IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS ANTHONY SOFO,

Respondent.
_____/

Case No. 84,133
[TFB Case No. 93-30,655 (10B)]

THE FLORIDA BAR'S ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 068153

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on March 31, 1995, shall be referred to as "T" followed by the cited page number(s).

The Report of Referee dated April 26, 1995, shall be referred to as "ROR" followed by the referenced page number(s).

The respondent's Petition For Review dated May 26, 1995, shall be referred to as "PR" followed by the referenced page number(s).

STATEMENT OF THE CASE

On January 20, 1994, the Tenth Judicial Circuit Grievance Committee "B" found probable cause against the respondent. The bar filed its formal Complaint against the respondent on August 4, 1994, and the respondent filed his answer to the Complaint on August 17, 1994. On August 22, 1994, the Honorable Alice Blackwell White, Circuit Judge, was appointed as the referee in this case. The bar served Requests For Admission on the respondent on September 2, 1994, and the respondent submitted his responses to the bar's requests on October 8, 1994.

The final hearing in this case was conducted on March 31, 1995. The referee issued her report on April 26, 1995, recommending the respondent be found guilty of violating Rules of Professional Conduct **4-1.7(b)** for representing a client when the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest; **4-1.8(b)** for using information relating to the representation of a client to the disadvantage of the client without the client's consent after consultation; **4-**

1.9(a) for representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client without the former client's consent after consultation; and **4-1.9(b)** for using information relating to the representation to the disadvantage of a former client when the information relating to the representation has not become generally known. The referee recommended the respondent be suspended for a period of one (1) year and that he pay the costs incurred by the bar in prosecuting this case.

The Board of Governors of The Florida Bar considered this case during its May, 1995, meeting. The board voted to approve the referee's recommendation of a one (1) year suspension and payment of the bar's costs.

On May 26, 1995, the respondent filed a Petition For Review in which he sought review of the referee's disciplinary recommendations. On July 19, 1995, the Supreme Court of Florida advised that the respondent's Petition for Review filed May 30, 1995, was treated as his initial brief. This Answer Brief is

submitted in response to the respondent's petition for review/initial brief.

STATEMENT OF THE FACTS

The respondent's Petition For Review, which is considered by the court to be the respondent's initial brief, does not contain the referee's findings of fact or any citations to the record. Therefore, the following facts are taken from the Report of Referee dated April 26, 1995, unless otherwise noted.

The respondent is a member of The Florida Bar and, during the conduct in question, he lived in Kent County, Michigan. The respondent was the general counsel for a company called Micro Environmental, Inc., (hereinafter referred to as "Micro"). As counsel for Micro, the respondent drew a base salary and was a stockholder in the corporation.

In late 1991 and early 1992, an agreement was reached between Micro and a company called New Earth Environmental Technologies, Inc., (hereinafter referred to as "Neetco"). Neetco purchased the assets of Micro and certain assets of a related company called Gulf States Environmental, Inc., (hereinafter referred to as "Gulf States"). The terms of the

purchase involved the payout of money to Micro and its stockholders, including the respondent, over a certain period of time. As part of the sale of Micro's assets to Neetco, the respondent was also employed as general counsel for Neetco. The respondent admits that he continued his representation of Micro while drawing his salary as general counsel for Neetco. While he was representing Neetco, he was a creditor of Neetco's because he was owed money by Neetco as a shareholder of Micro.

Neetco became interested in renegotiating the financial arrangements reached in the sale of Micro's assets. The principals of Micro, including the respondent, became very dissatisfied with Neetco's performance under the original terms of the sale. It is clear that the renegotiation proposed by Neetco would have resulted in much less money being paid to the respondent for the stock he owned in Micro and Neetco.

