IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellee, v. JOHN EMIL MARKE, Respondent-Appellant	Supreme Court Case No. 84,377 The Florida Bar Case No. 94-50,964(15E)

ANSWER BRIEF OF THE FLORIDA BAR

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STATEMENT OF CASE

The Florida Bar does not disagree with the Statement of Case filed by the Appellant.

STATEMENT OF FACTS

The Statement of Facts presented by the Appellant places a certain slant on the facts giving rise to this matter. In order to highlight certain facts as well as to include some facts omitted by the Appellant, The Florida Bar states as follows.

The complainants, Mr. and Mrs. Sadik-Ogli, had consulted with respondent over an approximate fourteen 14 year period and considered him to be their personal family lawyer. (ROR at 1, para. 6 and 7). In 1991, Mr. Sadik-Ogli went to Mr. Marke for assistance in selling his company, Rahim Associates, Inc. d/b/a Rahim Tours to a leading Russian tour company called VAO Intourist. (T 48).

It was not disputed that respondent drafted the Sale and Purchase Agreement, the Employment Agreement, and Shareholders Agreement for Mr. and Mrs. Sadik-Ogli upon their instructions. (ROR at 3, para. 22). Respondent admitted that he represented Mr. and Mrs. Sadik-Ogli in the drafting of these three agreements. (ROR at 3, para. 23). Mr. Marke was instrumental in giving Mr. Sadik-Ogli advice on how to protect Mr. Sadik-Ogli's remaining stay with the company and how to guarantee Mr. Sadik-Ogli's responsibility and position. (T 52-53). Mr. Marke introduced an arbitration clause into the documents (T 55) which arbitration clause Mr. Marke later sought to use against Mr. Sadik-Ogli in Mr. Sadik-Ogli's unemployment compensation proceeding. (T 245; Bar exhibit 17).

Mr. Alexey Mesiatsev testified that with respect to the agreements, his company, VAO Intourist, was represented by New York lawyers not Mr. Marke (T 278- 279). See also, Mr. Sadik-Ogli's testimony at T 56 where he stated the buyers were represented by a Mr. Faulkner from New York.

The effective date of sale was January 1, 1992 (ROR at 2, para. 13) and everything appeared to have gone well for the first 17 months of the relationship (ROR at 3, para. 24). In June 1993, the relations between the Sadik-Oglis and Intourist began to deteriorate. (ROR at 3, para. 28).

On June 14, 1993, Mrs. Sadik-Ogli went to see respondent at his office while her husband was out of town on business. (ROR at 4, para. 34 & 35). Mrs. Sadik-Ogli testified that when she went to see Mr. Marke, he told her that her husband is his first client and Mr. Marke will always be loyal to his first client. (T 158 - 159). She understood that Mr. Marke was her lawyer and her husband's lawyer. (T 159). Mr. Marke never had a conversation with her in which he stated that he was going to represent the new owners of Rahim and he never requested her consent to represent the new owners. (T 160). In fact, Mr. Marke was actively advising Mr. Mesiatsev at that time and wrote a letter dated June 25, 1993 to Mr. Mesiatsev (Bar exhibit 16) in which he commented on a letter he originally had been shown by Mrs. Sadik-Ogli in draft format. (T 207). Mr. Marke admitted these items in his testimony (T 207), although he first testified that he never represented Rahim against Mr. and Mrs. Sadik-Ogli. (T 203). The June 25, 1993 letter further analyzed Mr. Sadik-Ogli's claims in light of the three agreements that Mr. Marke had originally drafted for the Sadik-Oglis. (T 208).

Respondent then assisted Rahim in preparation of the termination of employment letter to Mr. Sadik-Ogli which letter was signed by Mr. Mesiatsev. (ROR at 5, para. 42). This action occurred shortly after Mr. Marke had advised Mrs. Sadik-Ogli that he would always be loyal to her husband (T 158-159) and had echoed a similar statement to Mr. Sadik-Ogli. (T 68-69). Mr. Sadik-Ogli was later "shocked" to discover that Mr. Marke was the author of the termination letter. (T 74; see bar exhibit 7) and characterized the letter as containing lies and insults. (T 74-75). Even Mr. Marke admitted that the letter contained harsh language and would not have been chosen by Mr. Sadik-Ogli if he had been consulted about the matter. (T 210).

