evaluating Gallant's case. But Supreme Court Rule 37(9-A)(d) mandates a "clear and convincing evidence" standard apply when considering an interim suspension for a "substantial threat of serious harm to the public." Did the referee err by applying the wrong standard? *Notice of Challenge to the Referee's Recommendations Regarding the Interim Suspension of Attorney John F. Gallant, October 27, 2017, page 3.*

2. The referee refused to apply the standards used in preliminary injunctive relief when considering whether the interim suspension should continue, as are applied in similar situations in other jurisdictions, despite acknowledging the considerations were relevant. He did so because he felt constrained to apply "settled New Hampshire law," because the authorities cited to him were "different than those in New Hampshire," and because to do so would, in his opinion, "unnecessarily confuse the analysis." When considering something as dramatic and consequential as continuing the interim suspension of an attorney, should a balanced analysis be conducted, including the relative harms to the client and his clients from the suspension? *Id.*

3. The referee assumed that a "reckless remark" about the trial judge, attributed to Gallant, actually took place -- though the interview in which the *pro se* party recounted the remark occurred five weeks after the conversation in question. The referee emphasized the State's evidence from three witnesses which, at best, only partially corroborated the *pro se* party's account. On this and other evidence from the police investigation report, he concluded that Gallant had lied. Did the referee err by too willingly accepting the factual allegations in the police investigative report, and effectively convicting Gallant without a hearing, despite the presumption of innocence? *Id.*

CONTENT OF CITED SUPREME COURT RULES

Supreme Court Rules 37(9)(a), (b), and (i):

(a) Upon the filing with the court of a certified copy of any court record establishing that an attorney has been convicted of a serious crime as hereinafter defined, the court may enter an order suspending the attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction. Any order of suspension entered pursuant to this provision shall be effective immediately.

(b) The term "serious crime" shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."...

(i) Whenever an attorney is indicted or bound over for any felony, the court shall take such actions as it deems necessary, including but not limited to the suspension of the attorney.

Supreme Court Rules 37(9-A)(a), (b), and (d):

(a) The attorney discipline office may file a petition for interim suspension or other relief in this court alleging that an attorney has engaged in conduct that poses a substantial threat of serious harm to the public.

(b) The term "substantial threat of serious harm" encompasses any non-serious crime, conduct, or course of conduct that substantially impairs the attorney's ability to continue to practice in conformity with the Rules of Professional Conduct and Rule 50, or creates a substantial risk of harm to the public if the attorney is not suspended on an interim basis....

(c) The hearing on the petition shall be recorded. The parties shall have thirty (30) days to prepare for the hearing, but no continuance of the hearing shall be granted absent extraordinary circumstances. The attorney discipline office shall have the burden to prove the need for interim suspension by clear and convincing evidence. The referee or panel may consider whether measures short of interim suspension adequately safeguard the public against the threat of substantial harm.

Supreme Court Rule 37(16)(f):

(f) The court may suspend attorneys or disbar New Hampshire licensed attorneys or publicly censure attorneys upon such terms and conditions as the court deems necessary for the protection of the public and the preservation of the integrity of the legal profession. The court may remand the matter to the professional conduct committee for such other discipline as the court may deem appropriate.

STATEMENT OF THE CASE

This case arises out of Attorney John F. Gallant's suspension from the practice of law. He was suspended on an immediate basis under Rule 37(9)(i) on a request from the Attorney Discipline Office, when the Office reported Gallant had been indicted for witness tampering.

Gallant denies the allegations in the indictment. He challenges the suspension, and the report and recommendation of the referee appointed to hear his challenge. He argues that the referee overlooked flaws in the record before him, and gave too much credence to the unsworn and unsupported statements in the police report. He also argues that the referee erred (a) by applying the wrong burden of proof, and (b) by refusing to consider a balanced analysis, such as that conducted when preliminary relief is sought in a civil matter, when the referee considered whether the suspension should be continued for the protection of the public.

STANDARD OF REVIEW

In determining whether to adopt the referee's recommendation of suspension, the court reviews the recommendation *de novo* to determine whether the referee committed errors of law.

The standard of review for the referee's factual findings in a lawyer discipline case is usually "whether a reasonable person could have reached the same decision as the referee." *Reiner's Case*, 152 N.H. 163, 169 (2005). In this instance, however, there was no testimony. The parties submitted an agreed-upon set of documents, including police reports, transcript of hearings, and court documents. "[B]ecause the trial court in this case relied only upon a paper record and all of the documents from below are available for our perusal, we give less than ordinary deference to the trial court's factual findings." *Lawrence v. Philip Morris USA, Inc.*, 164 N.H. 93, 96–97 (2012). A broader standard of review is adopted under these circumstances because the "trial judge never had an opportunity to scrutinize the demeanor and credibility of

any witness and, therefore, was not privy to any special information, observation, or insight not available to this court." *Dana Commercial Credit Corp. v. Hanscom's Truck Stop, Inc.*, 141 N.H. 131, 132 (1996).

As the Court is on an equal footing with the referee concerning findings of fact, it may reach its own conclusions based on the evidence available.

STATEMENT OF THE FACTS

Attorney John Gallant had a brief conversation with a *pro se* party, prior to a May 24, 2017 hearing on the extension of a restraining order, a civil matter. *Transcript of Final Domestic Violence Hearing in Farina v. Zimmer, Family Division No. 659-2017-DV-00132,* contained in the record before this court as *Joint Exhibit List (hereinafter "Joint Exhibit --"), Exhibit 17, page 5.* Gallant's client was an attorney and a former employee of his law firm. *See Transcript of Hearing before the Honorable James E. Duggan, September 26, 2017, p. 33.* The *pro se* party, Emily Farina, was the former girlfriend of Gallant's client, Ethan Zimmer. Attorney Gallant maintains that he initiated the conversation to explain the options available to the parties as a way of discussing possible resolutions of the case. *Joint Exhibit 17, p. 5.*

There is no record of the conversation. The conversation itself was inconclusive; while it was in process, the parties were called into court for their hearing. *Joint Exhibit 17, p. 6.*

The hearing was recorded. The *pro se* party had a full exchange with the hearing judge regarding the case, the possible means of resolving the issues between the parties, and there being no need for her to attend future hearings. She acknowledged in that exchange that the process and court orders were fundamentally fair and protected her. *Joint Exhibit 17, p. 6, 8-9.* She was provided a form by the judge by which she could dismiss the matter. *Joint Exhibit 17, p. 8.* She made no complaint about the earlier conversation with Gallant to the judge, and indeed she told the judge she was "absolutely" satisfied with the outcome of the hearing. *Id.*

The judge ultimately continued the matter for three months, consistent with the discussions Gallant reported he had with the witness. *Joint Exhibit 17, p. 5.*

Neither the statements forming the basis of the indictment nor any reference to intimidating conduct appear in the hearing transcript. The only statements on the record support Attorney Gallant's version of the conversation.

