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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

DEANNA MCBRIDE BIRDSONG,

Petitioner,

Case No. 84,128

TFB No. 94-10,494 (13A)

v.

THE FLORIDA BAR,

Respondent.

\_\_\_\_\_ /

ANSWER BRIEF

OF

THE FLORIDA BAR

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## SYMBOLS AND REFERENCES

In this brief, The Florida Bar, Respondent, will be referred to as "The Florida Bar" or "The Bar". The Petitioner, DEANNA MCBRIDE BIRDSONG, will be referred to as "Respondent".

"TR" will refer to the transcript of the evidentiary hearing before the referee in the case styled The Florida Bar v. Birdsong, Supreme Court Case No. 84, 128, held on December 21, 1994.

"RR" will refer to the Report of Referee in Supreme Court Case No. 84,128, dated January 24, 1995. "RR II" will refer to the Supplemental Report of Referee dated April 10, 1995. "RR III" will refer to the Amended Supplemental Report of Referee dated June 6, 1995.

"TFB Exh." will refer to exhibits presented by The Florida Bar. at the evidentiary hearing before the Referee.

"Rule" or "Rules" will refer to The Rules Regulating The Florida Bar. "Standard" or "Standard" will refer to the Florida Standards for Imposing Lawyer Sanctions.

"RRRS" will refer to the "Request to Review Recommended Sanctions" filed by Respondent on April 18, 1995 and considered to be Respondent's Petition for Review. "SR" will refer to the Supplemental Response filed by Respondent on July 11, 1995, and considered to be Respondent's Initial Brief.

STATEMENT OF THE FACTS AND OF THE CASE

On July 11, 1995, Deana M. Birdsong, Respondent, filed with this Court, her Supplemental Response to the Report of Referee, which has been deemed as her initial brief. Ms. Birdsong's Supplemental Response omitted a statement of the facts. Therefore, The Florida Bar submits the following:

During the events giving rise to this disciplinary proceeding, Respondent was a partner in the law firm of Birdsong & Smith, P.A. (TR, pp. 8-9). On September 19, 1991, the Respondent's law partner, Elinor P. Smith, Esquire, consulted with Kirby D. Williams, Jr., a prospective client. Mr. Williams was interested in retaining the Birdsong & Smith law firm for the purpose in initiating a civil action against Massoud Karimi for breach of contract, fraud in the inducement, and rescission of contract regarding real property he and his wife, Marina Williams, had purchased from Karimi.

At some point during the September 19, 1991 consultation, Smith and Williams executed a document entitled "Fee Statement Miscellaneous Services" wherein Smith agreed to represent Williams in the proposed litigation for an initial fee plus a cost deposit. The Fee Statement also provided that Smith would begin work on the

case when one-half of the fee was paid, and would file the lawsuit when the full payment was received (TFB Exh.#1).

The Fee Statement executed on September 19, 1991 further provided that the agreement was not binding until Williams made a payment (TFB Exh. #1). Williams did not pay Smith the requested fee and representation by the Birdsong & Smith law firm was never undertaken.

In or about October of 1991, the Respondent, as a partner of Birdsong & Smith, P.A., met with Majid John Karimi (Karimi), as agent for his father, Massoud Karimi, in that the elder Karimi did not reside locally and did not speak English (TR, pp.9, 55). Respondent was retained by Massoud Karimi, through his agent John Karimi, to initiate a mortgage foreclosure against Kirby and Marina Williams concerning the same property that was the subject of Kirby Williams' October 19, 1991 consultation with Respondent's law partner, Elinor P. Smith (TR, pp. 9-10, 55).

Respondent testified at the evidentiary hearing before the referee that she was unaware at the time she accepted the representation that the prospective defendants in the foreclosure action, Kirby and Marina Williams, had previously consulted with her law partner regarding the same real property which was to be the subject of the litigation (TR, p.10). Consequently, the

Respondent did not obtain the consent of the Williamses prior to accepting the representation of Karimi in the foreclosure action.

On or about October 17, 1991, the Respondent filed a foreclosure complaint on behalf of Massoud Karimi styled Massoud Karimi v. Kirby D. Williams, Jr. and Marina Williams, Hillsborough County Circuit Court, Case No. 91-10514 (TR, p.10).

Kirby and Marina Williams subsequently retained C. Martin Lawyer, III, Esquire, of Bay Area Legal Services, Inc. to defend them against Karimi's foreclosure action (TR, pp.41,44).