Thereafter, on September 10, 1993, Mr. Marke wrote to Mr. and Mrs. Sadik-Ogli terminating any employment between them. (ROR at 5, para. 48). Five days later, Mr. Marke sent Mr. and Mrs. Sadik-Ogli a letter in which he advised that if certain items were not returned to Rahim, he would advise Rahim to suspend payments to Mr. Sadik-Ogli under the employment agreement. (Bar exhibit 10). The letter stated, in part: "I certainly would advise Rahim to sue - although I obviously could not do it - to recover the missing items and to ensure that you are not using the customer list for any purpose, particularly in violation of the non-competition clause of your employment contract." (Bar exhibit 10). Mr. Marke first testified that he did not see a conflict of interest with respect to this letter and that he did not represent Rahim in the same or substantially related matter for which he had also represented the Sadik-Oglis. (T 221). Upon further questioning, Mr. Marke stated that he recognized that he could not sue on behalf of Rahim because: "Well, obviously because then it would be dealing with matters that I had represented Ali's interest in." (T 229). Mr. Marke further explained that he now recognized a "problem" with his letter (T 233) but he did not admit any conflict of interest previously in his answer to the bar's complaint because: "When I wrote my answer I don't think I really fully appreciated how the bar might view it." (T 234).

On December 3, 1995, Mr. Marke wrote another letter where he advised that Mr. Sadik-Ogli had breached the applicable contract and stated that he was confident that Rahim would recover damages. (Bar exhibit 11). Mr. Marke testified that in his letter he was referring to the same contract that he had drafted on behalf of Mr. Sadik-Ogli. (T 231).

Next, respondent represented Rahim in unemployment compensation proceedings brought by Mr. Sadik-Ogli. (T 90, 244-245). Despite having drafted the termination letter for Rahim which gave Mr. Sadik-Ogli the option of resigning with his remaining contract pay or being terminated "for cause" without pay (Bar exhibit 7), Mr. Marke took the position in the unemployment compensation

proceedings that Mr. Sadik-Ogli had voluntarily left the company. (T 90, 244-245). Despite having drafted the employment agreement for Mr. Sadik-Ogli, Mr. Marke also took the position that the arbitration clause of the employment agreement barred the unemployment compensation claim. (T 245).

In terms of harm, Mr. Sadik-Ogli testified that not only was he disappointed when Mr. Marke refused to write a letter to assist him with his problems but that: "From my point of view, when I trusted him that this particular clause [as discussed in Bar exhibit 5] was made for my protection, I could not understand why isn't he standing by and protecting me on it." (T 134).

When Mr. Sadik-Ogli discovered in the unemployment compensation proceedings that Mr. Marke was the author of the termination letter, Mr. Sadik-Ogli testified:

> Well, I still haven't recuperated. I feel extremely betrayed. I feel extremely let down after all what I said before about you helping me with capitol gains, ideas and things like that, and then receiving this from him. (T 75).

Mr. and Mrs. Sadik-Ogli also testified that Mr. Marke's involvement caused them to be unable to pursue their other claims against Rahim (T 96-97) including Mrs. Sadik-Ogli's claim for unpaid vacation and back pay (T 166-168), Mr. Sadik-Ogli's claim for payments that had been suspended under the employment contract (T 86-89), and Mrs. Sadik-Ogli's complaint to the EEOC (T 225-226). Mr. Sadik-Ogli testified that they felt "defenseless" because of Mr. Marke's involvement:

> And when we tried to rectify these problems with the company directly, our contacts were ignored. Every time a reply came from Mr. Marke on behalf of the company, we felt very defenseless because we were trusting that if we have a problem, we could go to him. Now he was against us.
>
> We felt that we have been victims of some wrongdoing. (T 94).

As to Mr. Marke's state of mind during the conduct in question, Mr. Marke admitted that he was "very enthused about the opportunity to assist an important Russian company during a period

when historic changes were occurring in the former Soviet Union and Eastern Europe." (T 239),

Although Mr. Marke denied that he had "bragged" that Intourist was his client (T 239), Mr. Marke admitted that he had written that:

> I sometimes wonder aloud that Intourist continued to look to a small town lawyer for advice, even though it was setting up a subsidiary in New York City and could obviously tap the expertise of any of countless, countless, large, specialized and sophisticated law firms. (T 239).