Three weeks later, on June 15, 2017, Gallant returned to the same courthouse for a criminal matter regarding the same client. The criminal matter involved possible violations of the restraining order; Gallant was present on this particular day for the pretrial conference. The same judge was hearing both matters. In advance of the hearing, Gallant had a brief conversation with the police prosecutor. During the conversation, and based on his earlier appearance before the judge in the civil case, Gallant allegedly stated, "The judge wants this to go away." He also allegedly remarked, "The victim wants this to go away and won't show up." *Nashua Police Department Supplemental Narrative of Police Attorney Donald Topham, Joint Exhibit 1, pp. 5-6.*

Based on these two remarks, the Nashua police began an investigation of possible witness tampering. The *pro se* party was interviewed on June 29, five weeks after the day on which she and Gallant had their brief exchange, the interview conducted by a police officer who had no prior involvement in the matter. *Nashua Police Department, Farina Interview, Officer Nicole Clay, Joint Exhibit 1, p. 25.* During the interview, Ms. Farina recalled the interactions with Attorney Gallant differently than suggested by her remarks at the hearing. As recorded by Officer Clay, Farina said that Attorney Gallant asked her "can't we come to an agreement out-of-court?" He also allegedly stated, "I spoke to the judge yesterday; he doesn't want to hear this." Farina insisted she would not leave court without a judge dismissing the restraining order or Mr. Zimmer agreeing to a six-month restraining order. She claimed that Gallant tried to convince her to agree to a restraining order of only 30 days. *Id.* The record shows this to be false. *Joint*

Exhibit 17, p. 5. She said Gallant lied when he claimed to have spoken to her attorney, but there was no context provided by her about the alleged conversation. *Id.* Attorney Gallant denies he made such statements.

Based on her recounting, and further interviews conducted by the Nashua police, the County Attorney's Office pursued and secured an indictment for witness tampering. *Joint Exhibit 2.*

Attorney Gallant denies the allegations which make up the indictment. *See Affidavit of John F. Gallant, Esq., attached as Appendix Two to this Brief.* No hearing has taken place in the criminal matter, and no opportunity has yet been provided for him to prove his innocence.

Based on the indictment alone, Attorney Gallant was immediately suspended from the practice of law. He challenged the suspension, as permitted by the Supreme Court Rules. A referee was appointed (the Honorable James E. Duggan, hereinafter "the referee"), a hearing held, offers of proof made, and the referee submitted his recommendations. His conclusion was that the suspension should be left in place on an interim basis.

Gallant now challenges both the referee's fact-finding and his legal rulings. He asks this Court to recognize the faults in the referee's recommendation, and to vacate the interim suspension.

SUMMARY OF THE ARGUMENT

An interim suspension may be imposed when an attorney is indicted for a felony, if the court deems it necessary "for the protection of the public and the preservation of the integrity of the legal profession." But the Attorney Discipline Office has the burden to prove the need for an interim suspension *by clear and convincing evidence* when the attorney is alleged to have engaged in conduct that "poses a substantial threat of serious harm to the public." The referee imposed a lesser burden of proof, a preponderance of the evidence. This was error.

The referee refused to consider any factors other than the content of the indictment and evidence in support of it when he determined the interim suspension should be continued. The failure to consider other elements, such as the relative harm to the attorney and his clients from the continued suspension, or whether any measures short of suspension would be sufficient to protect the public, was error.

Had the referee considered whether a threat of irreparable harm to the public would be created if the suspension is lifted, whether there is an adequate remedy at law if the suspension is lifted, and whether the public interest is harmed more by the continuation of the suspension then by its vacation, he would have concluded that the suspension should be lifted.

The referee gave too much credence to the unsworn and unsupported evidence in the police investigative report. He concluded that Attorney Gallant had lied. This finding, well in advance of any trial or opportunity for Attorney Gallant to prove his innocence, and despite the presumption of innocence afforded the attorney, was error.

ARGUMENT

A. The burden of proof applied by the referee is inconsistent with the 'clear and convincing' standard mandated in suspension cases involving alleged 'serious threats to the public.'

In *Reiner's Case,* 152 N.H. 163 (2005)("*Reiner I*"), this court declared that it may impose an interim suspension pending the resolution of criminal charges, pursuant to Rule 37(9)(i). The standard for such a suspension is contained in Rule 37(16)(f): "when it is deemed necessary for the protection of the public and the preservation of the integrity of the legal profession." 152 N.H. at 168. Under *Reiner I,* at a post-suspension hearing, the ADO's burden of proof is a preponderance of the evidence. *Id.* The referee applied that standard here.

Attorney Gallant did not contest that the allegations in the indictment, if proven, amounted to serious misconduct that might threaten the integrity of the legal profession. The issue contested at the hearing, then, was whether Gallant's interim suspension was necessary for *the protection of the public.* Based on the record presented to him during the post-suspension hearing, the referee concluded that "Gallant's acts compromise the legal system itself, thereby creating a need to *protect the public* from his behavior." *See the Referee's October 10, 2017 Recommendations (hereinafter "Recommendations, p.--"),* p.13 (emphasis supplied).

A different standard of proof than the one the referee applied is required, however, in interim suspension proceedings where an attorney is alleged to have engaged in conduct "that poses a *substantial threat of serious harm to the public.*" *See* Rules 37(9-A)(a) and (b) (emphasis supplied). When the Attorney Discipline Office seeks a suspension based on alleged conduct that poses "a substantial threat of serious harm to the public if the attorney is not suspended on an interim basis," the ADO "shall have the burden to prove the need for interim suspension *by clear and convincing evidence.*" Rule 37(9-A)(d) (emphasis supplied).

Whether the phrase justifying a suspension due to the alleged threat from the attorney is 'necessary for protection of the public,' Rule 37(16)(f), or 'substantial threat of serious harm to the public,' Rule 37(9-A)(a), the meaning is the same. Accordingly, the applicable standard should be clear and convincing evidence. In requiring the ADO to meet only the lesser standard, the referee failed to properly apply the rules applicable to suspensions. He erroneously concluded that the ADO had met the standard of evidence required to demonstrate that the public needed to be protected from the alleged behavior.

B. The referee erroneously refused to apply the standards used in preliminary injunctive relief.

1. The referee felt constrained to apply "settled New Hampshire law," and refused to apply preliminary relief standards as a whole. He nevertheless then applied some of the standards, though not all. This was error.

Attorney Gallant argued that the justification for an interim suspension should be measured by the standards for preliminary injunctive relief. The referee declined, reasoning that he lacked "authority to deviate from settled New Hampshire law." *Recommendations,* p. 9.

But the referee in fact applied some of these standards. He considered, for example, the strength of the evidence contained in the record in addition to the allegations in the indictment. *Recommendations,* p. 10. Indeed, the bulk of his analysis of the necessity of the suspension consists of him weighing that evidence. *Recommendations,* pp.10-13. With no input from Gallant, he went so far as to conclude that the evidence was sufficient to show "a pattern of misleading or false statements," conduct which he declared "not only unacceptable, but ... detrimental to the administration of justice." *Recommendations,* p.12.

