IN THE SUPREME COURT OF FLORIDA

097

THE FLORIDA BAR,
Petitioner,

CASE NO. 85,422

v.

TFB NOS. 94-10,671(12C)
94-11,328(12C)

DANIEL FOSTER JOY,
Respondent.

5/20

FILED
SID J. WHITE
MAY 6 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

THE FLORIDA BAR'S REPLY BRIEF AND ANSWER BRIEF TO CROSS PETITIONER'S INITIAL BRIEF

SUSAN R. GRALLA Zemankiewicz
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 747130

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES REGULATING THE FLORIDA BAR

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The Respondent, DANIEL FOSTER JOY, will be referred to as "Respondent". "T" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. 85,422 held on August 7-8, 1995. "T-2" will refer to the transcript of the disciplinary hearing held on this case on January 8, 1996. "TFB Exh" refers to exhibits presented by The Florida Bar at the final hearing. "Resp. Exh" refers to exhibits presented by Respondent, Daniel Foster Joy.

The Report of Referee dated January 12, 1996, will be referred to as "RR". "Standards" will refer to the Florida Standards Imposing Lawyer Sanctions. "Rule or "Rules" will refer to the Rules Regulating The Florida Bar.

The Bar's Initial Brief will be referred to as "IB". Respondent's Answer Brief on Petition and Initial Brief on Cross Petition for Review For Referee's Report will be referred to as "AB/IB".

STATEMENTS OF THE FACTS AND CASE

CASE NO. 85,422

The Florida Bar will rely on its rendition of the facts as set forth in its Initial Brief which refutes or differs from some of the facts set forth in the Respondent's Answer Brief and Initial Brief on Cross Petition.

SUMMARY OF THE ARGUMENT

The Respondent challenges the Referee's finding that Respondent engaged in conflicts of interest by representing clients with adverse interests, violated the trust accounting rules when he transferred the settlement funds from his office trust account to a non-attorney account, and misrepresented by omission a material fact when he made a written statement to Mr. Smith that all of the funds had been disbursed.

The Bar argues that the evidence presented was competent and substantial, that such evidence supports the referee's findings, and that the referee's recommendations of guilt are not clearly erroneous.

The clear and convincing evidence in the record supports the referee's conclusion that while representing Morrison Court, Respondent simultaneously represented Morrison Court's minority shareholder, Sam Cohen. Respondent undertook such concurrent representation without first obtaining the consent of Morrison Court's president/director/majority shareholder, Joel Cantor. The referee found that the minority shareholder's interests were directly adverse to the interests of Morrison Court, and therefore, the Respondent violated Rules 4-1.7(a), 4-1.7(b), and 4-1.7(c), Rules Regulating The Florida Bar.

The referee's finding of guilt as to Respondent's violation of the trust accounting rules is fully supported by the clear and convincing evidence in the record. When Respondent transferred the settlement funds from his law office trust account to a non-trust account controlled by a non-lawyer, Respondent had neither the consent nor the approval of his client, Morrison Court, nor that of the other principals, G & O and Midland Risk. Such transfer placed the settlement funds at risk, which violated Respondent's fiduciary duties not only toward his client, but also toward G & O and Midland Risk. Based upon these findings of fact, the referee found the Respondent's conduct to be in violation of Rule 4-1.15(c), Rule 4-1.15(d), and Rule 5-1.1(b).

The clear and convincing evidence supports the referee's conclusion that Respondent's statement to Mr. Smith regarding the transfer of the escrowed funds was only partially true, and was deliberately made with the intent to mislead. The referee found such conduct to constitute a misrepresentation by omission in violation of Rules 4-4.1 and 4-8.4(c).

The referee's findings of fact and recommendations of guilt should be upheld by this Court. However, this Court should reject the referee's recommended discipline of a public reprimand, and instead, should suspend the Respondent from the practice of law for

ninety-one (91) days with proof of rehabilitation required prior to reinstatement. This Court should further require that Respondent attend Ethics School and that he bear The Bar's costs of these proceedings. A ninety-one (91) day suspension is both appropriate and supported by the Florida Standards for Imposing Lawyer Sanctions and prior decisions of this Court.

ARGUMENT I

THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE IN THE RECORD AND SHOULD BE UPHELD.

Petitioner hereby incorporates and adopts by reference the arguments presented in its Initial Brief and supplements as follows:

The Respondent challenges the referee's findings of fact, conclusions of law, and recommended discipline.

A referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support, since the referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). This Court also recognized in The Florida Bar v. Thomas, 582 So. 2d 1177, 1178 (Fla. 1991) that because the referee is in a unique position to assess the credibility of witnesses, his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect. This Court further stated in The Florida Bar v. Neu, 597 So. 2d 266, 268 (Fla. 1992) that in Bar disciplinary proceedings, the party seeking to overturn the referee's findings and recommendations of guilt has the burden of

showing that the referee's report is clearly erroneous or lacking in evidentiary support.