SUMMARY OF ARGUMENT

The referee properly rejected the negligence standard in light of the evidence and properly held Standard 4.32 of the Florida Standards for imposing lawyer sanctions to be the applicable standard in imposing a suspension in this case. Even if the negligence standard, Standard 4.33 were to be imposed, the existence of the aggravating factors warrant the imposition of a suspension.

There was evidence of harm in this case but in any event, both Standards only require the potential for harm for imposition of discipline. Such potential was inherent in respondent's actions.

Any lesser discipline than that imposed by the referee would not sufficiently protect the public and have the necessary deterrent effect. The referee was correct when he found that "it is imperative that a clear and unmistakable message be sent that it is not acceptable for lawyers to breach the duty of loyalty to their clients."

ARGUMENT

I. The Referee's Recommendation Should Stand.

A. The Referee Properly Rejected The Negligence Standard and Applied Standard 4.32 on Suspension.

At the final hearing on this matter, Mr. Marke's counsel asserted that Mr. Marke was negligent.

(T 28). The referee properly rejected this argument and found that Standard 4.32 was applicable. (ROR at 8).

There was significant evidence for the referee's determination. First, the bar submits that it is not mere negligence to review drafts of letters with Mrs. Sadik-Ogli, assert unwavering loyalty to Mr. Sadik-Ogli (respondent's first client) and then turn around and analyze the same letters for the benefit of the adverse party. This conduct is particularly egregious in light of the fact that the analysis performed for Mr. Mesiatsev was based on agreements that the respondent had originally drafted for Mr. and Mrs. Sadik-Ogli as his clients.

Second, the bar submits that it is not mere negligence to draft a termination of employment letter for the employer when the letter is based on an employment agreement that was originally drafted for the employee. Interestingly enough, when Mr. Mesiatsez testified that he consulted with Mr. Marke as to whether it was legal to send the letter in the first instance. (T 276-277), Mr. Marke's response was positive to sending the letter. (T 277).

The foregoing conduct does not amount to a mere accidental lapse of judgment. This court has held that a public reprimand should be imposed for isolated incidences of neglect, lapses of judgment or technical violations of trust accounting rules without willful intent. See, The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991) in which this court rejected a public reprimand for failing to reveal a potential conflict of interest and other violations and imposed a 60 day suspension. This case does not fall within the parameters of an isolated instance of neglect or lapse of judgment.

Third, the bar submits that it is not mere negligence to send a letter to your former client (a mere five days after termination) and state that: "I certainly would advise Rahim to sue." (Bar exhibit 10). Mr. Marke explained that he let his personal pique cloud his judgment. (T 231). However, the

letter itself recognizes some awareness on respondent's part of the conflict of interest prohibition since the letter states that Mr. Marke "obviously" could not bring the suit himself. (Bar exhibit 10).

Fourth, the bar submits that it is not mere negligence to then send another letter to the former client (Bar exhibit 11) advising the former client that he had breached the applicable contract, which contract had originally been drafted on that same client's behalf.

Fifth, the bar submits that Mr. Marke's conduct in the unemployment compensation proceedings amounts to more than negligence. Despite having written the termination letter which offered Mr. Sadik-Ogli the option of either resigning with pay or being fired, Mr. Marke argued that Mr. Sadik-Ogli's departure was voluntary. Despite having drafted the employment agreement including the arbitration provision to protect Mr. Sadik-Ogli, Mr. Marke attempted to use that provision to preclude the unemployment compensation claim.

As to Mr. Marke's mental state throughout this process, it appears that his enthusiasm for the new Russian client overshadowed the duty of loyalty that he owed and, in fact, had espoused to Mr. and Mrs. Sadik-Ogli. This enthusiasm apparently caused him to knowingly disregard the duty of loyalty owed to the Sadik-Oglis.

B. Should the Court Find That The Referee Erroneously Applied Standard 4.32 and Should Have Applied Standard 4.33, the Aggravating Factors Still Warrant the Imposition of a Suspension.