On November 6, 1991, Lawyer filed on behalf of the Williamses, an Answer and Counterclaim to the Karimi foreclosure complaint (TR, p. 45). Lawyer also simultaneously filed a Motion to Disqualify Counsel for Plaintiff/Counter Defendant, citing the September 19, 1991 Kirby Williams' consultation with Respondent's law partner, Smith as sufficient conflict of interest to disqualify the Respondent. A copy of the Motion to Disqualify Counsel was sent to Respondent via U.S. mail one day prior to the filing (TFB Exh. #1; TR, pp.10,45; RR, p.3).

Subsequent to her receipt of the Motion to Disqualify Counsel, Respondent took no action to seek or to obtain a waiver of conflict from the Williamses (TR, pp.12-13, 46-47; RR, p.3). Respondent had actual notice of the conflict of interest when Lawyer served her



with a copy of the Motion to Disqualify Counsel on or about November 5, 1991 (TR, p.13; RR, p.4). Respondent, however, chose to continue to formally represent Karimi in the subject litigation (TR, p. 12).

Lawyer testified at the evidentiary hearing that although he expressed to the Respondent his reservations regarding her continued involvement in the case, he continued to deal with the Respondent because she had not voluntarily removed herself from the representation, and the possibility of a negotiated settlement still existed (TR, pp. 46-47; RR, p. 4). The Respondent admitted that she was aware of the possibility of a potential for conflict by her continued representation of Karimi, but contended that since Lawyer was corresponding with her regarding settlement of the subject litigation, this constituted an "informal waiver" (TR, p.13).

After it became apparent in March of 1992 that an amiable settlement between the parties could not be reached, Lawyer set the Motion to Disqualify Counsel for hearing before The Honorable Gaspar J. Ficarrota, trial judge in the foreclosure action (TR, p.48).

On March 5, 1992, a hearing was held before Judge Ficarrota regarding the Motion to Disqualify (TR, p. 50). At the hearing,

Kirby Williams gave testimony that he had consulted with the Birdsong & Smith law firm concerning the subject matter of the litigation before the plaintiff/counter defendant, Karimi, had consulted with the same law firm regarding the representation.

On March 13, 1992, Judge Ficarrota issued an Order Granting Motion to Disqualify Counsel for the Plaintiff/Counter Defendant wherein Respondent and the law firm of Birdsong & Smith, P.A. were disqualified as counsel for the plaintiff/counter defendant. The Court also allowed Karimi thirty (30) days in which to obtain new counsel (TFB Exh. #2).

Subsequent to the Order Disqualifying Counsel, Respondent failed to file a Motion for Rehearing or other responsive pleading asking the Court to reconsider its order. Respondent also failed to appeal the ruling. Instead, Respondent sent correspondence dated May 8, 1992 to John Karimi informing him that she had been disqualified as counsel, and advising him that he should appear without counsel at his father's foreclosure trial (TR, p.21; TFB Exh. #4).

In her May 8, 1992 letter to Karimi, Respondent also advised Karimi that she would assist him in the preparation of trial and necessary documents in the case (TR, p.23; TFB Exh. #4). Respondent testified at the evidentiary hearing before the referee that she so

advised Karimi without first disclosing the communication to the Court or to the opposing counsel, and without obtaining the permission of Judge Ficarrota (TR, pp. 40-41).

On October 14, 1992, again without disclosing to the Court or obtaining its permission, Respondent provided advice to Karimi with regard to the Defendant/Counter Plaintiff's Motion for Default on the Amended Counterclaim. Respondent also admitted that she drafted and prepared Karimi's responsive pleading to the Motion for Default (TFB Exh. #6), delivered Karimi's response to the Court, and provided a copy of the response to the opposing counsel by facsimile transmission (TR, pp.31-34, 36). Respondent admitted at the evidentiary hearing that at no time did she disclose to the Court that she had prepared and drafted Karimi's responsive pleading (TR, pp.40-41).

Lawyer first became aware of Respondent's continued informal representation of Karimi after she was disqualified from doing so on October 15, 1992, when he received the Respondent's transmission and observed the fax notation indicating that the pleading had come from the Birdsong & Smith law office (TR, pp. 50,51-53; TFB Exh.#6).

A hearing on the Defendant/Counter Plaintiff's Motion for Default was held before Judge Ficarrota on October 15, 1992.

During that hearing, Lawyer informed the Court that he had been furnished with Karimi's response to the Motion for Default by facsimile transmission from the office of Birdsong & Smith, as was clearly indicated on the fax notation on the pleading (TR, pp. 50-52).

Karimi gave telephonic testimony at the default hearing that Respondent had assisted him in preparation of his response to the Motion for Default, and had faxed it to him in Virginia for his signature and return to Tampa for filing with the Court and service upon the opposing counsel (TR, p. 52).

