IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JOHN EMIL MARKE,

Respondent.
_____/

Supreme Court Case No. 84,377
TFB Case No. 94-50,964(15E)

INITIAL BRIEF OF RESPONDENT JOHN EMIL MARKE IN SUPPORT OF PETITION FOR REVIEW

McFarlain, Wiley, Cassedy & Jones, P.A.
215 S. Monroe Street, Suite 600
P. O. Box 2174
Tallahassee, Florida 32316-2174
(904) 222-2107

Richard C. McFarlain
Fla. Bar No. 052803
Charles A. Stampelos
Fla. Bar No. 240885

Attorneys for Respondent, John Emil Marke

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PRELIMINARY STATEMENT

Complainant, The Florida Bar, shall be referred to as The Bar. The original Complainants, Mr. Ali Sadik-Ogli and his wife, Marja-Liisa Sadik-Ogli, shall be referred to as Mr. Sadik-Ogli or Mrs. Sadik-Ogli or Mr. and Mrs. Sadik-Ogli, as the case may be. Respondent, John Emil Marke, shall be referred to as Mr. Marke.

Citations to the evidentiary hearing held before the Honorable Richard D. Eade, the Referee, on March 31, 1995, shall be by the symbol (T) followed by a page reference. There are two transcript volumes of the evidentiary hearing.

Citations to the final hearing held before the Referee on May 5, 1995, shall be referred to by the symbol (F) followed by a page reference.

The Bar introduced nineteen (19) exhibits into evidence and they will be referred to by (Bar) followed by an exhibit number. Mr. Marke's three (3) exhibits shall be referred to by (Marke) followed by an exhibit number.

Citations to the Referee's Report filed with the Court on or about May 15, 1995, shall be by the symbol (ROR) followed by a paragraph and/or page reference.

Respondent also offered two videotaped depositions for consideration by the Referee. The videotaped depositions are of lawyer F. Gregory Barnhart and Circuit Court Judge Catherine Brunson. Judge Brunson appeared pursuant to a subpoena. These videotaped depositions are referenced at page 31 of the May 5th Final Hearing. The videotaped depositions were not transcribed by the court reporter during the May 5th hearing. (F 31.)

STATEMENT OF THE CASE

On or about September 20, 1994, The Bar filed a Complaint against Mr. Marke. The Bar alleged that Mr. Marke violated Rules 4-1.7(a) and (b) and 4-1.9(a), Rules Regulating the Florida Bar (Rules). The Bar claimed in part that Mr. Marke had a conflict of interest when he represented the interests of Rahim Associates, Inc. (Rahim), a travel agency, contrary to the interests of Mr. and Mrs. Sadik-Ogli, its original owners.

On or about October 26, 1994, Mr. Marke filed his Answer, denied engaging in conflicts of interest, and raised several affirmative defenses.

In support of its position, The Bar submitted a Trial Memorandum to the Referee on or about March 31, 1995.

The evidentiary hearing in the case was held on March 31, 1995, before Judge Eade. The Bar elicited the testimony from three witnesses, Mr. and Mrs. Sadik-Ogli, and Mr. Marke. Counsel for Mr. Marke elicited the testimony of Mr. Alexey Mesiatsev who, at the time of the hearing, was the President of Rahim. (T 252.) During the hearing, The Bar introduced nineteen (19) exhibits and Respondent offered three (3) exhibits into evidence.

On or about April 27, 1995, and May 4, 1995, respectively, The Bar and Mr. Marke submitted written closing arguments to the Referee.

On May 5, 1995, the final hearing was held at which time the Referee determined Mr. Marke was guilty of three conflicts of interest and not guilty of a fourth involving Mrs. Sadik-Ogli. (F 16-26.) Also, and prior to imposing a thirty (30) day suspension, two videotaped depositions were considered by the Referee. The character witnesses, the Honorable Catherine Brunson and lawyer Gregory Barnhart, testified as to their knowledge of Mr. Marke as a

practicing attorney. (F 31.) Further, Mr. Marke addressed the Referee during the final hearing. (F 32-40.) Bar Counsel recommended a suspension "on a short term basis." (F 26.) The Referee recommended a thirty (30) day suspension (F 40-44), and also recommended The Bar's costs be assessed against Mr. Marke. (F 41.)

On or about May 15, 1995, the Referee's Report (ROR) was filed with this Court.

The Referee, based upon his findings of fact, recommended that Mr. Marke be found guilty of violating Rule 4-1.7(a)[1], Rule 4-1.7(b),[2] and Rule 4-1.9(a).[3] Specifically, the Referee found:

> A. Respondent's conduct in drafting the June 25, 1993 letter to Mr. Mesiatsev and related conduct constituted violations of Rule 4-1.7(a) and Rule 4-1.7(b).
>
> B. Respondent's representation of Rahim in the preparation of Mr. Sadik-Olgi's termination of employment letter constituted additional violations of Rule 4-1.7(a) and Rule 4-1.7(b).
>
> C. Subsequent to September 10, 1993, respondent's representation of Rahim in the unemployment compensation proceedings and in the letters prepared by respondent constituted violations of Rule 4-1.9.
>
> D. Although The Florida Bar contended that the September 10, 1993 letter prepared by respondent qualified as an admission of violations of Rule 4-1.7(a) and (b), I find that the evidence did not rise to the level of clear and convincing that Mrs. Sadik-Ogli was a client of respondent's at the time the letter was prepared. Therefore, I declined to find that there was a conflict on this point.

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[1] Improperly representing a client when the representation of that client was directly adverse to the interests of another client.

[2] Improperly representing a client when the lawyer's exercise of independent professional judgment was materially limited by the lawyer's responsibilities to another client or by the lawyer's own interest.

[3] Improperly representing a client in the same or a substantially related matter in which that client's interest was materially adverse to the interests of a former client.

(ROR, para. III.)

The Referee recommended that Mr. Marke be suspended from the practice of law for a period of thirty (30) days with automatic reinstatement at the end of the period of suspension. (ROR at 8, para. IV.) The Referee considered Florida's Standards for Imposing Lawyer Sanctions and case law. He found Standard 4.32 applicable, and found the following factors to be aggravating:

> 9.22(c) a pattern of misconduct (as evidenced by respondent's conduct in June 1993 when he failed to disclose his representation of Rahim, his drafting of the termination letter from Mr. Sadik-Ogli's employment in July 1993, his letter of September 15, 1993 to his now former clients taking the new owner's position against them, his letter of December 3, 1993 stating that he is confident Rahim Tours will recover damages and his conduct in the 1994 unemployment compensation proceeding where he sought to use the employment agreement against his former client).
>
> 9.22(i) substantial experience in the practice of law (respondent was admitted to practice on January 31, 1977).

The only mitigating factor found by the Referee was Mr. Marke's absence of a prior disciplinary record. The Referee concluded his remarks as follows:

> In conclusion, I am satisfied that the recommended disciplinary measure is necessary to meet the Court's criterion 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 that it is not acceptable for lawyers to breach their duty of loyalty to their clients.

(ROR at 8-9, para. IV.) The Report tracks The Bar's Trial Memorandum and proposed report.

On June 12, 1995, a timely Petition for Review was filed on behalf of Mr. Marke.

STATEMENT OF THE FACTS

The Referee's Report sets forth Findings of Fact which largely track the allegations set forth in The Bar's Complaint. The purpose of this Brief is not to contest the Hearing Officer's Finding of Fact or Findings of Guilt. Rather, Mr. Marke takes issue with the Referee's recommendation of a thirty (30) day suspension. To this end, Mr. Marke offers the following additional facts which are of record and which bear directly on the extent of the conflict of interest, Mr. Marke's state of mind, and mitigating circumstances.

Mr. Sadik-Ogli grew up in Finland and learned Russian as his first language. (T 34.) He also speaks Finnish, Swedish, and English. (T 34.) Mrs. Sadik-Ogli was born in Finland and Finnish is her native language. She also speaks English. Mr. and Mrs. Sadik-Ogli have been married for 28 years. (T 154.)

Mr. and Mrs. Sadik-Ogli moved to Canada in 1969 and lived in Canada or the United States since that time. (T 116-17.) They had a will prepared in Canada and later had a U.S. will prepared by a Finnish community leader who was not a lawyer. (T 43-44, 115, 118.) Mr. and Mrs. Sadik-Ogli never consulted Mr. Marke with respect to drafting a will for them. Id.

Mr. Sadik-Ogli first met Mr. Marke in May of 1979. (T 34, 182.) Mr. Sadik-Ogli was employed with Finn Air and was transferred to Florida. His company needed office space. At the time, he consulted Mr. Marke's law partner, Mr. Edwin Lammi, the Finnish Consul in the area, who drafted the office lease for Finn Air. (T 35, 181.)

Thereafter, Mr. Sadik-Ogli consulted with Mr. Marke regarding several matters from 1979 through 1991. (T 35-42, 146-49, 182-86, 213) (Bar Ex. 12 and 13.) He used another lawyer with respect to a trademark issue. (T 43-44.) In February of 1983, Mr. Marke assisted Mr.