If the Court finds that the referee erred in applying Standard 4.32, the bar submits that the aggravating factors found by the referee still warrant the imposition of a suspension. The referee found Standard 9.22(c) a pattern of misconduct and Standard 9.22(i) substantial experience in the practice of law to be applicable. The referee commented on his concerns with these factors as

follows:

> And the Court is also aware that lawyers in the practice of law, we all make mistakes and there is not a lawyer that I've ever met that hasn't wished that on one occasion wished he had the opportunity to revisit it or redo certain transactions where he errored or she had errored. And I'm aware of that.
>
> My duty here is to impose a punishment which is commensurate with the offense and when I have the guidelines before me, it's a little bit easier but on the other hand, he is a seasoned lawyer. A seasoned lawyer.
>
> What was done here was unexcusable. This isn't a lawyer fresh out of law school and it wasn't an isolated transaction either which gave rise to the conflict. This was over a matter of time with series of transactions which were interrelated and ongoing. He had an ongoing relationship with the corporation at the expense of his former client.
>
> In fact, at one time he had the same client and a different client to where he represented both of them and it clearly was a conflict of interest. And above all, it was in writing. He made it quite clear in his letters to his former clients where he stood to where he represented the corporate client at the expense of the husband and wife and recommending that the corporation should sue them. He represented the client -- the corporate client at the unemployment compensation hearing. (F 42-43).

The Florida public reprimand cases cited by appellant do not lead to a contrary result. None of them involved the aggravating factor of the serious pattern of misconduct as is found in the instant case. For example, in The Florida Bar v. Ethier, 261 So. 2d 817 (Fla. 1972) no aggravating factors were expressly listed in the opinion although the opinion noted that respondent had been given a private reprimand previously for similar misconduct. The court did not reject the referee's proposed discipline, as the appellant is urging in this case, but upheld the referee's recommendation of a public reprimand for dual representation of litigants in a divorce action. In The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983), The Florida Bar petitioned to review the referee's recommendation that respondent be found not guilty in a case involving dual representation of an heir to an estate and the personal representative. This court concluded that the referee's findings were erroneous and imposed

a public reprimand without discussion of aggravating or mitigating factors.[1] In The Florida Bar v. Stone, 538 So. 2d 460 (Fla. 1989), the court disagreed with certain findings of fact by the referee, overturned a finding of guilt with respect to a neglect count, rejected an aggravating factor on a non-conflict of interest count and reduced a six months suspension to a public reprimand in a dual representation case. There was no finding, as in the instant case, that the respondent engaged in a lengthy and significant pattern of repeated misconduct with respect to a former client.. In The Florida Bar v. Milin, 502 So. 2d 900 (Fla. 1987), the court reviewed an uncontested referee's report imposing a public reprimand for representation of adverse parties in two related suits and the opinion does not discuss aggravating or mitigating factors.

C. The Appellant Argues That Foreign Case Law Which May Have Guided The Referee To Recommend Suspension is Inapplicable; There Is No Basis To Establish That The Referee Relied On Foreign Law.

The appellant attempts to distinguish certain foreign case law which he states "may have guided the referee." (Initial Brief at 37). The bar never cited foreign case law, respondent's counsel never cited such law, and the referee did not mention such law at trial, at the final hearing on discipline or in the referee's report. In fact, the referee expressly stated in his report that he was relying on the Florida Standards as well as "pertinent Supreme Court of Florida disciplinary decisions." (ROR at 8). While the foreign cases may provide some interesting factual scenarios where suspensions have been ordered in conflict of interest cases, there is no basis to believe anyone relied on them in the instant case and the bar will not discuss them further.

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[1]McKenzie was later disbarred in separate subsequent proceedings. The Florida Bar v. McKenzie, 581 So. 2d 53 (Fla. 1991).

D. Florida Cases Cited By The Florida Bar Are Not Inapplicable But Show That Each Case Must Be Decided On Its Own Merits.

Appellant spends a great deal of time in his brief distinguishing the cases cited by the bar in its trial memorandum. The cases discussed by appellant are: The Florida Bar v. Mastrilli, 614 So. 2d 1081 (Fla. 1993) (6 months suspension); The Florida Bar v. Feige, 596 So.2d 433 (Fla. 1992) (two year suspension); The Florida Bar v. Crabtree, 595 So. 2d 935 (Fla. 1992) (disbarment); The Florida Bar v. Belleville, 591 So. 2d 170 (Fla. 1991) (30 day suspension); compare with The Florida Bar v. Kramer, 593 So. 2d 1040 (Fla. 1992) (public reprimand).

The above cases are noteworthy in that they show that conflicts of interest may warrant anything from a public reprimand to disbarment depending on their facts and whether there are other rule violations involved.