On August 31, 1992, the respondent authored and sent a letter to the principals of Neetco. In this letter, written on Neetco letterhead and signed by the respondent as general counsel, the respondent gave notice to Neetco that unless Neetco

performed under the agreement to the satisfaction of Micro, then Micro would take back the technology sold to Neetco. It is undisputed that the respondent wrote this letter while in the employ of Neetco as its general counsel. When Neetco failed to meet the deadline imposed in the aforementioned letter, the respondent signed and issued another letter on August 31, 1992. This second letter, also on Neetco letterhead and signed by the respondent as general counsel, purported to terminate the agreement between Neetco and Micro and to return to Micro the technology previously sold to Neetco. There was also a letter sent to the customers of Neetco, signed by the respondent, advising the customers of the action taken by Micro and the assertions by Micro that Neetco was no longer authorized to use the technology the customers would want to purchase. The respondent claimed that his letters of August 31, 1992, constituted the termination of his professional relationship with Neetco. Neetco asserted, through affidavits by several principals of Neetco, that his representation was not terminated until September 9, 1992.

The referee found there was clear and convincing evidence

that the respondent violated his ethical obligations under Rule of Professional Conduct **4-1.7(b)**, as his dual representation of Micro and Neetco was patently a conflict. This was further exacerbated by the respondent's stock ownership in each of the corporations. The problems with this dual representation are graphically demonstrated in the respondent's first letter of August 31, 1992. In that letter, the respondent is writing on the letterhead of his client and employer, Neetco, on behalf of his other client and himself. In that letter, he takes a position that is extremely adverse and detrimental to Neetco. The referee found there was no way the respondent could adequately represent his own interests and the interests of clients who were at odds with each other. The actions of the respondent following the initial letter on August 31, 1992, further show the impossibility of the dual, or even triple, representation.

The referee further found that the same set of facts set forth above also constituted, by clear and convincing evidence, a violation of Rule of Professional Conduct **4-1.9(a)** for representing another person in the same or a substantially

related matter in which that person's interests are materially adverse to the interest of the former client without the former client's consent after consultation. The respondent was also charged with violating Rules of Professional Conduct **4-1.8(b)** and **4-1.9(b)** which concern the use of information obtained in the representation of a client without the client's permission. The respondent claimed that the letter to the customers of Neetco was not sent as an attorney but only as a business matter. The referee found the bar established by clear and convincing evidence that the respondent did use information obtained during his representation of Neetco to the detriment of Neetco and without its consent or when the knowledge had not become generally known.

It should be noted that the third, fourth and eleventh paragraphs of the respondent's Petition For Review, dated May 26, 1995, contain the respondent's version of the facts as he argued on the record at the final hearing. The referee did not make those same findings of fact in her report and/or rejected those arguments by the respondent.

SUMMARY OF THE ARGUMENT

The respondent is seeking review of the referee's recommendation as to discipline in this case. While the respondent's petition for review does contain some of his personal views as to the facts, he apparently does not take exception to the referee's findings of fact or her recommendation of guilt. Because this court has the ultimate responsibility for imposing the appropriate level of discipline, a referee's recommendation as to discipline is subject to broader review than the findings of fact. The facts in this case are unique and, at times, somewhat complex. However, the type of misconduct in which the respondent has engaged is not, unfortunately, uncommon. This court has long held that an attorney may not represent conflicting interests in the same general matter, regardless of how well-meaning his motive or however negligible the adverse interest may be.

In this case, the referee specifically found the respondent had a financial interest in the conflict situation and, therefore, it is conceivable that while the respondent's actions

may have been well-intentioned, there was also a selfish motivation involved which cannot be ignored. The case law and standards indicate that a suspension is the appropriate level of discipline when an attorney knowingly engages in a conflict of interest situation that results in injury to a client. The respondent sacrificed the interests of one client for the benefit of another client and for himself. Such conduct not only reflects adversely on the respondent, but also damages the image of the legal profession. Given the facts of this case, and considering the purposes of attorney discipline, the referee's recommended sanctions in this case are appropriate and warranted.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF A ONE (1) YEAR SUSPENSION IS APPROPRIATE GIVEN THE FACTS OF THIS CASE.

During the final hearing in this case, the referee heard extensive testimony from the respondent and some mitigating evidence as presented during the respondent's arguments. The referee specifically noted in her report that she considered that mitigating information as well as the respondent's financial situation at the time of the conduct, ROR, p. 3. After considering all the evidence and testimony presented, the referee recommended that the respondent be found guilty of the rule violations charged. The referee further recommended as the appropriate discipline that the respondent be suspended for a period of one (1) year and thereafter until he proves rehabilitation. While a referee's recommendation for attorney discipline is persuasive, it is ultimately this court's task to determine the appropriate sanction, The Florida Bar v. Reed, 644 So. 2d 1355 (Fla. 1994). The bar submits that the referee's recommended one (1) year suspension is appropriate given the facts of this case.