In doing so, the referee was actually engaged in evaluating one of the four traditional factors in preliminary injunctive relief -- specifically, an evaluation of the likelihood of success

on the merits of the charges. Refusing to consider the other elements traditionally associated with preliminary injunctive relief was error, to the prejudice of Attorney Gallant.

2. The referee also refused to measure the interim suspension by the standards for preliminary injunctive relief by inaccurately claiming that the authorities cited by Gallant address provisions "different from those in New Hampshire." *Recommendations*, p. 9. This, too, was error.

The citations offered to and rejected by the referee refer to standards that, in substance, are indistinguishable from the New Hampshire standard. (*Compare* "conduct that poses a substantial threat of serious harm to the public," or an interim suspension "is necessary for the protection of the public," standards contained in Supreme Court Rule 37, *with* "conduct ... likely to cause immediate and serious injury to a client or the public" (ABA Standards for Imposing Lawyer Sanctions, (2015), § 2.4, "Interim Suspensions," at p. 63), and "[an interim suspension is justified when the lawyer] poses a substantial threat of irreparable harm to the public" (*In re Discipline of Trujillo*, 243 P.3d 972, 979 (Utah 2001).

The ABA Standards, while admittedly not controlling, are nevertheless cited as guidelines in the great majority of this court's attorney discipline cases. *See, e.g., Feld's Case,* 149 N.H. 19 (2002), a matter cited within *Reiner I.* And the jurisprudence of other jurisdictions influenced the result in *Reiner I* itself, in which the court relied heavily on *FDIC v Mallen*, 486 U.S. 230 (1988), a case involving federal law. In preparing the *Reiner I* opinion, the court appears to have also consulted the law of Massachusetts, at one point citing *Matter of Kenney*, 504 N.E.2d 652 (Mass. 1987).[1]

It was error for the referee to simply reject jurisprudence from other forums, without considering the wisdom to be gained by examining the analysis of interim suspension matters offered by those forums.

[1] *Reiner I,* 152 N.H. at 167. The opinion in *Reiner I* was authored by Justice Duggan, the referee in this matter.

3. Though conceding they include considerations that are relevant, the referee refused to apply preliminary injunctive relief standards because it would "unnecessarily confuse the analysis" applied to such a case is this. *Recommendations*, p. 9. He was wrong.

Litigants and courts apply the preliminary relief standards nearly every day of the week. They are not complex. They are an integral part of New Hampshire's jurisprudence. "[T]he granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." *UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 14 (1987). Cases of preliminary relief represent the necessary balancing act that courts apply in contested matters when evaluating an action that may seriously damage one party on a temporary basis. *See FDIC v Mallen*, in which the Supreme Court balanced a variety of factors in examining the process used. 486 U.S. at 243-4.

"Interim suspensions function similarly to civil temporary restraining orders, except that they do not automatically expire." ABA Standards, Standard 2.4, p. 66. *See, e. g., People v. Varallo*, 913 P.2d 1 (Colo.1996) (interim suspension analogous to a preliminary injunction); *In re Discipline of Trujillo*, 24 P.3d 972, 980 (Utah 2001) (petition for interim suspension should be measured by the standard applied for issuing preliminary injunctions -- "weighing the harm to the attorney in the event the interim suspension is granted against the harm to the public in the event the interim suspension is denied").

In *Trujillo,* the Supreme Court of Utah likened an application for interim suspension to the process governing the issuance of preliminary injunctions, and adapted it to the professional discipline context. The standards adopted by the court closely resemble the requirements for preliminary relief:

> [I]n determining whether an attorney poses a substantial threat of irreparable harm to the public, a disciplinary court must consider (1) whether the public will suffer irreparable harm unless the order of interim suspension issues, (2) whether the threatened injury to the public outweighs whatever damage the proposed order may cause the attorney temporarily suspended from the practice of law, (3) whether the proposed order, if issued, would be adverse to the public interest, and (4) whether there is a substantial likelihood, based on all the available evidence, that a significant sanction will be imposed on the attorney at the conclusion of any pending disciplinary proceedings.

24 P. 3d 972, 979.

Similarly, in lawyer suspension matters, "This court has the inherent power to take reasonable and expeditious action in the suspension or removal of members of the bar for the protection of the community. In the exercise of this power this court has the obligation to make appropriate disciplinary orders for the protection of the public, as well as for the maintenance of public confidence in the bar as a whole." *Reiner I,* 152 N.H. 163, 168 (citation omitted). In determining the appropriateness of a proposed disciplinary order, the court must consider all the relevant interests. The Rules recognize the appropriateness of such considerations; *see, e.g.,* Rule 37(9-A)(d) ("the referee ... may consider whether measures short of interim suspension adequately safeguard the public against the threat of substantial harm"), and the interaction of Rules 37(9)(a) and (i) (a suspension is the likely consequence when an attorney is convicted of a serious crime, but when an attorney is indicted, "the court shall take such actions as it deems necessary, including but not limited to the suspension of the attorney" -- thereby indicating some analysis should take place.

Applying the preliminary relief factors is necessary in this context, where the only evidence against Attorney Gallant consists of the briefest of comments, reported by hearsay weeks after they occurred, the likelihood of him committing similar conduct in the future is remote, and the result of the suspension is not the protection of the public, but significant harm to his clients.

C. Had the referee applied the preliminary relief standards, he would have concluded the suspension was unnecessary to protect the public.

In order to obtain preliminary injunctive relief, the petitioner must demonstrate: (1) a present threat of irreparable harm; (2) there is no adequate remedy at law; (3) a likelihood of success on the merits; and (4) the public interest would not be adversely affected if the court granted the preliminary injunction. *UniFirst Corp. v City of Nashua,* at 14-15. The circumstances in this case fail to meet any reasonable standards that could be applied in evaluating the need to continue Attorney Gallant's suspension.

1. There is no threat of irreparable harm to the public if the suspension is lifted.

Attorney Gallant was first admitted to practice law in 1986. He was admitted to the New Hampshire bar in 1989. Since that time, he has tried dozens if not hundreds of cases in the courts of this state. By his count, he has appeared in hearings or trials before 20 or more of the 36 sitting or retired New Hampshire Superior Court justices, and three of the five sitting members of the Supreme Court. His practice demands that he appear regularly before the judges of our courts. There is little reason to suspect he would knowingly jeopardize his ability to do so.

This the first felony of this kind charged against Gallant. There is no credible suggestion of a pattern of behavior. Even if the incident occurred (which Gallant staunchly denies), the intense focus on him going forward guarantees it will not happen again.