Karimi further testified at the default hearing that he had continued consulting with the Respondent regarding the foreclosure litigation after she was disqualified. He testified that he did so because no one in Respondent's office told him not to call, and he had fully paid the Respondent for completing the lawsuit (TR, p.52).

Sometime after the October 15, 1992 default hearing, Karimi, as agent for his father, retained Paul Riffel, Esquire, to represent him in the foreclosure litigation. On February 17, 1993, at Riffel's request, the Respondent executed her Verified Petition for Attorney's Fees in the Karimi v. Williams case. The Petition listed fees charged to Karimi totaling \$687.50 after Respondent had

actual notice of a conflict of interest on November 6, 1991 (TFB Exh. #3).

By correspondence dated October 16, 1992, the day after the default hearing, Martin Lawyer notified Richard M. Blau, Esquire, of the Thirteenth Judicial Circuit Grievance Committee "A" of what he believed to be unethical conduct on the part of Respondent (TR, pp. 51-52; TFB Exh. #8). Thereafter, on October 27, 1992, Lawyer executed a sworn complaint against the Respondent.

The Thirteenth Judicial Circuit Grievance Committee "A" found probable cause for further disciplinary proceedings, and on August 3, 1994, The Florida Bar filed its Complaint with this Court.

On December 21, 1994, an evidentiary hearing was held before The Honorable Patrick K. Caddell, referee. At the hearing, Karimi testified that he had numerous consultations with the Respondent concerning the foreclosure litigation after March 13, 1992, the date of the Order Disqualifying Counsel (TR, pp. 57-67). The Respondent initially denied contacts with Karimi subsequent to the Order Disqualifying Counsel (TR, pp. 26-27), but later acknowledged the evidence of numerous telephone calls from Karimi to her office (TR, p.78; TFB Exh. #12). Respondent then contended that the telephone calls were of a personal nature, were to assist Karimi in locating other counsel, or were of a procedural nature, rather than

for the purpose of providing legal advice and assistance on the subject litigation (TR, pp.78-80).

On January 24, 1995, Judge Caddell issued a Report of Referee which contained his findings of fact. Judge Caddell found that Respondent's May 8, 1992 letter to John Karimi (TFB Exh. #4) clearly advised a course of legal conduct to Karimi, and that Respondent's statement that "I will go over trial preparation with you and the necessary documents" was an offer of behind-the-scenes legal representation (RR, p. 7).

Judge Caddell recommended that Respondent be found guilty of violating Rules 4-1.10(a), 4-8.4(a), and 4-8.4(d), Rules Regulating The Florida Bar (RR, p.8). Judge Caddell further recommended that Respondent be found not guilty of violating Rule 4-1.9(a), and reserved a recommended finding as to violation of Rule 4-8.4(c) pending further argument at the sanctions hearing (RR, p. 8).

Subsequent to the issuance of the Report of Referee, the Respondent sent a letter to Judge Caddell in which she attempted to further argue her position that she had not violated Florida Bar disciplinary rules since her assistance to Karimi was merely a courtesy for a former client. Respondent also advised Judge Caddell in her letter that she had an excessive work load.

A sanctions hearing was held before Judge Caddell on March

10,1995, at which time the parties presented argument and evidence as to whether Respondent had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c), as well as argument and evidence of aggravating and mitigating factors relating to Respondent's misconduct.

On April 10, 1995, Judge Caddell issued his Supplemental Report of Referee wherein he found Respondent not guilty of violating Rule 4-8.4(c) (RR II, pp. 1-2). Judge Caddell also made the following recommendations regarding sanctions:

- (1) that the Respondent be suspended from the practice of law for a period of thirty (30) days;
- (2) that the Respondent be placed on probation for a period of not less than one year nor more than three years, dependent upon the successful completion of certain requirements;
- (3) that the Respondent complete a minimum of fifteen (15) hours of Florida Bar approved professional ethics education;
- (4) that the Respondent complete a Florida Bar approved law office management course;
- (5) that the Respondent complete a Florida Bar approved personal/professional time management course;
- (6) that the Respondent be required to limit her caseload to that amount which can be professionally handled within a 55-hour maximum work week; and
- (7) that the Respondent be assessed costs in the amount of \$2,369.99. (RR II, p. 5).

On April 14, 1995, Respondent filed with Judge Caddell, her Request to Review Recommended Sanctions wherein the Respondent stated her objections to Judge Caddell's recommended disciplinary sanctions (RRRS).

By correspondence dated April 18, 1995, Judge Caddell advised the Respondent that he had forwarded her "Request to Review Recommended Sanctions" to the Supreme Court of Florida, as he considered his role as referee to have concluded upon the submission of his final report.