In his petition for review/initial brief, the respondent mentions many factors which he considers to be mitigating, such as: he acted in good faith; he has been embarrassed by the disciplinary process; he has experienced great financial loss; his conduct was a single error of judgment; and he has learned his lesson. While such information may be interesting, it does not correspond with the mitigating factors listed in the Florida Standards For Imposing Lawyer Sanctions.

On page three of his petition for review, the respondent cites six (6) mitigating factors under the standards which he believes are relevant to this case. The bar accepts that standard 9.32(a) - absence of a prior disciplinary record, standard 9.32(e) - cooperation with the disciplinary process, and standard 9.32(l) - remorse, are applicable to the respondent. The bar does not agree with the other mitigating factors the respondent has cited. The respondent believes there is an absence of a dishonest or selfish motive in his conduct [standard 9.32(b)]. However, throughout her report the referee describes the respondent's financial stake in both corporations he was representing. The referee specifically found that such dual

representation was patently a conflict which was further aggravated by the respondent's stock ownership in each of the companies, ROR, p. 2. Further, the rules which the respondent has been found guilty of violating expressly prohibit representing two clients in the same matter, particularly when the respondent's own interests are involved. The fact that the respondent had a financial interest in the business conducted between his two clients clearly indicates he had a selfish motivation during the representation. Whether or not the respondent was financially successful in the endeavor is irrelevant. The fact remains the respondent's own interests were adverse to the conflicting interests of his clients and it was a situation in which the respondent should never have been involved.

The respondent cites standard 9.32(g), evidence of good character or reputation, as a mitigating factor. During the final hearing, the respondent did mention his lack of a disciplinary record in his 20 years of practice and his financial situation at the time of the misconduct, T, p.p. 13-14, 59, 147. Although the referee provided the respondent with the opportunity

to further expand on any other mitigating information, he did not do so. On page four (4) of his petition for review, the respondent details the history of his practice of law and provides further information concerning his character and reputation. That information was not presented to the referee and was never made a part of the record. Therefore, it is not evidence of good character or reputation as the referee only considered that mitigating evidence which was presented on the record. As this information was not previously presented to, and considered by, the referee, it should not be considered upon this review.

The respondent contends that the imposition of other penalties or sanctions against him is also a mitigating factor [standard 9.32(k)]. There has been no evidence presented of any penalties or sanctions concerning the respondent, other than he became embroiled in civil suits involving Micro and Neetco. The respondent states that aside from the expensive and time-consuming litigation imposed upon him, the litigation was settled "to the satisfaction of the parties to that litigation," PR, p.p. 5-6. Therefore, there do not appear to be any sanctions imposed

on the respondent which should be considered in mitigation.

The respondent fails to mention that there are aggravating factors present in this case as well. A dishonest or selfish motive, as described herein with respect to the respondent's financial interest in the representation, is considered an aggravating factor under standard 9.22(b). Additionally, the respondent has approximately twenty years of experience in the practice of law and has practiced "from Alaska to Florida," PR, p. 4. It is clear the respondent has substantial experience in the practice of law which is also considered an aggravating factor under standard 9.22(i). In other words, due to that experience, the respondent knew or should have known that his representation of two companies with adverse interests, in which he was also financially involved, was patently conflicting and ethically impermissible.

The respondent suggests in his petition for review that the referee's recommended discipline of a one (1) year suspension is unwarranted. He claims that harsh sanctions have not been imposed in other bar discipline cases concerning conflict of

interest when they do not involve more egregious conduct, as in the instant matter. The respondent further suggests that his misconduct in this case was merely a lapse of judgment. The bar disagrees with the respondent's assertions. There are many bar disciplinary cases where conflict of interest was the main issue and that resulted in the attorneys being suspended from the practice of law.