Sadik-Ogli with the incorporation of Rahim Associates, Inc., (hereinafter "Rahim") a travel agency. (T 39, 154.) Mr. Marke acted as Rahim's registered agent and continued in that capacity through the events giving rise to the Complaint. He signed annual reports from time to time. (T 213.) During this time, Mr. Sadik-Ogli paid Mr. Marke from his personal funds for work performed on his behalf between 1979 and 1991. Rahim paid for work performed for Rahim. (T 45.) Mr. Marke was not on a retainer. (T 44-47.) Mr. Sadik-Ogli always considered Mr. Marke to be a "very reasonable man" and "never an expensive lawyer." (T 47.) Mr. and Mrs. Sadik-Ogli considered Mr. Marke as their personal family lawyer. (T 44, 155.)

In 1991, Mr. Sadik-Ogli advised Mr. Marke that he was developing a process to sell Rahim to Vao-Intourist USSR Company for Foreign Traveler (hereinafter Intourist), a prominent Russian-based travel agency. (T 47-48.)

Mr. Alexey Mesiatsev (hereinafter Mr. Mesiatsev) has been in the travel business since 1975. (T 252.) He first met Mr. Sadik-Ogli in November of 1989 in Miami, Florida. (T 254.) In the summer of 1991, he was introduced to Mr. Marke by Mr. Sadik-Ogli "as a company [Rahim] lawyer." (T 254.) The purpose of his trip was to take a close look at Rahim owned by Mr. and Mrs. Sadik-Ogli. (T 253.) He also met Mr. Marke in October of 1991 with several other Russians and Mr. Marke was introduced "as the company lawyer." (T 255.) See also (T 108).

Mr. Sadik-Ogli decided to sell Rahim to Intourist and in or around December of 1991 asked Mr. Marke to assist him. (T 47-48.) Mr. Sadik-Ogli agreed with Intourist that the drafting of the documents would be his or Rahim's responsibility. (T 48, 277.) Mr. Marke represented him. (T 50.) But, Mr. Sadik-Ogli also acknowledged that Mr. Marke was Rahim's corporate

counsel on and prior to December 20, 1991. (T 107-08.) And, Mr. Marke remained Rahim's counsel after January 1, 1992, including through July 21st, 1993, and thereafter. (T 108-09.) He was always Rahim's lawyer. (T 107-10.)

Mr. Mesiatsev's New York lawyer, who represented Intourist regarding this deal, spoke with Mr. Marke, by telephone. (T 56, 194, 197, 256, 278.) The basic terms of the deal were negotiated between Mr. Mesiatsev of Intourist and Mr. Sadik-Ogli. (T 48, 257.) The buy-out figures were negotiated by Mr. Sadik-Ogli and Intourist. (T 192).

According to Mr. Marke, negotiations between Mr. Sadik-Ogli and Intourist started in the preceding year. (T 193.) As the deal came closer to fruition, Mr. Sadik-Ogli asked Mr. Marke to draft the agreements. (T 87-88, 195-96.) The three agreements were drafted at the same time. (T 189.) Mr. Sadik-Ogli and Mr. Mesiatsev explained to Mr. Marke what they wanted to accomplish. (T 192-93.) Thereafter, Mr. Marke drafted the Shareholder Agreement and Purchase and Sale Agreements for Mr. and Mrs. Sadik-Ogli. (Bar Ex. 1-2) (T 49-51, 193.) As an outgrowth, it was determined that an Employment Agreement should be drafted. (T 193.) Each of the documents was prepared by Mr. Marke for Mr. and Mrs. Sadik-Ogli upon their instructions. (ROR at 3, para. 22-23) (T 195-96.) Mr. Marke thought of himself "as representing [Mr. Sadik-Ogli] personally in drafting the three agreements, although he [thought] Rahim was billed and paid for [his] services." Complaint, ¶ 24; Answer ¶ 24. See also (T 151). At the time, Mr. Marke considered all the parties to have an identity of interest until the agreements were executed. (T 194, 196.) With respect to the Employment Agreement, from Mr. Marke's perspective, he viewed Mr. Sadik-Ogli as an employee of Rahim. (T 192.) Rahim paid Mr. Marke to draft all of the agreements. (T 194-95.)

The Sale and Purchase Agreement provided that Mrs. Sadik-Ogli would convey all of her 250 shares to Intourist and that Mr. Sadik-Ogli would convey 50% or 125 shares to Intourist. After the transfer, Intourist owned 75% of the authorized shares in Rahim with Mr. Sadik-Ogli owning 25%. (Bar Ex. 1.) Intourist agreed to pay Mr. and Mrs. Sadik-Ogli $390,000.00 for their shares of stock. Mr. and Mrs. Sadik-Ogli also granted Intourist the right to purchase the remaining 25% of Mr. Sadik-Ogli's stock based upon a graduated scale, including but not limited to, $155,000.00 payable on or after January 1, 1993. (Bar Ex. 1 at 2, para. 4.d.) All of the company's assets would still be owned by Rahim. The parties agreed to arbitrate any disputes concerning the interpretation or enforcement of the Sale and Purchase Agreement. Id. at 3, para. 8.

The Shareholder's Agreement provided in part for the creation of a Board of Directors of no more than four directors with the minority shareholder, Mr. Sadik-Ogli or his nominee being one. (Bar Ex. 2, para. 2.) The Shareholder's Agreement also provided for the management of the business and that the President of Rahim would be the Chairman of Intourist. Mr. Sadik-Ogli would serve as one of two Vice Presidents "in charge of sales and administration including day by day offices routine." The other Vice President was required to "be a Soviet citizen appointed by Intourist" whose responsibilities included "marketing and production." Mr. Sadik-Ogli was "specifically obligated to train the Intourist employees." Id. at 2, para. 3 and 4. Further, "[u]ntil December 31, 1993, the Minority Shareholder [Mr. Sadik-Ogli] shall make all others decisions required in the ordinary course of business without the approval of the Board of Directors except that he" could "not [m]ake capital expenditures in excess of $3,000.00 per item[,] [e]nter into lease contracts lasting more than two years or obligating the Company for

more than $1,000.00[,] nor [h]ire or replace employees not authorized under the table of organization adopted by the Board of Directors from time to time." Id. at para. 3.2.a.-c. Compare with p.23, infra.

The Employment Agreement between Mr. Sadik-Ogli and Rahim authorized an initial two (2) year term of employment for him commencing January 1, 1992, and ending on December 31, 1993. (Bar Ex. 3, para. 1.2.) (The two (2) year term was Mr. Sadik-Ogli's idea. (T 191.)) Mr. Sadik-Ogli's term would continue unless, in part, either party gave notice to the other on or before June 30, 1993, the renewal date. (Bar Ex. 3, para. 1.3.) It was declared that Mr. Sadik-Ogli would be one member of Rahim's Board of Directors and one of two Vice-Presidents and have all those powers consistent with his position. He was required to "devote his full time and attention and his best efforts and ability to the business and affairs of the Company . . . and shall not engage in any activities which a reasonable man could conclude would interfere with the proper discharge of his duties." Mr. Sadik-Ogli was also to "make all day-to-day management decisions during the first two years and take the responsibility for training his successor, so that there will be continuity in the business." (Bar Ex. 3 at 2, para. 2.) Mr. Sadik-Ogli agreed to a five year non-compete clause. Further, the Employment Agreement provided, in part,

> (b) The Company [Rahim] may terminate the Executive's [Mr. Sadik-Ogli] employment for good cause at any time. As used in this paragraph, at a minimum "good cause" shall include (i) material breach of this Agreement, or (ii) any other conduct by the Executive that a reasonable person could conclude may have a material and adverse effect on the business interests or reputation of the Company.
>
> (c) The Company may terminate the Executive's [Mr. Sadik-Ogli] employment at any time for any reason or no reason at all.

(Bar Ex. 3 at 4, para. 6.3(b) and (c).) The Employment Agreement also provided for

compensation to Mr. Sadik-Ogli in the event he was terminated for other than good cause or for good cause as defined in paragraphs 7.1 and 7.2. (Bar Ex. 3 at 4-5.) In this case, Mr. Sadik-Ogli was terminated for other than good cause. He was entitled to receive his salary to the end of the initial term or December 31, 1993. Id.

During the drafting of the Agreements, Mr. Sadik-Ogli says he discussed his minority shareholder status with Mr. Marke who indicated that the by-laws required an 80% majority before a decision could be made. (T 54.) However, the Agreements do not have an 80% voting majority requirement. (Bar Ex. 1-3.) Mr. Sadik-Ogli also felt comfortable with the fact that all Intourist employees would report to him until decided differently by the Board of Directors. (T 52-56.) In short, Mr. Sadik-Ogli felt comfortable with his position until the end of his contractual period of employment. (T 56.)

The actual closing of the deal took place in Moscow on December 20, 1991, effective January 1, 1992. (T 57, 195.)