Further, Attorney Gallant has no pending cases involving a *pro se* litigant in a restraining order matter or domestic matter, and he will voluntarily accept no representation in any matter similar to the one involved with the indictment at any time prior to the resolution of these matters. *See Affidavit of John F Gallant, Esq., Appendix Two.*

2. There is an adequate remedy at law if the suspension is lifted.

Attorney Gallant denies that he committed any criminal act. He should be given the opportunity to defend these charges, both in the criminal setting and before the Professional Conduct Committee, before a suspension applies. If the ADO believes his behavior warrants discipline, there is a due process procedure for exacting same against him. Given his long career, and the potential for devastating loss and damage to his career, his family, his reputation, his firm, his partner, and his clients by an interim suspension, that process should be followed. Those results should dictate the result of the suspension process.

3. There is no clear likelihood of success on the merits of the charges.

The indictment appears to have been based on summaries of testimony prepared long after the event, some involving double hearsay. The indictment itself is flawed, as it accuses Gallant of tampering with a witness in a criminal matter, when the alleged conversation, even as reported, occurred in the restraining order matter and had nothing to do with the criminal case.

Flaws in the testimony and contradictions between witnesses are readily apparent. For example:

> Emily Farina was not interviewed until June 29, more than five weeks after the May 24 conversation with the Respondent. The interview was conducted by a Nashua police officer (Nicole Clay) who was uninvolved in the earlier events. *Joint Exhibit 1, p. 25.*
>
> Nashua police prosecutor Topham prepared his supplemental narrative on July 13, more than seven weeks after the hearing he attended (May 23). *Joint Exhibit 1, p. 5.* He was not present in court on May 24, the day the conversation in question occurred. *Joint Exhibit 18; see also Transcript of Hearing before the Honorable James E. Duggan, September 26, 2017, pp. 27-8.*
>
> Topham's July 13 supplemental narrative includes his recollection of a June 15 conversation with the victim/witness advocate, who was herself relaying a conversation with the witness in which Topham did not participate – double hearsay. *Joint Exhibit 1, p. 5.*

The police notes contradict each other. For example, Topham writes that Farina "stated that Attorney Gallant told her that she had to sign this Agreement and so she did." *Id.* Officer Clay, by contrast, writes that "Farina advised that she never signed any agreement with Gallant." *Joint Exhibit 1, p. 25.* The transcript of the May 24 hearing confirms it was actually Judge Moore who gave Farina the Agreement. *Joint Exhibit 17, p. 8.*

Farina told the police that Gallant tried to convince her to agree to a restraining order of only 30 days in length. *Joint Exhibit 1, p. 25.* But on the record, Gallant told Judge Moore that he suggested a period of three months. *Joint Exhibit 17, p. 5.*

Had Gallant's conversation with Farina been intended to sway her testimony in some impermissible way, it is unlikely he would have reported that very conversation to Judge Moore, as he did during the May 24 proceedings. *Joint Exhibit 17, pp. 5-6.*

Ms. Farina was present when Gallant told Judge Moore of their conversation. She raised no objection to his characterization of its content. She conversed with Judge Moore and confirmed her satisfaction with the resolution reached that day. Ms. Farina was asked by Judge Moore, "[D]o you feel that the Court's orders at this time are fundamentally fair and protect you?" She responded, "Absolutely." *Joint Exhibit 17, p. 9.*

Attorney Gallant's words, even as described by others, can be read as a fair interpretation of Judge Moore's approach to the matters of Farina v. Zimmer and State v. Zimmer—Judge Moore was giving the parties an opportunity to peacefully resolve their conflicts with as little drama, and as little judicial oversight, as possible. *Joint Exhibit 15, pp. 11-13; Joint Exhibit 17, pp. 6-8.* Judge Moore was sensitive to Zimmer's bar status, and was clear that he would do what he could to minimize the impact of the case on Zimmer's license. *Joint Exhibit 15, p. 11; Joint Exhibit 17, p. 7* ("I'm sensitive to what you do for a living, and I'm trying to work with you there.")

The police report includes Ms. Farina's statement that Attorney Gallant told her that "I've spoken to the judge and he wants this to go away." The police later interviewed Judge Moore, who advised he had no recollection of having any conversation with Attorney Gallant that was not on the court record. The referee gave this apparent conflict significant weight in his report. *Recommendations, p. 7.* But how likely is it that an experienced trial attorney would initiate an *ex parte* communication about an ongoing case with the judge, and then use it as the basis for a negotiating position? And of what value is the so-called "corroboration" when the judge denies such a conversation occurred – which, of course, it never did?

Further, the Recommendations are flawed by the referee's unfair weighing of the evidence. The referee acknowledged "there are weaknesses in the State's case against Gallant," *Recommendations, p. 11.* He then recounts evidence from three witnesses who *partially* corroborate Ms. Farina's account. *Id.* The referee improperly gave greater weight to the corroborating evidence than the apparent conflicts, concluding that the evidence "is sufficient to show a pattern of misleading or false statements." *Recommendations, p. 12.*

4. Most importantly, the public interest is harmed more by the continuation of the suspension then by its vacation.

Hundreds of clients of Attorney Gallant's law firm depend on him to represent their interests in New Hampshire and elsewhere. Those clients are already seriously inconvenienced by the suspension, and their interests may be fatally prejudiced. Gallant's law partner suffers from a devastating cancer, and works a very limited schedule. Attorney Gallant has taken over a significant portion of his partner's caseload and responsibilities. Their law firm employs many employees. The interests of those employees and their families are put at risk by the disruption arising from his suspension. *Affidavit of John F. Gallant, Esq., Appendix Two.*

But the referee refused to balance these factors in his analysis. Instead, he looked primarily to the terms of the one-paragraph indictment. He then unfairly credited the State's evidence, and ignored the presumption of innocence to which Attorney Gallant was due. He apparently neglected to consider whether measures short of continuing the interim suspension would adequately safeguard the public against the threat of substantial harm, as provided in Rule 37(9-A)(d).

The process the referee followed was flawed, unfair, and did more harm to the public than good. His recommendations should be disregarded by this Court.

D. <u>The referee's factual findings were flawed</u>.

There is no record of what Gallant actually said. Most tellingly, none of the alleged statements made by Attorney Gallant were brought up by the *pro* se party, despite the judge specifically asking her if she was satisfied with the process. *Joint Exhibit 17.* It stands to reason that if Attorney Gallant had attempted to intimidate her mere moments before, the purported victim would have mentioned this when specifically asked if the process was fair. The referee ignored this logic, instead crediting the *pro se* party's version of an event five weeks earlier.

Attorney Gallant's remarks, even if made as reported, were made on the fly, in the context of advocacy. Even his supposed recitation of Judge Moore's remarks – "The judge wants this to go away" -- falls within an acceptable range of advocacy. The referee, however, rejected Gallant's characterization of the remarks. *Recommendations, p. 10.*

The referee assumed that a remark attributed to Gallant -- "I spoke with the judge yesterday" -- actually took place. *Recommendations, p. 11.* He gave the remark great weight in his recommendations. *Recommendations, p. 12.* But Gallant and the *pro se* party to whom he allegedly made the remark were about to appear before Judge Moore himself. Attorney Gallant is a very experienced trial lawyer. It is extremely unlikely that he used such words under the circumstances in which the statement is alleged to have been made. Moreover, the *pro se* party did not bring the alleged statement to the court's intention, despite the opportunity to do so.