In Reed, supra, the attorney was suspended for six (6) months as a result of her involvement in a real estate transaction. Ms. Reed engaged in a conflict of interest with respect to the transaction in that she acted as the attorney and realtor for the buyers, the sellers' attorney to a limited extent, the closing agent, the escrow agent, the property owner and the landlord. The buyers had engaged in fraudulent conduct with respect to a cashier's check placed in Ms. Reed's trust account as the escrow deposit. In order to conserve the property and reduce the exposure of all parties, including other clients' funds held in her trust account, Ms. Reed inserted her name as grantee on the quit claim deed and took title to the property without tendering any consideration for the property. Ms. Reed

wrote checks against the escrow deposit, even though she knew those funds were in dispute, in order to make mortgage payments on the property to avoid it being foreclosed upon. Ultimately, Ms. Reed sold the property and the outstanding mortgages were satisfied. The referee found that Ms. Reed was not responsible for, nor did she promote, the situation she found herself in concerning the property transaction. The court found that Ms. Reed was guilty of engaging in the conduct alleged as well as exercising extremely poor judgment. Ms. Reed should not have undertaken to serve more than one party to the same transaction. However, the court also found that she did not intentionally violate the rules in order to enrich herself.

In another case, The Florida Bar v. Mastrilli, 614 So. 2d 1081 (Fla. 1993), the attorney received a six (6) month suspension. Although this case is not factually similar to the instant matter, it concerned strictly the issue of conflict of interest. Mr. Mastrilli undertook the representation of two women who were injured in an accident while one was the driver and the other was the passenger in the same vehicle. When the insurance company denied payment, Mr. Mastrilli filed suit

against the driver on behalf of the passenger, effectively filing suit against his own client in the same matter for which he had been retained. Mr. Mastrilli argued that he was merely negligent in failing to discover the conflict of interest and that no harm came to either client. The court disagreed that the attorney was merely negligent and found that Mr. Mastrilli either knew or should have known his clients' interests were adverse when he sued one on behalf of the other.

An attorney was suspended for 90 days for failing to foresee a potential conflict of interest, failing to follow proper record keeping procedures, and failing to act properly in responding to a client's wishes, The Florida Bar v. Jameison, 426 So. 2d 16 (Fla. 1983). Jameison's misconduct arose out of his relationship with one elderly client. For over a year, he had a close relationship the client and became aware of the client's financial situation. Mr. Jameison obtained $20,000 from the client in order to create a foundation with his wife to help youthful offenders. The attorney failed to advise or encourage his client to seek out independent counsel prior to contributing the $20,000 to the yet unborn foundation, notwithstanding Mr.

Jameison's central role in the foundation and as attorney for the major benefactor. His primary purpose was to acquire substantial amounts of "seed money" to effectuate his own personal foundation which did not meet with his fiduciary responsibilities owed to his client. The attorney was also found guilty of gross negligence in failing to advise his client of a lost certificate of deposit until he was forced to do so. The court found that Mr. Jameison's actions were not committed with criminal intent or corrupt motive and resulted from his failure to foresee the potential conflict of interest.

In a case most similar to the instant matter, the court found a three (3) month suspension was warranted for an attorney who was involved in a transaction in which he had an irreconcilable conflict of interest, The Florida Bar v. Pahules, 334 So. 2d 23 (Fla. 1976). The attorney represented a young promoter in several real estate ventures. Subsequently, the client became involved with the inventor of a process known as "colorflame." Mr. Pahules obtained a patent for the inventor and then took the lead in devising a plan to exploit the patent commercially. Mr. Pahules formed a corporation in which he owned

one-third of the stock and the client and the inventor each owned one-third. Mr. Pahules then formed another corporation with the intent that 51% of its stock would be issued to the first corporation and the balance to the public. He served as secretary-treasurer and general counsel of the second corporation. An addendum was created to the prior agreements that grossly benefitted the first corporation. The client then secured the purchase by another individual of a large amount of stock shares from the second corporation. Neither Mr. Pahules or the client informed the individual of the existence of the addendum. In addition, Mr. Pahules repeatedly turned over escrow funds to the client who sometimes used the funds to pay personal expenses. The court found Mr. Pahules should have been able to determine that his client was misappropriating the corporation's funds but he did not and continued to turn the funds over to the client. Ultimately, a new group took over the corporations and removed the client and Mr. Pahules from their positions. The colorflame process was never marketed and litigation was instituted against Mr. Pahules and his client. The referee and the court found that although there was an irreconcilable conflict of interest in Mr. Pahules' participation

in the corporations, his conduct did not involve dishonesty, fraud, deceit or misrepresentation.