Between January of 1992 and June of 1993, Mr. Sadik-Ogli, on behalf of Rahim, asked Mr. Marke to write a letter to a person among the Finnish community who was spreading unfounded rumors about Rahim, which Mr. Marke did. (T 58-59.) But, Mr. Marke performed no legal tasks for Mr. and Mrs. Sadik-Ogli personally during this period of time, nor did Mr. Marke have a written contract to perform legal services for Rahim prior to or after January 1, 1992. (T 60-61.) Rather, Mr. Marke had provided counsel to Rahim since 1983. (T 107-10, 213.) According to Mr. Sadik-Ogli, after January 1, 1992, Mr. Marke never asked him for his consent to represent Intourist or the new owners of Rahim. (T 58, 152-53.)

After the deal was consummated, Mr. Sadik-Ogli began running the day-to-day operations

of Rahim. (T 61, 257.) Mr. Mesiatsev, who negotiated the deal with Mr. Sadik-Ogli, came to Florida in April of 1992, and assumed the role of Vice-President of Rahim. (T 123, 256-57.)

In June of 1992, there was a gala event held at the Ritz Carlton apparently to celebrate the first Soviet/American joint venture in the travel business. (T 177-78, 257.) Mr. Marke, as Rahim's lawyer was present, among other persons. Mr. and Mrs. Sadik-Ogli were present at the gala. (T 257-59.) Mr. Marke was introduced to the Intourist delegation by Mr. Sadik-Ogli as Rahim's company lawyer. Mr. Marke was listed as Rahim's lawyer on a list of company names and positions as of June 1, 1992. (T 172-73, 259-62) (Marke Ex. 3.) Mr. Mesiatsev agreed the list of company names and positions was accurate. (T 262.) Mrs. Sadik-Ogli also considered Mr. Marke Rahim's lawyer as of June 1, 1992. (T 174.)

As noted by the Referee, in June of 1993, relations between the Sadik-Oglis and Intourist began to deteriorate. (ROR, p. 3, para. 28.) At this time, Mr. Marke did not appreciate what was happening between Mr. Sadik-Ogli and Intourist. (T 237.) He did not see the "tremendous rupture coming up." (T 237-38.) He thought they could resolve any misunderstanding. (T 238.) If Mr. Marke had perceived a real conflict, he "would have bailed out on everybody." (T 200.) See also (T 237-39). Unknown to Mr. Marke, Mr. Sadik-Ogli and Mr. Mesiatsev had an "increasing collection of disagreements" and "a couple of real arguments." (T 124.)

On June 11, 1993, Mr. Sadik-Ogli received three letters (dated June 10th) from Mr. Valadimir Malinine, the President of Rahim and Chairman of Intourist. (T 61) (Bar Ex. 4.) The first letter advised Mr. Sadik-Ogli of the expiration of the terms of the Employment Agreement, extends Mr. Malinine's appreciation and gratitude for the work done by him, and informs Mr. Sadik-Ogli that the conditions of the new employment agreement, if so desired by either party,

should be agreed upon prior to August 31, 1993. (Bar Ex. 4.) A second letter informed Mr. Sadik-Ogli of Intourist's decision to purchase his remaining 25% shares for $155,000.00 according to the terms of the Sales and Purchase Agreement. Id. The third letter is written to Mr. Mesiatsev authorizing him to fulfill his commitments and obligations as the President of Rahim until the close of 1993. Id.

Mr. Sadik-Ogli received these letters in facsimile format and they were delivered to him by Mr. Mesiatsev. (T 63.) Mr. Sadik-Ogli says he was "delighted" Intourist wanted to buy his shares and "welcomed" his relief from service from Rahim. But, it was the third letter which upset him and put him second in command of Rahim. (T 63-64.) He thought Mr. Mesiatsev was dishonest and did not want him as his boss. (T 127.) He would not have cared if Rahim had terminated him first before they promoted Mr. Mesiatsev. (T 129.) He called Mr. Marke (T 64), although Mr. Marke did not recall speaking with him. (T 198.) Mr. Marke did not know the letters were being sent. (T 198, 205.) But see (T 64). According to Mr. Sadik-Ogli, Mr. Marke tried to pacify him and said not to take any action. This was the day before Mr. Sadik-Ogli went on a five (5) week trip to Europe and Asia.[4] Mr. Marke told him "not to take any action." (T 64.) Mr. Sadik-Ogli told Mr. Marke that he would try to find the time to write a reply.

Mr. Sadik-Ogli drafted three separate replies during the evening of the 11th, and left town for five (5) weeks, but left the draft letters with his wife and asked her to deliver them to Mr. Marke the following morning. He further asked his wife to ask Mr. Marke to re-write them in

[4] Mr. Sadik-Ogli claims this was a business trip for which he should have been paid. (T 86-89.) Mr. Mesiatsev says he knew about the trip in advance "but it always was considered as a vacation journey . . . ." (T 264.) The trip was not approved by the Board of Directors as a business trip. (T 264.) See also (T 266).

"legal lingo" and make sure they were sent to Moscow. Mr. Sadik-Ogli, when discussing these draft letters, says he always considered Mr. Marke to be his lawyer. (T 66-67.)

It was significant to Mr. Sadik-Ogli that Mr. Mesiatsev was promoted over him. Mr. Mesiatsev was considered a trainee, although he had been in the travel business since 1975. (T 252.) But, Mr. Sadik-Ogli also presumed that Mr. Mesiatsev would take over Rahim some day, just not at this point in time. (T 66.) Mr. Sadik-Ogli knew that he could be terminated at any time. (T 125.)

On June 14th, Mrs. Sadik-Ogli brought the three draft responses to Mr. Marke at his office. (T 156, 198, 205) (Bar Ex. 5.) She asked Mr. Marke to read them and have them typed on his letterhead. Then, she would send them to Moscow as her husband's reply. (T 157.) According to Mrs. Sadik-Ogli, Mr. Marke laughed and told her why should she care if Mr. Mesiatsev fell flat on his face. Mr. Marke said let it go. Mr. Marke did not seem worried or concerned. (T 179.) Mr. Marke supposedly told her that Mr. Mesiatsev was coming to see him, but that he did not because Mrs. Sadik-Ogli was present. (T 157.) She does not remember Mr. Marke saying what the Russians were doing was proper under the Agreements. (T 158.) Mrs. Sadik-Ogli had last seen Mr. Marke once in the corporate office about six (6) months or a year prior to June 14th. (T 159.)

Mr. Marke recalls telling Mrs. Sadik-Ogli that Florida corporation law permitted shareholders and directors to do in writing whatever they could do in a formal meeting. He told her that Intourist, by exercising its option to purchase the remaining shares of stock in Rahim, effected ownership and control of Rahim. (T 198.) He further told her that Intourist was going to pay a lot of money to them and Mr. Marke "frankly didn't then [and does not] now understand

what the problem was." (T 198.) Mr. Marke acknowledges that he tried to give her the best advice he could, although Mr. Marke says he refused to be retained by Mr. Sadik-Ogli. (ROR at 4, para. 38) (T 198-99, 237-39.) He gave "her very human advice." (T 199, 237-39.) Mr. Marke "felt he [Mr. Sadik-Ogli] was shooting himself in the foot and [Mr. Marke] asked her to have him call [him] so [he] could tell [Mr. Sadik-Ogli] that." (T 199, 237-39.)

She said, however, that Mr. Marke told her that Mr. Sadik-Ogli was his first client and that he would always be loyal to his first client. (T 158-59.) Mr. Marke explained Mrs. Sadik-Ogli called him and asked to see him because she indicated at that point in time "that they're doing bad things to Ali and her" so he advised her to speak with him further. According to Mr. Marke, he determined that the Russians were performing on the contract and that he would have told her that Mr. Sadik-Ogli was his first client and that he would be loyal to him if the Russians would have done something wrong. (T 200.)

At the time, Mrs. Sadik-Ogli understood Mr. Marke to be their lawyer and Mr. Marke did not say anything to her about representing Rahim at this June 14 meeting. (T 160.) Mr. Marke thought he was Rahim's lawyer not their lawyer. (T 200, 203.) They hired him to represent Rahim. (T 203.) Mrs. Sadik-Ogli said she did not consent to Mr. Marke's representation of Rahim. (T 160.)

By letters dated June 11, 1993, Mrs. Sadik-Ogli sent Mr. Malinine several letters in her husband's name acknowledging, among other things, Intourist's decision to terminate his contract and that he "naturally accept[s] your decision." (Bar Ex. 5.) In one three (3) page letter, Mr. Sadik-Ogli questioned Mr. Mesiatsev's new authority. Id. The letter did not mention his problems with Mr. Mesiatsev. He did not try to destroy Mr. Mesiatsev's career. (T 128.) But,

Mr. Sadik-Ogli questioned Mr. Mesiatsev's competency. (Bar Ex. 5.) Mr. Marke says he tried to discourage Mrs. Sadik-Ogli from sending these letters "because they were extremely denigrating toward Mr. Mesiatsev and, . . .[he] thought Ali was shooting himself in the foot." (T 206.) Mr. Marke felt that they should do nothing especially since Mr. Sadik-Ogli left the country for five (5) weeks. (T 206.) Subsequently, Mr. Mesiatsev furnished Mr. Marke with a copy of Mr. Sadik-Ogli's letter to Mr. Malinine which was the "most denigrating of the various possibilities." (T 206.)