The indictment conflates Gallant's alleged conversation with the *pro se* party concerning the *civil* restraining order, with his subsequent conference with the police prosecutor in the *criminal* matter. *Joint Exhibit 2.* The referee committed the same mistake.

The referee minimized the weaknesses in the State's case against Gallant, while emphasizing the evidence from three witnesses who only partially corroborated the *pro se* party's account. *Recommendations, pp. 11-12.*

The referee concludes "this is not a case simply of two parties' conflicting, unsupported statements." *Recommendations, p. 12.* Yet that is exactly what it is – a *pro se* party's unsworn recollection of a remark five weeks earlier, against the denial before this Court by the attorney who supposedly made the remark. Accepting that "such reckless statements" actually occurred, the referee concluded that Gallant lied, that there was a pattern of misleading or false statements, and that the pattern "compromise[d] the legal system itself." But Attorney Gallant denies that any such statements were made, at least with the meaning attributed to them. No fact-finding has taken place, no one has concluded that anything of the sort occurred, and Gallant has yet to have his day in court. The referee's conclusions were error, sufficient to render his Recommendations unreliable.

CONCLUSION

Attorney John Gallant requests this Court to vacate his interim suspension. The criminal and professional disciplinary processes are adequate to deal with the alleged conduct in this case. Absent this relief, Gallant's clients will suffer inappropriate, unnecessary, and avoidable harm, while the suspension will do little to protect the general public from any threat Gallant supposedly poses.

REQUEST FOR ORAL ARGUMENT

This matter is scheduled for oral argument on December 6, 2017. Attorney William C. Saturley will argue for Attorney Gallant.

CERTIFICATION THAT THE DECISION IS INCLUDED

The referee's report and recommendation, with which Attorney Gallant takes issue and which is the subject of this challenge, is attached as an appendix to this brief (*Addendum 1).*

Respectfully submitted,

JOHN F. GALLANT, ESQ.

By his attorneys,

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CERTIFICATE OF SERVICE

Copies of this *Brief of Attorney John F. Gallant, Esq.* were forwarded to Janet DeVito, General Counsel, and Brian Moshegian, Assistant General Counsel for the Attorney Discipline Office, by electronic and U.S. first class mail, on November 29, 2017.

William C. Saturley, Esq.

APPENDIX ONE

Referee's October 10, 2017 Recommendations

Rec'd
10/10/17

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The State of New Hampshire
Supreme Court

Docket No. LD-2017-0010

In the Matter of John F. Gallant, Esquire

Referee's Recommendations

On August 15, 2017, Attorney John F. Gallant was indicted by a Hillsborough County Grand Jury for felony witness tampering. See RSA 641:5 (2016). The indictment alleged that he "purposely attempted to induce or otherwise cause [Emily Farina] to withhold testimony and/or information from the court by telling [her] 'I spoke with the judge yesterday; he doesn't want to hear this' and '[c]an't you just drop it' or words to that effect."

On September 11, 2017, the Attorney Discipline Office (ADO) filed a certified copy of the indictment with the New Hampshire Supreme Court. On September 13, 2017, the Court ordered that, "considering the nature of the alleged felony, Attorney Gallant's immediate suspension from the practice of law is necessary to protect the public and to preserve the integrity of the legal profession." See Sup. Ct. R. 37(9)(i), 37(16)(d), (f).

At Gallant's request, the Court scheduled a hearing, which was held before me, James E. Duggan, as referee, on September 26, 2017, to determine whether his interim suspension, pending resolution of the indictment, should be lifted. See Sup. Ct. R. 37(16)(d); Reiner's Case, 152 N.H. 163, 167 (2005) (Reiner I); Reiner's Case, 152 N.H. 594, 597 (2005) (Reiner II). At the hearing, there was no testimony. Instead, the parties submitted an agreed-upon set of documents, including police reports, transcripts of hearings, and court documents.

The following facts are supported by the record. Gallant, and his law partner, Timothy Ervin, represented Ethan Zimmer, an attorney who had formerly practiced with them, when Emily Farina petitioned for a domestic violence order of protection against Zimmer. An ex parte temporary restraining order was issued on April 28, 2017. On May 12, 2017, before a final hearing

was held on the petition, Zimmer was arrested. On May 17, 2017, he was arraigned in the 9th Circuit Court – District Division – Nashua (Moore, J.) on four counts of violating the temporary restraining order and three counts of theft by unauthorized taking. Bail was set at $25,000.

On May 18, 2017, the trial court held a hearing to review Zimmer's bail. Ervin represented Zimmer. Farina appeared with her attorney, William Barry. Ervin requested a reduction in bail because Zimmer's presence was essential the next day at the closing of the sale of Zimmer and Farina's house. Barry stated that reducing bail was in Farina's best interest and that the sale of the house was "going to deescalate the connection . . . between the parties." When questioned by the court whether she felt that Zimmer "present[ed] a credible threat of harm to [her]," Farina responded, "No. I just want to get the house sold and then we can go from there . . . I want to get out of that house . . . We just have to get through tomorrow."

The police prosecutor objected, but the trial court reduced Zimmer's bail to $2,000 cash. The court stated that Zimmer would be required to return the following Tuesday, May 23, to review the bail. The trial court stated, "I want to find out how the closing went. I want to see what's going on." The court emphasized that, if there were "any issues" over the weekend, Zimmer's bail would be raised. Barry stated that, if there were no "issues," he and Farina would not appear. The trial court agreed. The trial court told Zimmer, "If there aren't any issues, . . . I'll figure . . . this was a blip in the radar, you're back on track, and you're good to go." The court emphasized that, under these conditions, May 23 would be "a very quick hearing."

On Tuesday, May 23, Zimmer appeared, represented by Gallant. Because there had been no "issues," Farina did not appear. The hearing lasted less than two minutes. Gallant raised a question about the final hearing on the restraining order, which was scheduled for the following morning. The trial court urged Gallant to "sit down with Attorney Barry." The court stated:

> Mr. Zimmer, look, sir, I want to wish you the best of luck. I mean, I'll tell you something right now that it's not

> the mistakes in life that . . . define you and it's how you deal with them. You know that.
>
> . . . .
>
> And I'm glad that things are back on track. If there's something that I can do to help you down the road, if there's issues, please be proactive. Give me a chance to take care of the issue for you, okay?
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> . . . .
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> I am sure that the two of you can resolve this issue and I'll be happy to work with you. I'm here tomorrow, so you can do one of two things on the underlying restraining order. You can certainly sit down with Attorney Barry and see if you can't work it out. If for some reason you feel that there's an issue having me hear the case, just let me know and I'll find you a different judge.