On May 16, 1995, Bar counsel filed with the referee, a Motion for Clarification as to the recommended length of probation. The Respondent did not object to the Bar's motion and on June 6, 1995, Judge Caddell issued an Amended Supplemental Report of Referee in which he recommended a two-year period of probation (RR III, p.5).

The Florida Bar Board of Governors voted not to appeal the Supplemental Report of Referee and this Court and the Respondent were notified that the Bar would not be filing a Petition for Review. Thereafter, Respondent filed with the Court an undated pleading entitled "Supplemental Response".

On July 27, 1995, The Florida Bar received notice from this Court that Respondent's "Request to Review Recommended Sanctions" filed on April 18, 1995, would be treated as Respondent's Petition



for Review, and that Respondent's "Supplemental Response" filed on July 11, 1995 would be treated as Respondent's initial brief.

### SUMMARY OF ARGUMENT

The referee properly recommended that Respondent be found guilty to violating Rule 4-1.10(a), Rule 4-8.4(a), and Rule 4-8.4(d). The record established by clear and convincing evidence that the Respondent engaged in a conflict of interest when she continued to represent a client after receiving notice that her law partner had previously consulted with the opposing party regarding the subject matter of the litigation.

The record established by clear and convincing evidence, and the referee properly found that the Respondent violated the Rules of Professional Conduct when she continued to represent a client after receiving actual notice that a conflict of interest existed, and after the trial judge had disqualified her from such representation.

The record also established by clear and convincing evidence, and the referee properly found that the Respondent engaged in conduct prejudicial to the administration of justice when she knowingly and intentionally engaged in conduct which violated a valid court order by continuing to represent a client after the trial judge had disqualified her from doing so.

The record established by clear and convincing evidence that Respondent knowingly engaged in conduct which caused harm or

potential harm to a client, the parties, or the legal system; that she perpetrated a deceit upon the Court and the parties; that she deliberately and knowingly violated a court order; that she demonstrated a lack of candor during the disciplinary proceedings; and that she failed to demonstrate an acknowledgment or understanding of the inappropriateness of her actions. Additionally, Respondent has received prior discipline, has substantial experience in the practice of law, and continues to demonstrate a lack of remorse.

The Respondent has presented no valid legal argument which would show that any of the referee's findings of fact or conclusions of law are erroneous or unsupported in the record.

Similarly, the Respondent has presented no valid legal argument which would show that the referee's recommended disciplinary sanctions are incorrect.

Clearly, the evidence presented in the record herein, the applicable Standards, the relevant case law, and the aggravating and mitigating factors support the referee's recommended sanctions. The Florida Bar urges this Court to affirm the referee's findings of fact, conclusions of law, and recommended discipline.

**ARGUMENT I: The Referee's findings of fact and conclusions of law are supported by clear and convincing evidence and should be upheld.**

A referee's findings of fact are presumed correct and should be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Stalnaker, 485 So. 2d 815, 816 (Fla. 1986); The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986).

The referee herein listened to testimony and evidence presented by the parties, observed the demeanor of witnesses, and found Respondent to have engaged in the legal representation of Karimi after she had received actual notice of a conflict of interest (RR, p. 4), and that she continued such legal representation in violation of an order of the Circuit Court which disqualified her from doing so (RR, pp. 5-7). By this conduct, the referee found that Respondent violated Rules 4-1.10(a), 4-8.4(d), and 4-8.4(a), R. Regulating Fla. Bar (RR, pp. 7-8).

Respondent testified at the evidentiary hearing before the referee that she did not believe her actions violated either the spirit or the letter of the Order Disqualifying Counsel in that she was merely offering procedural advice. The referee found that this explanation "flies in the face of the overwhelming evidence." (RR, p. 7).

The referee, as fact finder, properly resolves conflicts in

the evidence. The Florida Bar v. Hoffer, 383 So. 2d 639, 642 (Fla. 1980). Regarding the issue of whether the Respondent's actions amounted to the legal representation of Karimi in violation of Judge Ficarrota's Order, the referee states "The undersigned finds that the testimony of Karimi and the evidence presented by the Bar constitute the more consistent and credible version of events." (RR, p. 6).

Additionally, the Respondent has presented no viable legal argument in either her Request to Review Recommended Sanctions or in her Supplemental Response which would show that any of the referee's findings of fact are erroneous or unsupported by the record.

Thus, the referee's findings of fact and conclusions of law are supported by clear and convincing evidence and should be upheld.