The court has long held that an attorney represents conflicting interests, within the meaning of the rules, "when it becomes his duty, on behalf of one client, to contend for that which his duty to another client would require him to oppose." The Florida Bar v. Moore, 194 So. 2d 264, 269 (Fla. 1966). In the Moore case, a legally separated husband and wife agreed to establish an inter vivos trust under which the wife, as life tenant, would receive annual income in lieu of demanding alimony and property in the event of a divorce between the parties. The trustees were the wife and two (2) other individuals. Thereafter, the parties divorced and the wife remarried. She and her second husband retained Mr. Moore to advise them as to her rights under the trust instrument and the contemporaneous property settlement agreement which her former husband had breached. Mr. Moore believed that under the terms of the trust instrument, the trustees had the authority to recover past due taxes from the former husband, either by direct suit or by charging the amount against the principal of the trust of which

the former husband was then designated as a remainderman. Mr. Moore also believed the wife was entitled to share in the trustees' fees payable from the principal because she was a co-trustee. He prepared a memorandum stating his views and sent it to the other trustees. They disagreed with his assessment of the situation and resigned. Thereafter, the wife's second husband was selected as one of the successor trustees. Mr. Moore continued representing the wife and also began to advise and represent the trustees with respect to the trust administration, including the transfer of trust assets. He failed to make the trustees aware that they owed a duty to the remainderman, the life tenant's first husband. The referee found that Mr. Moore had represented and advised both the trustees and the life tenant when a conflict of interest existed. The court ordered that he, for engaging in multiple acts of misconduct, be suspended for three (3) months and until he paid full restitution and costs.

Notably, the court in the Moore case made the following finding with respect to conflict of interest:

> It is settled that, except in exceptional circumstances which are not to be found in this record, an attorney may not represent conflicting interests in the same

> general transaction, no matter how well-meaning his motive or however slight such adverse interest may be. The rule in this respect is rigid, because it is designed not only to prevent the dishonest practitioner from fraudulent conduct but also to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. At p. 269.

Like the instant matter, there were mitigating factors in the Moore case, including his lack of a prior disciplinary history. However, there were no specific findings or evidence of any selfish or dishonest motive behind Mr. Moore's actions as he was simply involved in representing adverse interests. It is the bar's position in the instant case that the respondent's conduct was more egregious because he was representing his own personal interests in addition to the adverse interests he was handling for his clients.

The Florida Standards For Imposing Lawyer Sanctions also support a suspension as the appropriate discipline in this case. Under 4.3, Failure To Avoid Conflicts of Interest, standard 4.32 holds that a 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. In the instant matter, the issue of client injury should also be considered. During the final hearing, one of the principals of Neetco, Joseph J. Nolan, testified that once the respondent issued the letters against Neetco on behalf of Micro, customers no longer wanted to do business with Neetco and it destroyed the company, T, p.p. 135-137. Although the referee did not make specific findings as to the harm Neetco suffered, she did find the respondent guilty of violating Rules of Professional Conduct 4-1.8(b) and 4-1.9(b) concerning his revelation of information that was detrimental to Neetco. Accordingly, standard 4.2, Failure To Preserve The Client's Confidences, is relevant to this case which holds at 4.22 that a suspension is appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.

The purposes of attorney discipline are threefold. 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; the judgment must be fair to the respondent, being sufficient to punish the breach of ethics while at the same time encouraging reformation and rehabilitation; and the judgment must serve to deter others who might be prone or tempted to become involved in similar violations, The Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992). It does not appear that the State of Florida will be adversely affected by the respondent's suspension given the number of attorneys practicing law in this state and the fact that the respondent currently resides in Virginia. Rather, the bar is more concerned with the two other purposes of attorney discipline. The respondent has stated that he felt he had no other choice but to become involved in the conflict situation given the financial considerations. The respondent and all attorneys must understand that a choice is always present, that is, to avoid even the appearance of a conflict of interest at all cost. If they do not, they will be subject to serious sanctions as in this case. Despite his assertions to the contrary, the respondent did not remove himself from the conflict situation until after the damage to one of his clients was already done.