Also, on or about June 15th, Mrs. Sadik-Ogli received a letter from Mr. Mesiatsev advising that Mr. Mesiatsev was the only person authorized to sign company checks alone. (Bar Ex. 14) (T 160-61.)

On June 25, 1993, Mr. Marke wrote to Mr. Mesiatsev and apparently responded to Mr. Sadik-Ogli's three (3) page letter written to Mr. Malinine. (Bar Ex. 16) (T 207-08.) In part, Mr. Marke told Mr. Mesiatsev there was nothing to worry about and that he stood ready to assist him. (T 205-6) (Bar Ex. 16 at 2.)

At the "very last end of the trip," Mr. Sadik-Ogli said he spoke with Mr. Marke and advised him he could not work under Mr. Mesiatsev. Mr. Marke also expressed his loyalty to him. (T 68-69.)

Mr. Sadik-Ogli then returned to the United States where the transaction to purchase his shares and the payment of $155,000.00 was completed and the money was transferred. (T 69.) The transaction was completed prior to Mr. Sadik-Ogli's July 21st resignation from Rahim. (Marke Ex. 3) (T 141.) Mr. Sadik-Ogli was effectively under Mr. Mesiatsev's control for two (2) days. (T 130, 210.)

Two days after Mr. Sadik-Ogli returned to Florida, on July 21, 1993, Mr. Mesiatsev wrote and delivered a letter to Mr. Sadik-Ogli notifying him of Rahim's intention to terminate his employment effective immediately. (Bar Ex. 6) (T 70, 87.) Mr. Sadik-Ogli had already contemplated two options for himself, in that he could absolutely not work under Mr. Mesiatsev and that if he resigned himself, he would lose his salary for the remainder of the term of his two year employment. (T 71.) Mr. Mesiatsev's July 21st letter gave Mr. Sadik-Ogli two choices: either resign immediately and Rahim would treat the resignation as if he were terminated for other than good cause and Mr. Sadik-Ogli would be paid his regular compensation on the regular pay days through the end of the year or, if he chose not to resign, Rahim would consider the termination to be one for cause based upon insubordination and conflict of interest. (Bar Ex. 6) (T 71.)

On July 20th, Mr. Sadik-Ogli asked Mr. Marke "if he couldn't be terminated." When he did receive the termination letter on the 21st, he was pleased. Mr. Sadik-Ogli did not believe that the letter had been written by Mr. Mesiatsev. He recognized the computer print-out and knew that Rahim did not have this equipment. He immediately called Mr. Marke and thanked him for releasing him from his position with Rahim. (T 70, 74, 103-06, 210, 217.) Mr. Marke "made a comment that it is written on [his] unmistakable style. And I remember asking [Mr. Marke] a question that why does it have to be so harsh and rude in a way. And he said that he had to make the wording very strong." (T 70.) Again, Mr. Sadik-Ogli was pleased to be released from his obligations. (T 70.) When asked whether he was pleased with the language of the letter, Mr. Sadik-Ogli said that what he cared about were the options which he had already contemplated. (T 70-71.) Mr. Sadik-Ogli had developed some understanding that Mr. Marke was involved in

arrangements during this time period. (T 74.) Although in July of 1993, Mr. Sadik-Ogli still believed Mr. Marke's involvement was on his behalf as his attorney. (T 74.)

Mr. Mesiatsev said that it was his idea to send the July 21st termination letter in order to protect the business of the company. (T 217-18, 275.) The original draft came from Moscow. (T 270.) Mr. Mesiatsev wrote the first draft and gave it to Mr. Marke for editing. (T 276.) Mr. Marke prepared the final draft of the letter which gave him his choices. (T 212, 276.) Mr. Marke made suggestions regarding various words but the major topic or major message of the letter was his and not Mr. Marke's. (T 276.) He asked Mr. Marke for his advice regarding the letter, although not whether they should write the letter, and Mr. Marke said that the response was positive. (T 219, 277.) He further asked Mr. Marke if it was legal to send the letter. (T 277.) The language in the letter was harsh "and absolute[ly] accurate language." Mr. Marke "was looking for a way to get [Mr. Sadik-Ogli] to stop doing bad things to [Rahim]." (T 210.)

At the time the July 21st letter was written, Rahim had made the decision to either ask Mr. Sadik-Ogli to resign or terminate him for cause. (T 215-17.)[5] Mr. Marke considered himself to be the agent for Rahim. He was Rahim's lawyer. Mr. Marke did not feel he "had represented [Mr. Sadik-Ogli] since December of '91." (T 212-13.) But, he would not have represented Rahim if litigation ensued. Rahim indicated to Mr. Marke that "it had reason for termination for cause." Mr. Marke memorialized this in the letter. (T 218.)

At this point we need to digress. In January of 1994, Mr. Sadik-Ogli pursued a claim for unemployment compensation. (T 89.) He represented himself and Mr. Marke represented Rahim.

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[5] After they left Rahim, Mr. and Mrs. Sadik-Ogli caused trouble for Rahim. (T 267, 270-74) (Bar Ex. 18-19.)

The claim was opposed by Rahim. In May of 1994 and during the hearing, Mr. Sadik-Ogli received a copy of a letter written by Mr. Marke dated July 21, 1993, which is the same letter authored by Mr. Mesiatsev to Mr. Sadik-Ogli dated July 21st except that the letter is written on Mr. Marke's letterhead. (Bar Ex. 7) (T 76.) Mr. Marke brought the letter to the hearing. (T 76.) Mr. Sadik-Ogli testified that he was shocked to see the letter. (T 73-74.) Prior to May of 1994, he never saw the letter on Mr. Marke's letterhead. (T 77.) He saw the termination letter on Mr. Marke's letterhead, spoke with his wife, and remembered that it was in Mr. Marke's "unmistakable style" and thought that perhaps Mr. Marke had made a draft for Rahim. (T 76-77.) The letter confirmed his "fears" which had developed during the period of his resignation and after that. He says Mr. Marke's letter contained several lies, including but not limited to, the accusation of insubordination. He felt insulted and "extremely betrayed." (T 74-75.)

Now, back to the chronology. Within an hour of receiving the July 21, 1993, letter, Mr. Sadik-Ogli resigned as a director and Vice-President of Rahim. (T 77-78, 136-37) (Marke Ex. 1.)

Mr. Sadik-Ogli's next contact with Mr. Marke occurred in early to mid August. He was happy. (T 131, 142-43.)[6] Some Finns asked him for help and he contacted Mr. Marke to undertake the job. At the same time, he asked Mr. Marke for the corporation book and seal for "Rahim Tours, Inc.," a separate, dormant corporation formed by Mr. Marke for him. He asked

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[6] On March 8, 1994, Mr. Sadik-Ogli wrote a letter to Ms. L. M. Jones of the Florida Unemployment Compensation Claims Office. In part, he recounts the facts of his termination and, in part, references Mr. Mesiatsev's July 21st termination letter. (Marke Ex. 3.) He explains how Mr. Marke indicated that it was "with his own unmistakable style" and further claimed "[t]his was Mr. Marke's first attempt to try to harass me." Id. Yet, notwithstanding how he felt, after the fact, Mr. Sadik-Ogli returned to Mr. Marke approximately two weeks later to have him do more legal work for him. (T 142-43.)

Mr. Marke to make a name change and Mr. Marke agreed. He also discussed a living trust with Mr. Marke, although Mr. Marke does not recall discussing this matter. (T 79-80, 82, 222--23.) At the time, Mr. Sadik-Ogli says he had no ongoing disputes with Rahim. (T 80.) His wife had received her final paycheck after she was "fired." It was not what she expected. Mrs. Sadik-Ogli wrote Rahim and explained what she thought was owed to her, including overtime pay for the time period when her husband was in charge of Rahim. (T 81, 112-14, 163.)

On August 5, 1993, Mrs. Sadik-Ogli wrote a letter to Mr. Mesiatsev advising of the amount she felt was due, or $5,700.00. (Bar Ex. 15.) Mr. Mesiatsev did not respond to the letter. (T 81, 163-64.)

Mr. Marke decided not to perform these additional tasks for Mr. Sadik-Ogli. (T 223.) He believed Mr. Sadik-Ogli was doing bad things and he saw a conflict emerging. (T 223-27.) This gave rise to Mr. Marke's September 10th letter withdrawing from representation of the Sadik-Oglis. (T 223-24.) (Bar Ex. 8.)

Mr. Marke admits that he had a brief client relationship with Mr. Sadik-Ogli in mid-August, and not Mrs. Sadik-Ogli since it was Mr. Sadik-Ogli who approached Mr. Marke regarding the additional legal matters. (T 224-25.) He wrote the termination letter to both. It "was just automatic" writing to both. (T 225.)

In August of 1993, and prior to his September 10, 1993 letter, Mr. Marke was representing Rahim. He was representing Rahim with respect to other disputes involving the Sadik-Oglis. (T 225-27.) These included but are not limited to Mrs. Sadik-Ogli's complaint with the EEOC and Fair Labor Standards Bureau, and the Sadik-Oglis' calls to the INS and threats to call the IRS, etc. (T 225-27.)