**ARGUMENT II: The referee's recommendations as to disciplinary sanctions are supported by case law and the Florida Standards for Imposing Lawyer Sanctions and should be upheld.**

It is the Bar's position that the referee's recommended sanctions are reasonable and warranted considering the Respondent's misconduct, the aggravating and mitigating factors, the relevant case law, and the Florida Standards for Imposing Lawyer Sanctions.

The Respondent argues that a suspension from the practice of law would be too harsh a discipline, claiming that the Standards only call for an admonishment (RRRS, p. 1). The Respondent further argues that a suspension would create an undue financial hardship on her and her employees and that she does not wish to have her professional record blemished with a suspension of her license (SR, p. 1).

In The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983), this Court defined the objectives of Bar discipline as follows:

"Discipline for unethical conduct by a member of The Florida Bar 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 as a result of undue harshness in imposing a penalty. 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. Third, **the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.** (Court's emphasis)

The Florida Standards for Imposing Lawyer Sanctions provide a format for Bar counsel, referees, and this Court to determine the appropriate sanction in attorney disciplinary matters.

Standard 4.32 regarding failure to avoid conflicts of interest provides that absent aggravating or mitigating circumstances,

"Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client."

As a result of Respondent's misconduct, Karimi did not retain new counsel for many months subsequent to the Order Disqualifying Counsel because he continued to rely on the Respondent. This reliance was at Respondent's invitation. In her letter to Karimi of May 8, 1992, Respondent suggests that Karimi represent himself as the agent of his father in the foreclosure trial and states, "I will go over trial preparation with you and the proper documents." Respondent further encouraged Karimi to rely on her for legal representation when she concluded the letter with "Call and we can discuss strategy." (TFB Exh. #4).

This type of ill-advised reliance on the Respondent had great potential for harm to Mr. Karimi's interests because he needed counsel with him throughout the litigation. The fact that there may not have been evidence of any actual loss due to Respondent's

misconduct does not eliminate the very real possibility of, and potential for harm to Karimi. Additionally, there is great potential for harm to the legal system when any lawyer knowingly and purposefully disobeys a valid court order.

Respondent argues that Standard 4.34 is appropriate and that admonishment is the appropriate sanction because the referee did not find any evidence of actual harm to her client or the other party in the foreclosure action (RRRS, p. 1).

Standard 4.34 provides that admonishment is appropriate when a lawyer is negligent in determining whether the representation will adversely affect the client, and causes little or no injury or potential injury to a client. (emphasis added)

Respondent's misconduct, rather than involving a negligent determination as the Respondent contends, was knowing and deliberate. Respondent had actual notice of the conflict to interest at least as early as November 6, 1991, when the defendant's attorney furnished her with his Motion to Disqualify Counsel (TR, pp.12-13, 46-47; RR, p. 4). Yet, Respondent made an intentional and knowing decision to continue the legal representation and took no action to seek or obtain a waiver of conflict from the Williamses (TR, pp. 5-7).

Moreover, Respondent acted to continue the legal



representation behind the scenes even after Judge Ficarrota had issued his Order Disqualifying Counsel (RR, p. 5-7). There was conflicting testimony during the evidentiary hearing as to the date on which Respondent first informed Karimi that she had been disqualified as his attorney. It is clear, however, that Respondent failed to immediately inform Karimi of that fact so that he would have an opportunity to obtain successor counsel within thirty (30) days as required by the Court's Order. (TFB Exh. #4).

Thus, Respondent's misconduct constitutes a knowing conflict of interest with the potential for injury to a client which warrants her suspension from the practice of law pursuant to Standard 4.32.

Standard 6.22 regarding abuse of the legal process states that absent aggravating and mitigating circumstances,

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

Although the referee found no evidence that Respondent's misconduct caused actual injury to the parties (RR II, p. 4), Standard 6.22 would apply since this Standard does not require a showing of actual injury, but only the potential for such injury or interference with a legal proceeding.

The seriousness of the Respondent's conduct in deliberately seeking to contravene a judicial order cannot be overlooked, regardless of whether an injury actually accrued to the parties. Any time an attorney seeks to disobey a court's ruling, there is great potential for harm to the entire legal system. As correctly and aptly stated by the referee:

" ... the integrity and effectiveness of our system of justice is primarily dependent upon voluntary compliance with orders of our various courts. When a officer of the Court elects to disregard a valid Court Order, it is a matter of grave concern, whether such action is calculated or a result of ignorance. If we who are entrusted with the safekeeping of our system of justice are free to disregard with impunity the valid orders of our Courts, then we can neither expect nor demand more of the general public. (RR, p. 3).