The following day, Wednesday, May 24, Farina appeared, without counsel, for the final hearing on the restraining order. Gallant met with Farina before the hearing occurred. It is Gallant's alleged statements during this pre-hearing meeting with Farina that are the basis for the indictment.

According to a June 29, 2017, police report of an interview with Farina, Farina said that, prior to the final hearing on the restraining order, Gallant approached her in the courtroom and asked whether she was represented in the domestic violence petition matter. She responded that she was not. He then asked to speak with her "privately." In a hallway,

> Gallant asked "can't we come to an agreement out of court". Farina responded that she was not comfortable with this because she and Zimmer previously had an agreement outside of court, prior to the restraining order, and Zimmer had not abided by it.

In the same police interview, Farina stated that:

> Gallant then claimed he had already spoken to Farina's lawyer, Bill Barry, that Gallant had emailed him or left him a message. Farina disagreed and Gallant insisted that he had spoken with her attorney. Farina then spoke with Atty Barry over the phone and confirmed that Atty

> Barry had not spoken with Gallant. Farina then returned to the courtroom.

Farina told police that, "[a] short time later," Gallant again asked to speak with her. This time he proposed going into another room instead of the hallway. Farina stated that "she believed Gallant was trying to get her to miss her hearing by going to another room to speak with him."

According to Farina, Gallant told her that the bail review hearing had been held the day before and stated, "I spoke to the judge yesterday; he doesn't want to hear this." When Farina questioned this, Gallant told her that "this was going to look really bad on [Zimmer's] record." Farina responded that "chainsaws look really bad," an apparent reference to an incident reported in the domestic violence petition. Farina told police that:

> Gallant claimed that this happened a year ago and stated 'Can't you just drop it'. Farina responded that this just happened a couple of weeks ago. Farina informed Gallant that she would not leave without a judge dismissing the restraining order or Zimmer agreeing to a six month restraining order. Farina advised that Gallant had tried to convince her to agree to a restraining order of only thirty days.
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> Farina then ended contact with Gallant and walked back to the courtroom where the hearing was held in front of Judge Moore. Farina advised that she never signed any agreement with Gallant.

Immediately following their conversation, Gallant and Farina appeared in court. The judge first questioned Farina whether she wished to go forward and then described her options: a hearing on the merits or keeping the temporary order for a set period of time. Gallant represented to the court that, although they had not finished their conversation before the case was called for hearing, they had been "talk[ing] about continuing the orders that are in place for a period of time." The trial court noted that "the Court as a whole kind of frowns on having that happen . . . [b]ecause there isn't any finality."

However, the trial court then proposed continuing the temporary restraining order for up to 180 days with review hearings at 90 and 180 days. The court asked Farina, "Does that work for you?" She responded, "That works." The court later asked Farina, "[I]s there anything that I can do at this point to help you?" She responded, "I think this is good." Then the court asked Farina, "[D]o you feel that the Court's orders at this time are fundamentally fair and protect you?" She responded, "Yeah. Absolutely." Farina did not mention the statements she said Gallant made to her prior to the hearing.

On June 15, a pre-trial conference was scheduled in the 9th Circuit Court – District Division – Nashua on the criminal charges against Zimmer. The police prosecutor reported that, prior to the conference, he spoke with the victim/witness advocate. The advocate said that Farina told her that:

> prior to the start of the Restraining Order Hearing Attorney Gallant asked her to speak with him privately.
>
> [Farina] stated that once in a conference room Attorney Gallant told her that "I've spoken to the Judge and he wants this to go away."
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> She stated that Attorney Gallant then told her that because of this she needed to sign an Agreement that even though the Restraining Order that would be issued that day was valid for 1 year, there would be a Review Hearing in 3 months at which time the Order would be [d]ismissed.
>
> She stated that Attorney Gallant told her that she had to sign this Agreement and so she did.

Gallant appeared for the pre-trial conference on behalf of Zimmer. According to the police prosecutor, prior to the conference, he and Gallant met to discuss the case. The following conversation ensued:

> I [the prosecutor] went into Courtroom 8 and asked Attorney Gallant to come and speak with me in the conference room outside Courtroom 8 which he did.

> Once I closed the conference room door and sat down, Attorney Gallant looked at me and immediately stated "The Judge wants this to go away." I said "What?" Attorney Gallant then re-stated "The Judge wants this to go away."
>
> Attorney Gallant then added "The victim wants this to go away and won't show up."
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> I then told Attorney Gallant that this was not going away and that the victim was present and wished the case to go forward.
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> Attorney Gallant then stated "I've been sitting in the Courtroom and she's not here."
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> I informed Attorney Gallant that the victim was in fact present and had been and was still in a different part of the Courthouse and that [the victim/witness advocate] had just spoken with the victim.
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> Attorney Gallant then requested that I [n]olle [p]ross the charges against Mr. Zimmer.
>
> I then informed Attorney Gallant that I would not be [n]olle [p]rossing the charges.

After the police prosecutor concluded his conversation with Gallant, he "was sufficiently concerned about the nature of Attorney Gallant's comments to [him] that [he] immediately notified [his] chain of command regarding the inappropriateness of these statements and possible witness tampering by a licensed New Hampshire Attorney."

The police then began investigating Gallant's statements. After taking a statement from Farina, police interviewed Barry. He confirmed that Farina had telephoned him from the courthouse on May 24. According to Barry,

> Farina advised [him] that Gallant approached her and told her that he had spoken with Atty Barry and that Atty Barry had told Gallant that Farina did not need to be present for the hearing on the temporary restraining order. Farina further advised that Gallant told her he had talked with Judge Moore and Judge Moore said Farina did not need to be at court.

Barry stated that he never "spoke with Gallant about the criminal charges or the restraining order." Barry confirmed that "he never received an email or call on his cellphone from Gallant" about these matters and that "Gallant never called the office or left a message there."

> On July 12, 2017, the police officer met with Judge Moore and asked if he ever had an off-the-record conversation with Zimmer's counsel, Attorney John Gallant. . . . J. Moore advised that his normal practice is not to meet privately with litigants in his chambers unless representatives of both sides are present. J. Moore advised that he did not recall ever bringing Atty Gallant into his chambers and could not think of a reason why he would do so.
>
> J. Moore further advised that [he] had no independent recollection of having any conversation with Atty Gallant that was not on the court record. J. Moore furthered [sic] that even if Atty Gallant had approached the bench to speak with J. Moore during a recorded court hearing, the audio record of that hearing would reflect any conversation. . . . J. Moore advised that he would never encounter an attorney in the hallway, much less have a conversation with an attorney in that setting. . . . I [the investigating officer] advised J. Moore of Atty Gallant's statements to Farina . . . . J. Moore asked "Why would I say that?" and further stated "I can't ever imagine saying to anyone I want this to go away." J. Moore advised that he never had a private, off-the-record conversation with Atty Gallant and never said anything about wanting the case to go away or not wanting to hear the matter in court.
>
> On July 18, 2017, a Nashua Police officer called Gallant at his office.
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> I [the officer] identified myself to Gallant and advised that I would like to speak with him regarding some statements made to Emily Farina during the course of the case on May 24, 2017. Gallant asked who Emily Farina was. I informed Gallant that Emily Farina was the plaintiff in a restraining order against his client, Ethan Zimmer. Gallant asked what statements I was referring to. I told Gallant that Farina had made claims regarding what he said to her and I asked Gallant if he would be willing to respond to the police department to clarify what Farina is claiming. Gallant stated

> he was not sure it was a good idea to come in and speak with me.
>
> Gallant took my name and phone number and advised that someone else would be calling me to ask more questions regarding what this is about before he decides whether or not to provide a statement.