Notwithstanding, he was concerned about Mr. Sadik-Ogli as a human being. He felt he was self-destructing at this time. He asked Mr. Mesiatsev not to judge Mr. Sadik-Ogli too harshly. Mr. Marke felt Mr. Sadik-Ogli had reacted harshly. In short, Mr. Marke says that he tried to influence moderation in August of 1993. This is the situation which led up to Mr. Marke's withdrawal letter of September 10th. (T 227-28.)

On September 10, 1993, Mr. Marke advised Mr. and Mrs. Sadik-Ogli, by letter, that he was "forced to withdraw from all representation of you." He advised in part that Mr. Mesiatsev had discussed Mrs. Sadik-Ogli's August 5th letter with him and that he advised against payment. He further advised that he could not "support the positions you have taken or the demands you have made" and that he "obviously [is] not able to represent you in any matter." (Bar Ex. 8) (T 82-83, 223-24.) He further returned a present that they gave him. Finally, he advised them that he would set out his reasoning in a separate letter. Id. After Mrs. Sadik-Ogli saw Mr. Marke's September 10th letter, it came to her attention that he was representing Rahim. She stopped pursuing her back pay, overtime compensation claims because, as she says, Mr. Marke was against it but that only Mr. Marke, and no one else from Rahim or Intourist, rejected her claim. (T 166-67.) However, Mr. and Mrs. Sadik-Ogli discussed her claim with lawyer Eaton. She did not pursue these compensation claims because Mr. Eaton "said that it's [a] very small claim." (T 168-69.) She claims that the matters with Intourist affected her health. (T 164.) She regarded Mr. Marke's letter as Rahim's final answer "at that time." (T 168.)

According to Mr. Sadik-Ogli, he regarded Mr. Marke as his lawyer prior to receiving Mr. Marke's September 10th letter. (T 82-84.) Except for a brief time in mid-August, Mr. Marke did not regard him as his client up to that time. (T 224.)

By letter dated September 11, 1993, Mr. Sadik-Ogli responded to Mr. Marke's letter of September 10th. (Bar Ex. 9) (T 84.) In short, he expressed his "disappointment." Id.

On September 15, 1993, Mr. Marke wrote Mr. and Mrs. Sadik-Ogli a letter of explanation. (Bar Ex. 10) (T 85, 229.) He advised them that he could not adopt Mrs. Sadik-Ogli's position with respect to additional compensation. He informed them that Mrs. Sadik-Ogli's personnel file had been removed from the office with her and was returned only after some period of time and that there was "no independent way of corroborating any of the information now contained in the time records." (Bar Ex. 10.) Mr. Marke also responds to some threats about violations of law, Mrs. Sadik-Ogli's request for overtime pay, and her claim to have an employment contract, which apparently Mr. Sadik-Ogli gave to her "a short time before the sale of Rahim to Intourist" and which was unknown to Mr. Mesiatsev. In short, Mr. Marke discredited Mrs. Sadik-Ogli's claims. He also discussed what he classified as other "serious matters." (Bar Ex. 10 at 2-3.) These included equipment which was missing for which Mr. Marke demanded the return of on behalf of Rahim. Id. at 3. Mr. Marke advised as follows:

> By this time, you must understand that Rahim intends to treat the matter very seriously. I certainly would advise Rahim to sue -- although, I obviously could not do it -- to recover the missing items and to insure that you are not using the customer list for any purpose, particularly in violation of the non-competition clause of your employment contract.
>
> In the event the items are not returned before October 1, 1993, I have advised Rahim to suspend payments to you under your employment contract. Then we will let the courts decide who owes what to whom.

(Bar Ex. 10 at 3.)

Mr. Marke regrets sending the September 15th letter. He should not have sent it. He was

personally offended by Mr. Sadik-Ogli's conduct. (T 230.) Mr. Marke agreed with the Referee that he should have told Rahim's principals to consult with their New York lawyers on the legal ramifications of these matters. (T 231.) Mr. Marke allowed his "personal pique at [Mr. Sadik-Ogli] to cloud his judgment." (T 231.) He got carried away and it was indeed unfortunate. (T 231-32.)

Mr. Marke did not recognize the position he was taking as a problem. It was an emotional letter which should not have been sent. Now he recognizes the problem, but not then. He would not do it again. (T 232-33.) Mr. Marke did not fully appreciate how The Bar might view the situation. (T 234.)

As part of the separation from Rahim, Mr. Sadik-Ogli believed he was to be paid a salary through December of 1993. (T 86.) However, Rahim withheld approximately $4,000.00 of salary due because he had been paid for what Rahim believed to be a non-business vacation trip which Mr. Sadik-Ogli pursued in June of 1993 with his son. (T 87-89.) Mr. Sadik-Ogli claimed that he had a pre-planned business trip to Europe and Asia, the purpose of which was to learn and educate staff. (T 86.) He says he paid his son's expenses. (T 87, 100-02.)

By letter dated December 3, 1993, Mr. Marke responded to Mr. Sadik-Ogli, refuting his contentions. (Bar Ex. 11) (T 87-88.) Mr. Sadik-Ogli had received a 10% increase in his salary retroactively applied to January 1, 1993, which is reflected in the letter. Apparently a deduction of $4,044.20 was made as a result of the trip for which vouchers were paid. Id. Mr. Sadik-Ogli says he has not been reluctant to pursue his claim for approximately $4,000.00, but decided not to do so because he always found Mr. Marke objecting. (T 96, 250.) The issue with respect to Mr. Sadik-Ogli's pay increase was resolved in his favor after he resigned from Rahim. (T 99.)

Aside from the $4,000.00, Mr. Sadik-Ogli received the compensation he was entitled to under the Employment Agreement. (T 247-49, 263.) Compare with, p.9, Shareholder Agreement.

In January or February of 1994, Mr. and Mrs. Sadik-Ogli filed a complaint with The Bar. (T 94-96.) After he and his wife were fired, problems accumulated. His wife could not receive a satisfactory solution for her back pay. However, Mr. Sadik-Ogli was pleased "up until the moment when suddenly [his] salary was started to be canceled, and [he] felt that [he] was a victim of some plotting because [he] was on a business trip, not a pleasure trip. So that was the second reason." (T 94.) He also says his contacts with the company were ignored. He felt "defenseless because [they] were trusting that if [they had] a problem, [they] could go to [Mr. Marke]. Now [Mr. Marke] was against [them]." (T 94.)

In May of 1994, Mr. Sadik-Ogli pursued his unemployment compensation claim and appeared before a Referee. (T 92.) He represented himself. Rahim, by and through Mr. Marke, opposed Mr. Sadik-Ogli's claim. (Bar Ex. 17) (T 89-93.) Mr. Sadik-Ogli prevailed on his claim. (T 90-91, 248.) Mr. Marke admits he should not have been involved. (T 242-44.)

Mitigation

The Honorable Catherine Marie Brunson, a Circuit Court Judge from Palm Beach County, testified as a character witness in the case. See Videotape Deposition May 2, 1995. Judge Brunson has been a sitting Circuit Court Judge since August 10, 1994. Prior thereto, she practiced law in Palm Beach County since June of 1976. She was an Assistant County Attorney for her first seven years of practice and, prior to ascending to the Bench, was in solo practice since 1984. Judge Brunson practiced in the areas of guardianship, real property, and probate.

Judge Brunson met Mr. Marke in 1985 or 1986. They were handling guardianship cases

at the time. Judge Brunson had served as a guardian for elderly persons and as an attorney for guardians and frequently on a pro bono basis. Mr. Marke was performing similar work and also frequently on a pro bono basis. Judge Brunson interacted with Mr. Marke regarding these cases. Her observation is that Mr. Marke is a conscientious and dedicated attorney and a caring person. She found him to be completely aboveboard and honest. He was well respected by his peers and known as a hard working, caring, and compassionate attorney and person.

Mr. Marke asked Judge Brunson if she would be a witness on his behalf. She was not aware of the details of The Bar's case but knew that it involved a conflict of interest. The finding of a conflict of interest would not affect her opinion. Her opinion is based on her knowledge of Mr. Marke during the years of her private practice. However, she advised that if the Referee found a conflict of interest, that in her opinion, Mr. Marke may have made an error in judgment. Nonetheless, Judge Brunson considers Mr. Marke to be of good character.

Attorney F. Gregory Barnhart also testified by videotaped deposition. See videotape deposition, April 28, 1995. Mr. Barnhart is a practicing attorney and was admitted to practice law in Florida in 1976. He practices civil trial law. His resume is included in the record.

Mr. Barnhart has held several distinguished positions, including but not limited to, President, in 1994, of the Academy of Florida Trial Lawyers.

Mr. Barnhart met Mr. Marke early in his law career. They had a case together in 1977 and 1978 and he considered Mr. Marke a good lawyer. Since that time, Mr. Marke has referred a number of trial cases to him in fields other than those practiced by Mr. Marke. Mr. Marke worked with him on commercial cases all within the past 16 years. He knows Mr. Marke quite well as a practicing lawyer.