The referee's recommended one (1) year suspension should ensure that in the future, the respondent will be able to immediately recognize conflict situations and will act appropriately. Accordingly, based upon the facts of this case, the case law, and the standards, a one (1) year suspension is the appropriate level of discipline for an attorney who engages in the multiple representation of adverse interests in the same matter, including his own interests, and who reveals information related to the representation to the detriment of a client.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact and recommendations as to discipline and impose a suspension of one (1) year, and tax costs against the respondent which total $1,917.52.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085

(407) 425-5424
ATTORNEY NO. 068153

By: _____
JOHN B. ROOT, JR.
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent, Thomas Anthony Sofo, 4320 Tarpon Lane, Alexandria, Virginia, 22313; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 8th day of August, 1995.

Respectfully submitted,

JOHN B. ROOT, JR.
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 84,133
[TFB Case No. 93-30,655 (10B)]

v.

THOMAS ANTHONY SOFO,

Respondent.
_____/

APPENDIX TO COMPLAINANT'S ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 068153

Appendix

IN THE SUPREME COURT
OF FLORIDA (Before a Referee)
Supreme Court Case No. 84,133
[TFB Case No. 93-30,655 (10B)]

THE FLORIDA BAR,

Complainant,

vs.

THOMAS ANTHONY SOFO,

Respondent.

----------/

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, a hearing was held by the referee on March 31, 1995.

The Florida Bar was represented by John B. Root; the Respondent, Thomas Sofo, appeared on his own behalf. The referee took testimony from the parties and received evidence submitted by each party. The parties stipulated to venue. Record of Hearing ("Record"), p. 6.

II. Findings of Fact As To Each Item of Misconduct of Which Respondent is Charged: Respondent was charged in one count with violations of four separate provisions of the Rules of Professional Conduct. All of the alleged violations arose out of a common set of facts.

Sofo is a member of the Florida Bar, but he lived in Kent County, Michigan. His practice involved the representation of a limited number of clients in Michigan and Florida. Respondent was the general counsel for a company called Micro Environmental, Inc. (Micro). As counsel for Micro, Sofo drew a base salary and was a stock owner in Micro.

In late 1991 and early 1992, an agreement was reached between Micro and a company called New Earth Environmental Technologies, Inc. (Neetco). Neetco purchased the assets of Micro and certain assets of a related company called Gulf States Environmental, Inc. (Gulf States). The terms of the purchase involved the payout of money to Micro and its stockholders, including Respondent, over a certain time period.

As a part of the sale of Micro's assets to Neetco, Respondent was employed as general counsel for Neetco. He admits that he continued in his representation of Micro while drawing his salary as general counsel for Neetco. While he was representing Neetco, he was a creditor of Neetco's since he was owed money by Neetco as a shareholder of Micro.

Neetco became interested in renegotiating the financial arrangements reached in the sale of Micro's assets. See Respondent's Exhibit 4 to the hearing. The principals of Micro, including Respondent, became very dissatisfied withNeetco's performance under the original terms of the sale. Clearly, the renegotiation proposed by Neetco would result in much less money being paid to Sofo for the stock he owned in Micro and Neetco.

Respondent authored and sent a letter to the principals of Neetco on August 31, 1992, a copy of which is attached to the Complaint as Exhibit A. In this letter, written on Neetco letterhead and signed by Respondent as General Counsel, Respondent gave notice to Neetco that unless Neetco performed under the agreement to the satisfaction of Micro, Micro would take back the technology sold to Neetco. It is undisputed that Respondent wrote this letter while in the employ of Neetco as its general counsel.