Moreover, an attorney is not permitted to ignore and refuse to follow judicial orders based upon a belief that the imposition of the order would cause a detriment or hardship to the client. In Rubin v. State, 490 So. 2d 1001, 1003 (Fla. 3rd DCA 1986); 501 So. 2d. 1283 (Fla. 1986); *cert. denied*, 483 U.S. 1005, 107 S. Ct. 3228, 97 L. Ed. 2d 735 (1987), it was held that the need for obedience to a court order far outweighs any detriment to individuals who may be temporarily victimized by the order, even if the order were later found to be erroneous.

Respondent has asserted that her continued consultations with,

and legal assistance to Karimi after she was disqualified as counsel were somehow justified since her removal as counsel would cause a detriment to a client who could not afford to hire another attorney. This argument clearly is without merit when viewed in light of Rubin.

Moreover, Respondent received a benefit from her continued legal representation of Karimi after she received actual notice of the conflict of interest. Respondent's Verified Petition for Attorney's Fees filed in the foreclosure action shows that Respondent billed \$687.50 in fees after she became aware of the conflict and should properly have withdrawn from the representation.

Thus, Respondent's misconduct constitutes a knowing violation of a court order with the potential for injury to client or a party, and constitutes interference or potential interference with a legal proceeding which warrants her suspension pursuant to Standard 6.22.

Standard 7.2 regarding violations of duties owed as a professional provides that absent aggravating and mitigating circumstances,

"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.

The Respondent knowingly and intentionally engaged in a pattern of conduct for several months after the Order Disqualifying Counsel which the referee found constituted a "behind-the-scene" legal representation of Karimi, and that statements in Respondent's letter to Karimi of May 8, 1992 actually solicited the continued informal legal representation (RR, p. 7).

Significantly, the Respondent did not file a Motion for Rehearing or take any other steps asking the Court to reconsider its Order Disqualifying Counsel, nor did the Respondent take any action to obtain the Court's permission prior to consulting with Karimi about the subject litigation. Additionally, Respondent provided no indication to the Court or anyone else which would indicate that she was engaging in consultation with Karimi regarding the subject litigation. Had it not been for the printout on the fax machine that showed Karimi's responsive pleading to the Motion for Default had actually come from the Birdsong & Smith law office, it is likely that the deception would have continued. In effect, Respondent's actions in failing to disclose her continuing involvement in the Karimi foreclosure action perpetrated a deception and a fraud upon the Court and the parties.

Thus, Respondent's misconduct clearly violated her duty as a

professional and as an officer of the Court. Such conduct warrants her suspension pursuant to Standard 7.2.

Standard 9.22 lists several aggravating factors which may justify or increase the degree of discipline. The referee found the following aggravating factors:

- (1) Blatant violation of a valid Court order;
- (2) Lack of acknowledgment and/or understanding of inappropriateness of conduct;
- (3) Lack of candor in the disciplinary proceedings; and
- (4) Experience in the practice of law. (RR II, p. 3).

The referee further explained that "The violation of the Order of Disqualification by the Respondent was a matter open and obvious to everyone involved, with the sole exception of the Respondent. Despite a career spanning twenty years, the Respondent is unwilling or unable to grasp the seriousness of her actions." (RR II, p. 3)

The referee also noted his concern for Respondent's lack of candor during the disciplinary proceedings (RR II, p.2). Respondent initially testified at the evidentiary hearing that she had no contacts with Karimi from the date of Judge Ficarrota's Order until October 14, 1992 when Karimi contacted her concerning the Motion for Default (TR, pp. 26-27). After the Bar introduced telephone records evidencing at least fifteen (15) telephone calls

to Respondent's office by Karimi during this period, Respondent acknowledged the contact, but insisted it was of a personal nature rather than consultations regarding the foreclosure litigation (TR, p.78-79). This argument was refuted by Karimi, who testified that the telephone calls were indeed for the purpose of obtaining Respondent's assistance and advice on the pending foreclosure litigation (TR, pp. 34-36).

Furthermore, Respondent falsely stated in her Answer to the Bar's Complaint that "Respondent has been practicing law for twenty years with no prior inferences or suggestions of improper conduct." The Respondent again affirmed this false statement in answer to Bar counsel's questioning during the sanctions hearing (DT, p. 97).

In fact, Respondent had previously entered into a consent judgment and received a public reprimand for professional misconduct by order of this Court dated January 27, 1994, in Case No. 81,644, The Florida Bar v. Birdsong, 634 So. 2d 628 (Fla. 1994).