It was Mr. Barnhart's feeling that Mr. Marke's errs on the side of being too justice oriented. He wants to do what is right and is interested in making sure his clients are taken care of. He puts the interest of his client ahead of finances. He has never incurred any problem with Mr. Marke's ethics and, in fact, always found him to be an ethical lawyer, kindly and genuinely interested in his clients' welfare. Mr. Barnhart was familiar with Mr. Marke's reputation in the legal community and said that it was the "highest." He felt that fellow lawyers and judges held him in high esteem -- his work is good.

Mr. Marke did not discuss the merits of the case with Mr. Barnhart although he said that he was very embarrassed and humiliated and felt very bad. A finding of an ethical violation or conflict of interest would not affect his opinion of Mr. Marke.

Mr. Marke was admitted to practice law in Florida on January 31, 1977. (T 180.) He is not admitted to practice in any other jurisdiction. He has been a solo practitioner for the past eight years. Prior to that time, he practiced law with Edwin Lammi, his partner, who was the Finnish counsel. (T 181.) Approximately 70% or more of his practice is devoted to litigation. (T 81-82.) Approximately less than 1% of his practice, "a very fractional amount," is devoted to representing Rahim and Intourist. (T 182.) He has no past disciplinary record. (ROR.)

This case "has been the worst experience of [Mr. Marke's] professional life." (F 32.)

Mr. Marke recounted to the Referee how he once practiced guardianship law. He "practiced it because good people needed help and there were not very many people that were about to do that." It made him feel good to practice guardianship law. Most of his clients were HRS recipients and indigent. He left the practice of guardianship law approximately six years ago because he was, among other reasons, burned out. He was the one, as a guardian, to have

to make the decision "against the Medicaid operation for the senile 89 year olds who had brain cancer . . . ." (F 33.)

During his years of family practice, he never "turned a person away for a lack of money." He has always taken care of his clients. (F 35.)

With respect to the matter at hand, Mr. Marke recognized that after the three agreements were drafted and executed by Rahim and the Sadik-Oglis, he should have received their written consent and acknowledgment that he was the lawyer for one or the other. (F 34.) "[I]t just did not hit [him] so [he] did nothing and when things developed, [he] tried to help people find a resolution that was good for them." (F 35-36.)

Mr. Marke accepted the Referee's finding that he had a duty to Mr. Sadik-Ogli. (F 36.) As he characterized it, when the smoke cleared, Mr. Sadik-Ogli got everything he was supposed to receive. He realizes he cannot blame Mr. Sadik-Ogli for his conflict of interest. But, at the time, he did not recognize it. (F 36-37.) He simply tried to do the right thing about the business that had just been sold to Rahim. He tried to get everybody to the finish line and receive everything that was contemplated by them. (F 37.)

He admits that he:

> was wrong for not having either gotten consent in January [1992] or [he] was wrong in not having bailed out when the thing started going astray in June [1993]. I was wrong for that, I should have bailed out at that point and said to each of them, "both of you need to get your own lawyers."

(F 37.)

While he did not personally believe that his representation of Mr. Sadik-Ogli and his wife continued on a personal level after December of 1991, he acknowledged the Referee's finding

on this basis, and admitted that he "violated The Rules of Discipline and [he] ask[ed] humbly, that the Court not impose a heavy sanction against [him] because [he] was attempting to do the feel good, right thing and in doing what [he] thought was a 'feel good, right thing'." (F 39-40.)

Mr. Marke asked the Referee to give him as light a sanction as possible. He reiterated that he was embarrassed and had suffered with this matter every day physically and mentally. (F 40.)

Mr. Marke further explained that his wife teaches and the core of students, about 89%, are black. He tries to help her with her programs. (F 38-39.) He showed the Referee some pictures of a project he did for his wife and her students. He made a childrens' reading area out of a card board box. (F 38-39.)

SUMMARY OF ARGUMENT

Mr. Marke accepts the Referee's finding of a conflict of interest. He was negligent in not determining whether a conflict of interest existed when he advised and represented Rahim contrary to the interests of Mr. Sadik-Ogli.

A thirty (30) day suspension is not warranted under the facts of this case when viewed in light of the applicable Florida Standards for Imposing Lawyer Sanctions or under existing case law. There was no material harm suffered by Mr. Sadik-Ogli. This should be taken into consideration.

A public reprimand would be fair to the public, fair to Mr. Marke, and severe enough to deter others who might be prone or tempted to become involved in like violations.

ARGUMENT

I.

MR. MARKE IS APPROPRIATELY DISCIPLINED BY A PUBLIC REPRIMAND.

In this appeal, Mr. Marke does not seek to overturn the Referee's Recommendation as to Guilt. (ROR, para. III.) The sole issue before this Court is whether the recommended thirty (30) day suspension (ROR, para. IV) is appropriate given the lack of harm to Mr. Sadik-Ogli, the Factors to be Considered in Imposing Sanctions, and the body of precedent imposing a public reprimand for substantially similar behavior.

The Referee's recommended thirty (30) day suspension, although presumptively correct, is subject to this Court's broad scope of review. The Florida Bar v. Niles, 644 So. 2d 504, 506 (Fla. 1994). This Court does not give the Referee's recommendation of discipline the same deference as findings of fact because, "it is our [this Court's] responsibility to order the appropriate punishment." Id. (citing The Florida Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989)). Stated somewhat differently, the Referee's "recommendation for discipline is persuasive. However, it is ultimately [this Court's] task to determine the appropriate sanction." The Florida Bar v. Reed, 644 So. 2d 1355, 1357 (Fla. 1994).[7] (citation omitted.) To aid this Court in choosing a sanction, Mr. Marke can show that the recommendation is clearly erroneous or is not supported by the evidence. See The Florida Bar v. Lipman, 497 So. 2d 1165, 1168 (Fla. 1986); The Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992). Additionally, Mr. Marke can aid the

[7] "As former Chief Justice Ehrlich has noted, a referee's recommendation 'is a recommendation and nothing more. It does not carry the authority or weight of a finding of fact by the referee." The Florida Bar v. Belleville, 591 So. 2d 170, 172 (Fla. 1991) (citing to The Florida Bar v. Bajoczky, 558 So. 2d 1022, 1025 (Fla. 1990).

Court by citing to precedent illustrating that a public reprimand is "fair to the public . . . fair to the attorney . . . [and] severe enough to deter others [from] like violations." See The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970); The Florida Bar v. Dubbeld, 594 So. 2d 735, 736 (Fla. 1992). A public reprimand is appropriate for "isolated instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent." The Florida Bar v. Rogers, 583 So. 2d 1379, 1382 (Fla. 1991). (citations omitted.)

A. The Referee's Recommended Thirty (30) Day Suspension is Clearly Erroneous

When the Referee made his recommendation of discipline, he was necessarily guided by the Supreme Court's Factors to be Considered in Imposing Sanctions (adopted Jan. 1, 1987), which informed him that:

> Public reprimand is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Standard 4.33, Factors to be Considered in Imposing Sanctions (adopted Jan. 1, 1987). (emphasis added).[8] Likewise, the Referee was guided by Standard 4.32, which informed him that:

> 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.

Standard 4.32, Factors to be Considered in Imposing Sanctions (adopted Jan. 1, 1987). (emphasis

[8] Additionally, Standard 4.34 provides that an "[a]dmonishment is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interest, or whether the representation will adversely affect another client, and causes little or no injury or potential injury to a client." Standard 4.34, Factors to be Considered in Imposing Sanctions (adopted Jan. 1, 1987).

added). See generally The Florida Bar v. Wasserman, 20 Fla. L. Weekly S183, S184 (Fla. April 20, 1995) (comparing similar standards). The language of these two Standards is substantially similar. For example, the Referee could have followed either Standard whether or not he found that Mr. Marke's clients suffered actual or potential injury. The difference between the Standards appears to turn on whether Mr. Marke's behavior was negligent or intentional. Compare Standard 4.32 ("appropriate when a lawyer knows of a conflict") with Standard 4.33 ("appropriate when a lawyer is negligent"). The Referee did not choose a discipline based on whether Mr. Marke acted negligently or with intent. Instead, the Referee chose suspension instead of reprimand because "[a]ny lesser discipline . . . would not sufficiently protect the public and have the necessary deterrent effect." (ROR, para. IV.) Other factors enumerated in the Standards include:

> (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors.

Standard 3.0.

Mr. Marke accepts the Referee's finding and ultimate conclusion that a conflict of interest existed by virtue of his representation of Rahim whose interests were adverse to Mr. Sadik-Ogli. However, 30-day suspension is not an appropriate form of discipline under the facts of this case. It is respectfully submitted that Mr. Sadik-Ogli did not suffer any material harm as a result of Mr. Marke's actions in representing Rahim. It is further submitted that Mr. Marke did not intentionally and knowingly violate the conflict of interest rules regulating The Florida Bar. To this end, a public reprimand is more than adequate to satisfy the primary purposes of disciplining members of The Florida Bar.