The officer reported that on July 19, 2017, she received a voicemail from Ervin, on Gallant's behalf, which she returned on July 27, but that, as of August 3, neither Gallant nor Ervin had returned her call.

In his hearing memo, filed on the day of the interim suspension hearing, Gallant states that he has been practicing law for 30 years, "has tried dozens if not hundreds of cases," and that "[t]his is the first accusation against him of this kind, and there is no credible suggestion of a pattern of behavior." The ADO notes that, in 2009, Gallant was found to have violated his duty of candor toward the tribunal and truthfulness in statements to others. The ADO has not provided a copy of the order in this matter. Because the ADO has not provided the details of the prior matter, I conclude that it has little probative value.

Standard of Review:

The ADO bears the burden to show, by a preponderance of the evidence, that suspension is necessary for the protection of the public and the preservation of the integrity of the legal profession. Reiner I, 152 N.H. at 170; see Sup. Ct. R. 37(16)(f). To meet this burden, the ADO may supplement the allegations in the indictment with additional evidence. Reiner I, 152 N.H. at 170.

Gallant argues that whether to impose an interim suspension should be "measured by the standards for preliminary injunctive relief." (Bolding omitted.) He quotes the ABA Standards for Imposing Lawyer Sanctions, §2.4, at 66 (2015) (Standards), which states that "[i]nterim suspensions function similarly to civil temporary restraining orders." He also relies upon In re

Discipline of Trujillo, 24 P.3d 972 (Utah 2001), in which the Utah Supreme Court held that, when deciding whether to suspend an attorney on an interim basis, "the standards governing the issuance of preliminary injunctions, adapted to . . . a professional disciplinary proceeding" should be applied to "determin[e] whether an attorney poses a substantial threat of irreparable harm to the public." Trujillo, 24 P.3d at 979.

For two reasons, applying that standard to this proceeding would be inappropriate. First, as a referee, my task is to apply settled New Hampshire law. Cf. Reiner I, 152 N.H. at 169 (stating Court will review de novo whether referee committed errors of law). A referee does not have authority to deviate from settled New Hampshire law.

Second, both authorities cited by Gallant address interim suspension provisions different from those in New Hampshire. See Standards, p. 63 (authorizing interim suspension when "lawyer's continuing conduct is or is likely to cause immediate and serious injury to a client or the public"); Trujillo, 24 P.3d at 977 (authorizing interim suspension when a lawyer, among other things, "poses a substantial threat of irreparable harm to the public").

Furthermore, although the preliminary injunction standard includes considerations that are relevant under Reiner I and Reiner II, importing preliminary injunction law into this context would unnecessarily confuse the analysis set forth in Reiner I and Reiner II.

Preservation of the Integrity of the Legal Profession:

I first address whether Gallant's interim suspension is necessary to preserve the integrity of the legal profession. See Reiner I, 152 N.H. at 167. Both Gallant and the ADO acknowledge that this standard has been satisfied. I agree. Tampering with a witness, particularly one who is self-represented and the victim in a domestic violence dispute, is serious misconduct and serves to undermine the core principles of ethical lawyering and the lawyer's role as an officer of the court.

When a lawyer misuses the process, that lawyer threatens the very bedrock of the judicial system. Lawyering involves a public trust and requires an unswerving allegiance to honesty and integrity. A lawyer charged with such an offense cannot help but be looked upon by the public with untrusting eyes and that perception cannot help but be reflective upon the bar as a whole. See Reiner II, 152 N.H. at 598 (stating interim suspension of lawyer indicted for felonies arising out of money laundering and prostitution necessary to preserve integrity of legal system).

Protection of the Public:

The second, and more difficult, issue is whether Gallant's interim suspension is necessary for the protection of the public. See Reiner I, 152 N.H. at 167. Although the ADO need not prove that the allegations in the indictment are true, id. at 169, Gallant argues that I should consider the strength of the evidence against him. I agree. Reiner II relied, in part, upon the lack of any evidence beyond the indictments to corroborate or supplement the allegations. Reiner II, 152 N.H. at 598. The assumption behind that analysis is that the strength of the evidence against the attorney is a relevant consideration in addressing the protection of the public.

Gallant first argues that his statements, "even as described by others, can be read as a fair interpretation of Judge Moore's approach to" Zimmer's criminal and civil cases. He contends that "Judge Moore was giving the parties an opportunity to peacefully resolve their conflicts with as little drama, and as little judicial oversight, as possible." At the hearing before me, Gallant argued that Judge Moore wanted the domestic violence case "to go away," and that Gallant's characterization that Judge Moore did not "want to hear this [case]" was, in substance, accurate.

On the contrary, Gallant's characterizations were not supported by Judge Moore's statements. Judge Moore encouraged the parties to settle; he did not indicate in any way that he was unwilling to hear the case. Gallant's

characterizations implied that Judge Moore wanted Farina to take some action to resolve the case without judicial intervention, such as not pursuing her claim. In fact, Judge Moore simply offered "to work with" the parties to resolve the case.

Moreover, Gallant's statement, "I spoke with the judge yesterday," suggests that Gallant was not relying upon what Judge Moore said in the courtroom, but instead that Gallant had met privately with the judge. Thus, Gallant's argument that he was merely interpreting what the judge said is inconsistent with his implication that he had a private conversation with the judge.

Gallant argues that the State's case against him has several factual weaknesses. He points out that Farina failed to mention his statements to the trial court, even though Gallant and Farina appeared before the court immediately following their conversation that forms the basis for the allegation of witness tampering. Instead, as Gallant notes, Farina, in response to the trial court's query, stated that she was satisfied with the outcome of the hearing.

Gallant also emphasizes various inconsistencies in Farina's accounts of his statements. For example, in her police interview, Farina said that she did not sign "any agreement" with Gallant, but the victim/witness advocate told the police prosecutor that Farina told her that she did sign an agreement. Similarly, in her police interview, Farina stated that Gallant proposed a 30-day restraining order, but Gallant represented to the trial court that he proposed a three-month restraining order to Farina.

Gallant also notes the time that elapsed between his May 24 statements to Farina and her interview by police on June 29. He additionally notes that the police prosecutor was not requested to make a report until July 13. He contends that these delays undermine the reliability of the evidence.