As to mitigation, the referee found:

- (1) Lack of substantial prior disciplinary record;
- (2) Lack of evidence of lucre or impure motive;
- (3) Absence of evidence of harm to the client or opposing party; and

- (4) Excessive work hours on the part of the Respondent.  
(RR II, p.4)

Respondent made assertions during the course of the disciplinary proceedings that she had an extremely large case load and that her busy law practice required her to work an excessive number of hours each week. Consequently, the referee attempted to assist the Respondent and protect her clients by recommending that she be required to complete a Florida Bar approved management course, complete a Florida Bar approved personal/professional time management course, and provide quarterly reports during the probation period attesting to the number of cases she is handling during a 55-hour maximum workweek (RR II, p. 5).

Respondent argues that it would be an "impossibility" for her to comply with the referee's reduced case load recommendation until such time as she can hire a competent attorney to assist in her office (RRRS, p. 2).

This argument is patently without merit. It is a simple matter for Respondent to cease accepting new clients until she can attain a manageable case load as recommended by the referee. The Bar concurs with the referee's recommendations that Respondent reduce her case load and urges this Court to adopt those recommendations.

The referee's recommended sanctions are similar to those imposed in The Florida Bar v. Collier, 385 So. 2d 95, 96 (Fla. 1980), in which the respondent had been extremely dilatory in the administration of an estate and failed to properly respond to and comply with orders issued by the Probate Court. This Court approved the uncontested report of referee and imposed the recommended sanction of a sixty (60) day suspension, probation for two (2) years with mandatory status reports on the handling of probate and guardianship cases, and assessment of the Bar's costs against the respondent.

In The Florida Bar v. Jackson, 494 So. 2d 206, 207 (Fla. 1986), the respondent refused to appear for a federal criminal trial on a religious holiday. On the morning the trial was scheduled to begin, Jackson filed a written motion to stay all proceedings during the religious holidays. The Court denied this motion on the grounds that Jackson had previously assured the Court that he would be available for trial on the dates in question and that a stay could not be granted at that point in time, given the size and expense of the trial. After Jackson again refused to appear for trial, he was found in contempt.

Jackson is analogous to the instant case in that, like the Respondent herein, Jackson did not have a dishonest or selfish



motive. This Court found that regardless of the reasonableness of Jackson's sincere belief in the invalidity of the Trial Court's ruling, it could not condone his defiance of such ruling. Jackson was suspended for thirty (30) days. Id. at 209-210.

In The Florida Bar v. Wishart, 543 So. 2d 1250 (Fla. 1989), the respondent was the step-grandparent of a child who was the subject of a custody dispute. Wishart took possession of the child and refused to return her to the custodial parent despite a temporary restraining order which required the return of the child. Wishart also refused to obey a writ of habeas corpus issued by the Circuit Court that ordered him to surrender the child, claiming the writ was void for various reasons. This Court found the proper sanction for Wishart's misconduct to be suspension for three (3) years.

Like Wishart, the Respondent deliberately, wilfully, and knowingly disobeyed orders and judgments of the Circuit Court. As did Wishart, the Respondent also engaged in a continuing pattern of disobedience. The Court found Wishart, however, to have been impaired at the time of the misconduct due to his close personal and emotional involvement in the child custody matter. The Respondent can claim no such excuse.

In The Florida Bar v. Rubin, 549 So. 2d 1000, 1001 (Fla.

1989), the respondent represented a criminal defendant who he believed was going to commit perjury. Rubin petitioned the court for permission to withdraw. The court denied the petition and ordered Rubin to proceed to trial. Rubin then sought certiorari, which was denied by the Third District Court of Appeal. When Rubin refused to proceed to trial, the court issued a contempt order, which was also affirmed on appeal. Rubin eventually served thirty (30) days in jail as a result of the contempt citation.

The Bar subsequently prosecuted Rubin for disobeying an order of a tribunal. This Court found that after Rubin properly challenged the order and lost, it was incumbent upon him to follow the dictates of the trial court, and that his deliberate failure to do so constituted a violation of Bar disciplinary rules. Id. at 1003.

Recognizing that Rubin's conduct was, to a degree, a matter of conscious in that he was trying to protect himself from possibly assisting a client in perpetrating a fraud, this Court found the proper discipline for Rubin's misconduct to be a public reprimand. Id.

Respondent's misconduct is more egregious than that of Rubin in that she never undertook actions, as did Rubin, to challenge the validity of the court's ruling. Respondent made the decision that

since she did not agree with the ruling, she would defy the order. Furthermore, Respondent was not open and honest about the defiance, but engaged in activities which amounted to a contravention of the Order Disqualifying Counsel without the Court's knowledge.

In The Florida Bar v. Lee, 403 So. 2d 1336 (Fla. 1981), the respondent ceased representation of a client in a dissolution of marriage action without ever communicating that fact to the court or the client.