Mr. Marke represented Mr. and Mrs. Sadik-Ogli and Rahim through and including the effective date of Intourist's purchase of 75% of their stock which occurred on January 1, 1992. For one and one-half years thereafter, Mr. Marke wrote one letter on behalf of Rahim at Mr. Sadik-Ogli's request. Mr. Marke represented the interests of Rahim and did not perform additional work for the Sadik-Ogli's. While Mr. Sadik-Ogli testified he thought Mr. Marke was his personal lawyer throughout this period of time, Mr. Marke did not perceive it to be so. He thought his former representation of Mr. Sadik-Ogli ended at the consummation of the deal in December of 1991.

Mr. Marke now realizes that at the first sign or hint of trouble which began brewing in June of 1993, he should have advised Mr. Sadik-Ogli and the controlling interests of Rahim to seek separate counsel. Hindsight is usually 20/20 and this case is no different.

This case is also about the wounded feelings and ego of Mr. Sadik-Ogli. The record bears a fair inference that he was an astute business man. He sold his business for what appears to be a lot of money and he received the benefit of his bargain including being paid, except for a disputed $4,000.00 vacation/business trip, his salary for the expired term of his employment, including a retroactive pay raise. In fact, Mr. Sadik-Ogli asked Mr. Marke if he could be terminated and he was.[9] And, this request was made after Mr. Sadik-Ogli was informed that Mr. Mesiatsev would be in charge and after he sold his remaining shares to Rahim. Mr. Sadik-Ogli also knew that Mr. Mesiatsev's termination letter reflected Mr. Marke's "unmistakable style." What he did not know at the time was that a draft of the proposed letter had been written on Mr.

[9] In fact, Mr. Sadik-Ogli left the country after he received the June notifications, returned on July 19th, asked to be terminated on July 20th, and was actually terminated the next day. He suffered no actual harm as a result of being second in command.

Marke's stationery. However, even though Mr. Sadik-Ogli knew that the termination letter was written in Mr. Marke's "unmistakable style," he could not have been that disappointed with Mr. Marke because he asked him to perform other legal services in his behalf in August of 1993 after he was terminated.

The Referee, adopting The Bar's view, found two aggravating circumstances -- a pattern of misconduct and Mr. Marke's substantial experience in the practice of law. He found only one mitigating factor, i.e., Mr. Marke's absence of a prior disciplinary record. But, it is respectfully submitted that Mr. Marke did not intentionally and knowingly violate the conflict of interest rules. If he knew then what he now knows, the points of conflict would not have occurred. Also, Mr. Marke acknowledges that had he recognized the conflict, he "would have bailed out on everybody." (T 200, 237-39.)

Another factor considered by the Referee was his finding that Mr. Marke failed to disclose his representation of Rahim in June of 1993. It is clear that Mr. Sadik-Ogli, on behalf of Rahim, asked Mr. Marke to assist him one time after the deal (and prior to June of 1993) with Rahim was consummated in December of 1991. Notwithstanding, Mr. Sadik-Ogli believed Mr. Marke to be his personal lawyer. But, Mr. and Mrs. Sadik-Ogli also knew that Mr. Marke had been and was Rahim's counsel at the time. Unfortunately for Mr. Marke, as he now understand the case to be, he should have advised Mr. Sadik-Ogli of his status.

Mr. Marke does not claim that Mr. Sadik-Ogli is responsible for the conflict of interest. He accepts the blame especially for representing Rahim during the unemployment compensation hearing. But what he does suggest, however, is that he did not recognize a conflict of interest to exist. Rather, he tried to give both parties the best advice he could and, in fact, tried to give

Mr. and Mrs. Sadik-Ogli the best human advice he could. Mr. Marke's remorse for his actions should be considered in mitigation. In the last analysis, a public reprimand would be fair to the public, fair to Mr. Marke, and severe enough to deter others who might be prone or tempted to become involved in like violations.

B. In Prior Supreme Court Precedent involving Behavior Substantially Similar to Mr. Marke's Behavior, a Public Reprimand was Found to be "Fair to the public . . . fair to the attorney . . . [and] severe enough to deter others [from] like violations."

This Court, although guided by the Factors to be Considered in Imposing Sanctions, strives to achieve three purposes when imposing disciplinary judgments:

> [F]irst, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer; second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Niles, 644 So. 2d at 507 (citing The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983) and Pahules, 233 So. 2d at 132).

To the extent that Mr. Sadik-Ogli was a former client of Mr. Marke while Mr. Marke represented Rahim, a public reprimand is appropriate. This Court has generally imposed public reprimands, in lieu of other discipline, for the successive representation of adverse clients. For example, in The Florida Bar v. Ethier, 261 So. 2d 817 (Fla. 1972), Ethier drafted a separation and property settlement agreement for the wife who would not agree to it. Ethier filed a divorce complaint on behalf of the wife. No divorce proceeding was filed. Ethier did not withdraw nor was he dismissed by his client. Ethier had previously received $90.00 on account from the husband for tentatively initiating a divorce action against the wife. This was Ethier's second violation of the rule against representing adverse clients, because he had already received a

private reprimand for similar conduct.[10] Nevertheless, this Court rejected The Bar's request for "more stringent penalties," stating that "[w]e are satisfied that the referee's recommendation of a public reprimand will suffice here." Id. at 817. (citation omitted.) Other jurisdictions have agreed that a public reprimand is the appropriate sanction for successive representation of adverse clients. E.g., In re Brandsness, 702 P.2d 1098 (Or. 1985) (ordering a public reprimand for representing the husband in a dissolution proceeding when the wife was a former client).

Likewise, this Court imposed public reprimands for the concurrent representation of adverse clients. For example, in The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983), McKenzie "accepted a $1,000 retainer from an heir to an estate *and* accepted appointment as attorney for the personal representative of the same estate." Id. This Court rejected the Referee's report and instead found McKenzie guilty of dual representation. For this, a public reprimand was appropriate. Id. at 934.[11] To the extent that Mr. Sadik-Olgi was a current client of Mr. Marke while Mr. Marke represented Rahim, a public reprimand in this case is likewise appropriate.

A public reprimand is the proper discipline for representing adverse interests, either successively or concurrently, while serving the role of corporate counsel. In The Florida Bar v. Stone, 538 So. 2d 460 (Fla. 1989), this Court publicly reprimanded an attorney who incorporated

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[10] Ethier had received a private reprimand for similar conduct, yet Mr. Marke has never before been disciplined. (ROR, para. V.)

[11] One case, however, yields a different result. See The Florida Bar v. Gattegno, 509 So. 2d 927 (Fla. 1987) (publicly reprimanding, and placing on probation, an attorney who admitted he simultaneously represented both parties to a loan agreement). Gattegno, however, is distinguishable, because it involves this Court in its role of approving a stipulated consent judgment. See Id.

a business owned by Lange and Chadwick, but then defended Chick (who wanted to purchase all of stock or Chadwick's stock) against a suit brought by Lange against Chick and the business. This Court accepted part of the referee's findings of fact in aggravation, to wit:

> . . . He has engaged in what amounts to dual representation with conflicting interests. In addition, he has represented clients in this case with whom he had close personal relationships, giving rise to the probability that he was placing his own interests in conflict. He seems to be unable to recognize the severity of the conflicts which arose during his representation of the various parties in the matter.

Id. at 463. As a public reprimand was appropriate for the behavior of the corporate counsel in Stone, a public reprimand is appropriate in this case as well. Compare with In Re Banks, 584 P.2d 284, 1 ALR 4th 1124 (Or. 1978). In In Re Banks, a disciplinary proceeding was brought against two partners in a law firm which had represented a family-owned corporation at the time the corporation entered into an agreement hiring its founding shareholder as president. The Court held in part that at the time of the drawing of the agreement, the attorneys were also acting as the shareholder's counsel and therefore the attorneys' representation of the corporation several years later in a dispute with the shareholder over the application of the employment contract constituted unethical conduct warranting a reprimand of both attorneys. The Court added that the conduct of one of the attorneys who continued to represent the corporation after the president had lost control and at a time when his interests and those of the corporation's new board were opposed was also improper conduct warranting a reprimand of that attorney. See also David B. Harrison, Annot., "Propriety of Attorney who has Represented Corporation Acting for Corporation in Controversy with Officer, Director, or Stockholder", 1 ALR 4th 1124.

An aggravating factor in this case is Mr. Marke's behavior in aiding Rahim during the unemployment compensation appeal brought by Mr. Sadik-Ogli. Nevertheless, even with this

aggravating factor, a public reprimand is the appropriate sanction. In The Florida Bar v. Milin, 502 So. 2d 900 (Fla. 1987), Milin first represented the employee who prevailed in an unemployment compensation suit. Thereafter, the employer filed a complaint against the employee with the Department of Professional Regulation. The complaint was dismissed. The employee sued the employer and another for defamation and malicious prosecution. Milin filed an answer on behalf of the employer and one of its employees. This Court imposed a public reprimand on Milin based upon this conduct as reflected in the uncontested referee's report.