The bar also cited in its trial memorandum the case of The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991). In that case, this court rejected a public reprimand recommended by the referee and imposed a 60 day suspension for failing to fully reveal a potential conflict of interest among other misconduct. Appellant did not attempt to distinguish this case in his brief.

At the final hearing in this matter, the bar also gave the referee a copy of The Florida Bar v. Wasserman, 20 Fla. L. Weekly S183 (Fla. April 20, 1995) which had been decided shortly before the final hearing. (T 7-8). In that case, the referee recommended that Wasserman receive a public reprimand and six months probation. The bar appealed and this court held that Wasserman should be suspended for 60 days despite the fact that Wasserman caused no harm. Although the rule violations in Wasserman were not the same as is involved in the instant case, the case is noteworthy because it recognizes that the potential for harm is sufficient to impose a suspension.

In this case, there was evidence of actual harm. With respect to the unemployment compensation proceeding, Mr. Sadik-Ogli had to go through a contested proceeding in which his former attorney was his opponent. Since Mr. Sadik-Ogli was successful in that proceeding, it appears that appellant's argument is that Mr. Sadik-Ogli was not harmed. The harm is having to go through the process of the contested proceeding and having to face the man who was your trusted attorney as your opponent.

There was also evidence of harm in the chilling effect that Mr. Marke's involvement had on the willingness of Mr. and Mrs. Sadik-Ogli to pursue their other claims against Rahim including Mrs. Sadik-Ogli's claims for unpaid vacation and back pay, Mr. Sadik-Ogli's claim for about $4,000 and Mrs. Sadik-Ogli's complaint to the EEOC. Mr. Sadik-Ogli's testimony was to the effect that they could not proceed on their pending items because of Mr. Marke. (T 94 - 97). Whether these claims were meritorious or not and whether Mr. and Mrs. Sadik-Ogli would have ultimately prevailed on them is not the issue. The issue is that there was harm because of the effect that Mr. Marke's conduct had on the willingness of the Sadik-Oglis to pursue their claims.

Also, there was the emotional anguish that was apparent in Mr. and Mrs. Sadik-Ogli's testimony which the referee was in a special position to observe (eg,. Mr. Sadik-Ogli's testimony at 75). Emotional harm is nonetheless real harm.

However, both the suspension and negligence standard do not require that harm be found but only that there be a potential for harm. The potential for harm in respondent's conduct is self-evident. Not only did respondent fail to disclose the conflict of interest when he represented both Mr. and Mrs. Sadik-Ogli and their adversary simultaneously, but he then switched sides and attempted to use the agreements that he had drafted as a shield for Mr. Sadik-Ogli as a sword against him. What could be

potentially more harmful to a client trapped in this type of situation? Additionally, there is the potential harm to the profession if the lawyer's obligation of loyalty is allowed to be as fleeting as Mr. Marke's in this case.

CONCLUSION

To some extent, this case might be termed a textbook case of conflict of interest containing both a classic conflict of dual representation and prohibited misconduct with respect to a former client. The case was hotly contested by respondent up until trial when respondent, being confronted with inescapable evidence of his conflict, appeared to make some admissions of misconduct in his testimony. However, at the final hearing when the bar inquired if there was any admission, respondent, through his counsel, declined to acknowledge any wrongdoing. (F 9 - 12).

The referee, who was in a special position to observe the demeanor of the witnesses, especially the respondent, and the effect of this case upon Mr. and Mrs. Sadik-Ogli, imposed a 30 day suspension. The bar submits that the referee was correct when he found:

> In conclusion, I am satisfied that the recommended disciplinary measure is necessary to meet the court's criteria for appropriate sanctions: attorney discipline must protect the public from unethical conduct and have a deterrent effect while still being fair to respondent. The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). Any lesser discipline than that recommended would not sufficiently protect the public and have the necessary deterrent effect. It is imperative that a clear and unmistakable message be sent when it is not acceptable for lawyers to breach their duty of loyalty to their clients. (ROR at 8 - 9).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished on this 15th day of August, 1995, by regular U. S. mail to Richard C. McFarlain, Counsel for appellant, 215 S. Monroe Street, Suite 600, P. O. Box 2174, Tallahassee, FL 32316-2174.

Ronna Friedman Young
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