Lee's misconduct is analagous to the Respondent's misconduct in that there was no disclosure to the court. This Court approved the uncontested report of referee and suspended Lee for three (3) months.

In The Florida Bar v. Mastrelli, 614 So. 2d 1081, 1082 (Fla. 1993), the respondent undertook representation of two clients allegedly injured in an accident in which one client was the driver and one was the passenger in the same automobile. Mastrelli subsequently filed suit against the driver on behalf of the passenger. In effect, he filed suit against his own client in the same matter for which he had been retained.

Mastrelli argued, as does the Respondent herein, that his actions were merely negligent and caused no actual harm to his client. This Court found that Mastrelli either knew or should have

know that his clients' interests were adverse when he sued one on behalf of the other, and that there was potential that his actions would expose his client, the driver, to personal liability. Mastrelli was suspended for six (6) months.

The Respondent's argument that the proper discipline for her misconduct is an admonishment is also without merit when viewed in light of her prior discipline. Rule 3-5.1(b)(1), R. Regulating Fla. Bar, provides that an admonishment for minor misconduct is inappropriate when the respondent has been publicly disciplined in the past three years, or when the misconduct has caused injury or potential injury to a client.

The Respondent fails to raise any competent legal argument to the recommended disciplinary sanctions. Her claim that financial hardship would result to herself, her family, and her employees should she be suspended is simply not relevant to the issue of whether her misconduct rises to a level which would warrant a suspension pursuant to the Standards, the aggravating and mitigating circumstances, and the case law.

Likewise, Respondent's argument that a suspension would blemish her professional record is irrelevant, as is her argument that a suspension would cause hardship to her clients. Any time an attorney is suspended, even for a short period, there is bound to

be a detrimental effect on the respondent's financial condition. Likewise, the Bar, the referee, and this Court are aware that other attorneys must be engaged to handle the pending matters of Respondent's clients during a term of suspension. A recommendation for suspension is not taken lightly by the Bar, the referee, or this Court, and is only imposed when the respondent's conduct is so egregious as to warrant such penalty. As is evident in the record herein, the applicable Standards, and the relevant case law, Respondent's failure to withdraw after receiving actual notice of a conflict of interest and her flagrant violation of a valid court order warrants suspension.

Respondent's submission to this Court of letters of recommendation from former employers is likewise irrelevant and improper. Any evidence of good character or reputation which Respondent might want to present in mitigation should properly have been presented to the referee prior to or concurrent with the sanctions hearing, and not directly to this Court after the referee has issued his recommended sanctions.

Finally, the Respondent argues that the Bar's costs are excessive because her suspension would cause her financial difficulty. Rule 3-7.6(k)(1)(E), R. Regulating Fla. Bar, provides that the referee should provide to this Court, a statement of costs

incurred by The Florida Bar and recommendations as to the manner in which such costs should be taxed. The Respondent has failed to state a specific objection to any of the Bar's costs as inappropriate or excessive; therefore, the Bar's costs in the amount of \$2,369.99 should be assessed against the Respondent as recommended by the referee.

Clearly, the competent evidence presented in the record herein, the applicable Standards, the relevant case law, and the aggravating and mitigating circumstances support the referee's findings and recommendations.

Therefore, The Florida Bar respectfully requests that this Court enter an Order upholding the referee's recommended sanctions.

CONCLUSION

The referee's findings, that the Respondent knowingly engaged in a conflict of interest, that the Respondent violated the Rules of Professional Conduct, and that the Respondent engaged in conduct prejudicial to the administration of justice when she knowingly and intentionally violated a valid Court order are supported by clear and convincing evidence and should be upheld.

The referee's recommended sanctions are reasonable and warranted in light of the Respondent's misconduct, the Respondent's prior discipline, the applicable Standards, the relevant case law, and the aggravating and mitigating circumstances.

The Florida Bar respectfully requests that this Court uphold the referee's findings of fact, conclusions of law, and recommended disciplinary sanctions.

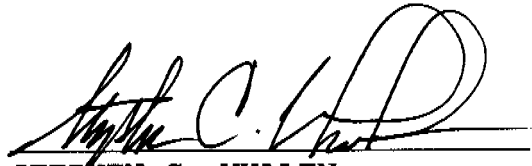
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief have been furnished by Airborne Express, No. 729657025 to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 34399-1927; a true and correct copy has been furnished by U.S. Certified Mail No. Z056308201, return receipt requested, and by regular U. S. Mail to Deanna McBride Birdsong, Esquire, Respondent, at her record Bar address of 9228 North 56th Street, Tampa, Florida 33617; and a copy to John T. Berry, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, all this 15th day of August, 1995.



STEPHEN C. WHALEN