C. Foreign Case Law, Which May have Guided the Referee to Recommend Suspension, is Inapplicable to Mr. Marke's Circumstances

The Record contains a copy of what appears to be an annotated version of Florida's Standards for Imposing Lawyer Sanctions, approved Nov. 1986, updated Feb. 1994, Factors to be Considered in Imposing Sanctions at 50-51. This annotation cites to, inter alia, three reported cases: Kansas v. Callahan, 652 P.2d 708 (Kan. 1982) (indefinite suspension); In re Krakauer, 404 A.2d 1137 (N.J. 1979) (one-year suspension); and In re LaPinska, 381 N.E.2d 700 (Ill. 1987) (one-year suspension). These cases do not support a conclusion that Mr. Marke should be suspended, because the facts of these cases make their results inapplicable to Mr. Marke's circumstances.

In Kansas v. Callahan, 652 P.2d 708 (Kan. 1982) (indefinite suspension), Callahan, believing that "he represented both parties as a scrivener to draw the papers and close the sale only after the terms of the purchase agreement had been negotiated between the parties", drafted an agreement leaving the selling party with no foreclosable interest in the sale property. For several years before and after the sale, Callahan was the buyer's personal attorney and co-owner with him of a corporation engaged in buying and selling farms and other real property. This was

not disclosed to the buyer. Id. at 710. When the buyer defaulted, Callahan advised the seller not to "foreclose", and only eventually informed the seller that she had no security interest, or mortgage, in the real estate and only held a promissory note. Id.

This case is distinguishable because it involved fraud and deceit. In Mr. Marke's case, the advice Mr. Marke rendered to Rahim was adverse to his client, but was not fraudulent. In Callahan, the attorney in part acted fraudulently in representing to the seller that a foreclosable lien existed. Id. at 713 ("His delay in apprising the Fultons that they had no foreclosable interest was less than an honest representation."). Mr. Marke, in assisting Rahim with its decision to terminate the employment and advising Mr. Sadik-Ogli not to resist the termination, which he asked for, made an honest representation to both. The attorney in Callahan, however, disadvantaged one client by alleging that the client had a foreclosable interest when in fact the attorney took no steps to create such an interest. Both of Mr. Marke's clients were given an agreement which embodied their intent; yet one of the Callahan attorney's clients did not get what he bargained for. While Mr. Marke in his continuing representation of Rahim may have taken positions adverse to Mr. Sadik-Ogli, the Callahan attorney acted to the detriment of one client throughout the transaction, and lied to that client to conceal his wrongdoing.

In In re Krakauer, 404 A.2d 1137 (N.J. 1979) (one-year suspension) the de la Fuentes purchased a restaurant business from a corporation owned by Lipari. Krakauer represented Lipari and the de la Fuentes were represented by other counsel. Id. at 1138. Subsequently, a fire substantially destroyed the restaurant premises. The de la Fuentes communicated with Krakauer and wanted him to act for them in settling the fire loss. The de la Fuentes needed financial assistance in order to reconstruct the burned building. Krakauer agreed to negotiate the necessary

mortgage loan for a 10% commission. While not in writing, he understood that the commission would become payable only if the loan were to be arranged through some outside source. Id. at 1139. Meanwhile, the de la Fuentes and two other families were negotiating a kind of joint venture. Each family made initial payment from which Krakauer received a portion as legal fees. At the same time, Krakauer received checks from the insurer totaling $30,000 which were circulated for endorsement and, upon their return, were deposited into his trust account. He drew from them in order to pay certain expenses incurred in reconstructing the property. Id.

Krakauer then paid his own firm $5,000 from these funds allegedly representing his fee for procuring the necessary financing. However, he had not at that time arranged for outside financing and in fact never did. The de la Fuentes, who became disenchanted with Krakauer, sought an accounting. The Disciplinary Review Board decided that all the expenditures in the statement were justified, "but also concluded that at that time [Krakauer] had every intention of keeping the $5,000 commission he had taken but not earned." Id. at 1139.

At the time of the closing date of the sale of the property, the joint venture was no longer viable. Krakauer "had been unable to obtain outside financing but, unbeknownst to the de la Fuentes, he had arranged with Lipari [his former client] to accept a $53,000 six and one-half year purchase money mortgage with interest at 18%. For this Lipari received a premium of $1,500, although [Krakauer] did not reveal this until his clients had retained new counsel." Id. at 1139.

The closing took place. The mortgage was drawn in favor of a corporation owned by Lipari unbeknownst to the de la Fuentes. Id. at 1140. They thought it was an outside lender and, accordingly, that Krakauer had earned his $5,000 commission. Id.

Krakauer also showed on his statement for services and disbursements the disbursement

of $560.00 for title insurance premium and title work. Id. The District Ethic's Committee and the Disciplinary Review Board concluded that "in representing the de la Fuentes in connection with their purchase of the property from Lipari, [Krakauer] did not render the free and loyal representation to which a client is entitled." Id. at 1140. Further, the Committee and Board concluded that Krakauer "intended to retain the $5,000 commission" and that he "acted unethically in his endeavor to collect as an alleged disbursement a charge for a title search which had never been ordered for his client . . . ." Id. at 1140. In light of these findings, the Court suspended Krakauer from the practice of law for a period of one year and until the further order of the Court. Id. at 1141.

This case is distinguishable because it involved theft. The attorney in Krakauer, unlike Mr. Marke, stole from his clients by retaining an unearned commission and attempting to collect for a title search which has not been ordered for the client. Id. at 1140. Additionally, the case involved multiple instances of incompetent representation, as well as deliberate and calculated behavior designed to benefit one client at the expense of the other. Most importantly, however, the case involved inappropriate financial gain for the accused attorney. No one alleged that Mr. Marke was stealing money from a client, nor can it be said that Mr. Marke was motivated by personal financial gain. Further, and importantly, Mr. Marke did not believe that Mr. Sadik-Ogli was his client during the summer of 1993 except for that short period of time in August when Mr. Sadik-Ogli asked him to perform additional tasks. Mr. Marke believed that he was Rahim's lawyer, not Mr. Sadik-Ogli's, which caused him not to perceive a conflict of interest existed until in or around September when he formally terminated his relationship with the Sadik-Oglis. This is not a case of a knowing and intentional breach of lawyer ethics as recounted above. In

retrospect, Mr. Marke acknowledges had he perceived a real conflict, he "would have bailed out on everybody." (T 200, 237-39.) See also In re Banks, 584 P.2d at 292.

In In re LaPinska, 381 N.E.2d 700 (Ill. 1987) (one-year suspension), LaPinska maintained a private practice while serving as City Attorney. In his private role, he performed a title search on behalf of a seller of real estate. Later, the buyers, apparently irate because they purchased a 70-foot rather than an 80-foot lot, filed a zoning violation complaint with LaPinska (as City Attorney) against the seller. The complaint involved the same parcel as the title search. On behalf of the city, LaPinska recommended a minimum fine for the seller. When the buyers later protested and demanded further prosecution, LaPinska agreed to privately represent the buyers for a contingent fee in a civil action for breach of contract and fraud against the Seller. At the next city council meeting, the buyer wanted to file daily ordinance violations against the seller and LaPinska, present at the meeting and the one who would be responsible for prosecuting the quasi-criminal charges, did not inform the city officials that he also represented the buyer in a civil action. During settlement negotiations, the seller was requested but refused to sign a release stating that LaPinska 'in no way used or threatened the use of his position as attorney for the City of Princeton in effecting a settlement . . . .' Id. at 702. The seller, instead of signing the document, brought a motion containing, in part, an ethics complaint.

This case is distinguishable because it involves a public officer who accepted private employment with respect to matters in which he had substantial responsibility as a public officer. The court makes continual references to a heightened duty for public officers. E.g., Id. at 703 ("A public officer owes an undivided duty to the public . . ."); Id. at 704 ("[I]f a potential conflict is fully disclosed to all affected parties, the parties may consent to such representation [b]ut this

escape hatch is not available to an attorney representing a municipality and a private client."); Id. at 705 ("dual representation is particularly troublesome where one of the clients is a governmental body."). The fact that LaPinska represented the city was a critical factor in choosing the penalty. Id.

D. Other Florida Case Law Relied Upon by The Florida Bar is Inapplicable to the Mr. Marke's Circumstances

Before the Referee, The Florida Bar relied upon case law to support its argument for suspension, most notably: The Florida Bar v. Mastrilli, 614 So. 2d 1081 (Fla. 1993) (six-month 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). See The Bar's Trial Memorandum at 9-10. Upon analysis, these cases do not support a recommendation that Mr. Marke be suspended.

In The Florida Bar v. Mastrilli, Mastrilli undertook the representation of two women allegedly injured in an accident while one was the driver and one was the passenger in the same vehicle. Mastrilli issued demand letters on behalf of the passenger against the insurance carrier of the driver on grounds the latter had been negligent, resulting in alleged injuries to the passenger totaling $100,000. The driver's insurance policy would cover only $50,000 in a loss. The insurance company denied payment and Mastrilli filed suit against the driver on behalf of the passenger. He filed suit against his own client in the same matter for which he had been retained. The driver terminated Mastrilli's employment when she received the complaint and learned she had been sued by her own attorney. The passenger's lawsuit eventually was settled for $20,000 within the limits of liability. Mastrilli showed no remorse for his actions. This

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