While there are weaknesses in the State's case against Gallant, there is evidence from three witnesses that partially corroborates Farina's account. The police prosecutor reported that Gallant told him that "[t]he Judge wants this to go away." This is substantially similar to the statement that Farina

reported Gallant made to her. Furthermore, the prosecutor reported that Gallant misrepresented to him Farina's position by telling him that "[t]he victim wants this to go away." This supports the inference that Gallant was willing to make false statements to resolve the case in his client's favor.

Farina's description of Gallant's statements to her is also partially corroborated by Barry's account. Barry confirmed Farina's statement that she called him from the courthouse when Gallant talked to her. Barry said that Farina told him that Gallant stated falsely, first, that he had talked with Barry and, second, that "he had talked with Judge Moore and Judge Moore said Farina did not need to be at court." Although this statement is not identical to the one that Farina reported to police, it is further evidence that Gallant falsely implied that he had an ex parte communication with Judge Moore.

Finally, the victim/witness advocate's account to the police prosecutor of her conversation with Farina also partially corroborates Farina's description of Gallant's statements. The advocate told the prosecutor that Farina said that Gallant told her, "I've spoken to the Judge and he wants this to go away."

On balance, this is not a case simply of two parties' conflicting, unsupported statements. Cf. Reiner II, 152 N.H. at 598 (relying, in part, upon lack of corroborating or supplemental evidence to determine interim suspension not necessary for public's protection). Although the evidence against Gallant is far from overwhelming, it is sufficient to show a pattern of misleading or false statements.

When viewed in its totality, Gallant's conduct was not only unacceptable, but was detrimental to the administration of justice. The evidence supports that Gallant misrepresented at least three people's statements: he misrepresented to Farina what Judge Moore and Barry had said, and he misrepresented to the police prosecutor what Judge Moore and Farina had said. Particularly troubling is Gallant's false statement that he had talked to Judge Moore, which implied that he had had ex parte communications and thereby suggested that he had a special relationship that he could employ to influence the system of justice. Gallant's willingness to make such reckless

statements to the police prosecutor and to Farina leads me to conclude that his interim suspension is necessary for the protection of the public.

"No single transgression reflects more negatively upon the legal profession than a lie." Grew's Case, 156 N.H. 361, 366 (2007); cf. Reiner II, 152 N.H. at 598 (holding interim suspension not required to protect public when, among other things, no allegation attorney made false statements). Unlike the acts in Reiner II, Gallant's acts compromised the legal system itself, thereby creating a need to protect the public from his behavior. This conduct goes to the core of an attorney's obligation to deal with witnesses fairly. This is essential to the judicial system's ability to protect the public. Thus, it requires vigilance, and its breach must have consequences.

Accordingly, I conclude that the ADO has shown, by a preponderance of the evidence, that suspending Gallant from the practice of law until the indictment against him for witness tampering is resolved is necessary for the protection of the public and the preservation of the integrity of the legal profession. See Reiner I, 152 N.H. at 167; Sup. Ct. R. 37(16)(f).

Recommendation:

I recommend that:

(1) the Court not lift its September 13, 2017, order, directing Gallant's immediate suspension from the practice of law in New Hampshire. See Sup. Ct. R. 37(9)(i), 37(16)(d), (f).

(2) Gallant be ordered to:

(a) keep the ADO and the Supreme Court advised of the status of the criminal proceedings and immediately notify the ADO and the Court if any other charges are brought against him; and

(b) immediately notify the ADO and the Supreme Court if the authority charged with the discipline of attorneys in any other jurisdiction takes action against him. See Reiner II, 152 N.H. at 598.

(3) Gallant be ordered to comply with:

(a) Supreme Court Rule 37(13)(b) and notify each of his clients who is involved in litigated matters or administrative proceedings in New Hampshire, and the attorney or attorneys for each adverse party in such matter or proceeding, of his suspension and consequent inability to act as an attorney after the date of this order;

(b) Supreme Court Rule 37(13)(d) and file with the Court, within 30 days of the date of this order, an affidavit showing that he has: (i) fully complied with the provisions of this order and with Supreme Court Rule 37(13); and (ii) served a copy of such affidavit upon the professional conduct committee; and

(c) Supreme Court Rule 37(19) and be assessed all expenses incurred by the attorney discipline system in the investigation and prosecution of this matter.

Respectfully submitted,

/s/ October 10, 2017

James E. Duggan, Referee

APPENDIX TWO

Affidavit of John F. Gallant, Esq.

NEW HAMPSHIRE SUPREME COURT

In the Matter of John F. Gallant, Esq.

Docket No. LD-2017-0010

AFFIDAVIT OF JOHN F. GALLANT, ESQ.

Attorney John F. Gallant, under oath, makes the following declaration, the substance of which he could testify to at trial.

1. I am over 18 years of age.

2. I was first admitted to practice law in 1986. I was admitted to the New Hampshire bar in 1989.

3. Since that time, I have tried dozens if not hundreds of cases in the courts of this state. By my count, I have appeared in hearings or trials before twenty or more of the 36 sitting or retired New Hampshire Superior Court justices, and three of the five sitting members of the Supreme Court.

4. I was indicted for the crime of witness tampering on August 15, 2017. I deny the allegations contained in the indictment.

5. I have had no opportunity to rebut the allegations in the indictment. There has been neither a trial nor a conviction in the criminal matter.

6. My practice includes numerous litigation matters ongoing in the courts of this state at the present time. My law partner suffers with gastric cancer, a debilitating and serious medical condition, significantly limiting his work time. While there are a total of five attorneys in the law firm, I perform the majority of the trial work and I oversea and manage almost all of

the litigation matters in the office, including particularly the New Hampshire work. At present, I cannot appear for my clients in those matters.

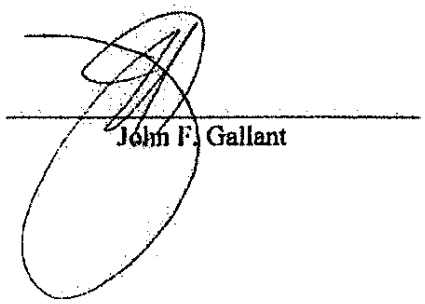
7. A significant component of my work is done in other jurisdictions on a *pro hac vice* basis. The suspension threatens those appearances.

8. The income I generate practicing law supports my partner, my staff, the firm's administrative support, and my family. If the suspension is not vacated in the near future, the future of the law firm, and the financial security it provides its employees and my family, are in jeopardy.

9. If the suspension is not vacated in the near future, the interests of my clients, the firm's employees, my partner, and my family, and my reputation, are all at serious risk.

10. In addition, I have no pending cases involving a pro se litigant in a restraining order matter or domestic matter and I will not accept representation in any matter similar to the one involved with the indictment at any time prior to the resolution of these matters.

FURTHER, THE AFFIANT SAYETH NAUGHT.



John F. Gallant