When Neetco failed to meet the deadline imposed in the letter, Respondent signed another letter on August 31, 1992. See Exhibit B to the Complaint. This letter, also on Neetco stationery and signed by Respondent as general counsel, purported to terminate the agreement between Neetco and Micro and to return to Micro the technology previously sold to Neetco. There was also a letter sent to the customers of Neetco, signed by Respondent, which advised the customers of the action taken by Micro and the assertions by Micro that Neetco was no longer authorized to use the technology the customers would want to purchase.

Respondent claims that the letters of August 31, 1992, constituted a termination of his professional relationship with Neetco. Neetco asserts that his representation was not terminated until September 9, 1992. See Affidavit of W.W. Berry, Bar's Exhibit 3, and Affidavit of Jeffrey Lee, Bar's Exhibit 2; see also Record at p. 83-84.

The Bar first charges that Respondent violated the provision of 4-1.7(b) by representing a client when the lawyer's exercise of independent professional judgment in the representation of the client may be materially limited by the lawyer's responsibility to another client or to a third person or by the lawyer's own interest. In this case, the referee finds that there is clear and convincing evidence that Respondent violated his ethical obligations under this section. His dual representation of Micro and Neetco is patently a conflict. This is further exacerbated by the Respondent's own stock ownership in each of the companies.

The problems with this dual representation are graphically demonstrated in the letter of August 31, 1992 (Exhibit A to the Complaint). In this letter, Respondent is writing on letterhead of his client and employer, Neetco, on behalf of his other client and himself. This letter takes a position that is extremely adverse and detrimental to Neetco. There is no way that Respondent could adequately represent his own interests and the interests of clients that are at odds with each other. The further actions of Respondent following the initial letter on August 31 further show the impossibility of this dual, or even triple, representation.

The same facts set forth above also constitute, by clear and convincing evidence, a violation of 4-1.9(a) for representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client without the former client's consent after consultation.

The Bar also charges Respondent with violations of 4-1.8(b) and 4-1.9(b), each of which involves using information obtained in the representation of a client without the client's permission. Respondent claims that the letter to customers of Neetco was not sent as an attorney but only as a business matter. The referee finds that the Bar has established by clear and convincing evidence that Respondent did use information obtained during his representation of Neetco to the detriment of Neetco and without its consent or when the knowledge has not become generally known.

III. Recommendation As to Whether or Not Respondent Should Be Found Guilty: I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations of the Rules of Professional Conduct: 4-1.7(b), 4.1.8(b), 4-1.9 (a), and 4-1.9(b).

IV. Recommendation as to Disciplinary Measures to be Applied: I recommend that the Respondent be suspended for a period of one year and thereafter until Respondent shall prove rehabilitation as provided in Rule 3-5.1(e), Rules of Discipline.

V. Personal History and Past Disciplinary Record: After a finding of guilt and prior to recommending discipline pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of Respondent:

Age: 43
Date admitted to Bar: 12/5/89
Prior disciplinary convictions or actions: None
Other personal data: I took into consideration the testimony that Respondent gave regarding his financial situation at the time of the conduct, as well as his arguments in mitigation. See Record.

VI. Statement of Costs and Manner in Which Costs Should Be Taxed: I find the following costs were reasonably incurred by The Florida Bar in the prosecution of this matter:

Grievance Committee Level Costs:	
Transcript costs	$ 230.00
Bar Counsel Travel Costs	84.61
Referee Level Costs	
Transcript Costs	542.75
Bar Counsel Travel Costs	108.16
Administrative Costs	750.00
Miscellaneous Costs	
Investigator Expenses	16.50
Copy Costs	185.50
TOTAL ITEMIZED COSTS	$1,917.52

The Referee finds that these costs have been incurred, based solely upon the Affidavit of Costs filed herein. It is recommended that all such costs and expenses, including the ones itemized above, be charged to Respondent.

DATED THIS 26TH DAY OF APRIL, 1995.

Alice Blackwell White
Referee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Report of Referee has been served by United States mail on John B. Root, Jr. at 880 North Orange Avenue, Suite 200, Orlando, Florida 32801, and to Thomas Anthony Sofo, 4320 Tarpon Lane, Alexandria, Virginia 22313, and to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this 26th day of April, 1995.

~~Judicial Assistant~~
Referee