Respondent has failed to sustain his burden of proof. In fact, Respondent has acknowledged in his brief, "that most (but certainly not all) of the findings of fact in the referee's report are correct..." (AB/IB, p. 2). In the instant case, the referee's findings of fact are not erroneous or lacking in evidentiary support. The referee's findings are supported by clear and competent evidence in the record of this case.

ISSUE I: THE REFEREE'S FINDING THAT RESPONDENT ENGAGED IN A CONFLICT OF INTEREST BY SIMULTANEOUSLY REPRESENTING MORRISON COURT AND ITS MINORITY SHAREHOLDER IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE IN THE RECORD AND SHOULD BE UPHELD.

Throughout his brief, Respondent maintains that his position is supported by the clear, convincing and uncontroverted evidence. Respondent's brief, however, fails to adequately challenge any of the evidence upon which the referee relied in issuing his findings. Further, Respondent sets forth no logical argument to support his proposition that his simultaneous representation of both Morrison Court and its minority shareholder, Sam Cohen, regarding the same transaction was not directly adverse.

Respondent appears to contend merely that the referee's findings of fact are erroneous because those findings are contrary

to his testimony, and are based solely on the testimony of Joel Cantor, a witness which the Respondent argues is not credible. This argument completely ignores the fact that The Bar introduced into evidence some thirty-five (35) documentary exhibits supporting its position, as well as, presented the testimony of Thomas A. Smith, Esquire, counsel for G & O, and Sam Cohen, the minority shareholder.

Additionally, Respondent stated in his brief that "The Bar was forced to admit, Joel Cantor was not, and is not, to be believed. (T-211, Bar Counsel)" (IB/AB, p.29). A review of page 211 of the final hearing transcript reveals that Bar Counsel made no such admission. Rather, Bar Counsel was merely stating that the Grievance Committee had believed that Cantor was not telling the truth regarding a single specific allegation. That the Grievance Committee found Cantor to be credible as to his other allegations against the Respondent is evidenced by that committee's probable cause finding. Respondent's brief also contains numerous other misinterpretations of the testimony and evidence presented.

Furthermore, since the referee was in a unique position to assess Cantor's credibility, his judgment regarding that credibility should not be overturned absent clear and convincing evidence that the referee's judgment is incorrect. The Florida Bar

v. Thomas, 532 So. 2d at 1178.

Respondent failed to meet his burden of showing that the Referee's findings that Respondent engaged in a conflict of interest are clearly erroneous or lacking in evidentiary support under The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992).

Respondent alleges a 'threshold inconsistency' in that if the referee could not find a violation of Rules 4-1.13(d) and (e), the referee could not then find a violation of Rules 4-1.7(a), (b), and (c). However, Rules 4-1.13 and 4-1.7 are not dependent upon one another, and as Rule 4-1.13(e) clearly indicates, an attorney's conduct governed by Rule 4-1.13 is subject to the further provisions of Rule 4-1.7. Rule 4-1.7 is the general rule that governs an attorney's conduct as to conflict of interest situations. Rule 4-1.13 is merely a narrower application of the conflict of interest rule.

Respondent argues that "because the law recognizes the distinction between a corporation and the persons that comprise it, the Rules recognize that an attorney can represent both a corporation and its "constituents" even where their respective interests are adverse." (AB/IB, p. 8). Respondent has misinterpreted the rule. Rule 4-1.13(e)provides:

A lawyer representing an organization may also represent

> any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 4-1.7. If the organization's consent to the dual representation is required by Rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. (emphasis added)

Thus, a lawyer is permitted to represent a corporation and its constituents in the same matter when their interests are adverse only upon first obtaining the consent of the clients after consultation and explanation regarding the conflict under Rule 4-1.7 (a), (b), and (c). In the instant case, the only appropriate official of Morrison Court who could have given consent to Respondent's dual representation of Morrison Court and Sam Cohen pursuant to Rules 4-1.7 and 4-1.13 was the sole director, only officer, and majority shareholder of Morrison Court, Joel Cantor.

There is no evidence in the record to indicate that Joel Cantor ever consented to Respondent's concurrent representation of Morrison Court and Sam Cohen, Morrison Court's minority shareholder, regarding the insurance settlement proceeds. Joel Cantor did not have the opportunity to consent because neither Cohen nor the Respondent disclosed the representation to him. (RR, p. 19).

In prior case law concerning a conflict of interest where at

least one client was a corporation, this Court has found attorneys guilty of violating Rule 4-1.7 without necessarily finding a violation of Rule 4-1.13. For instance, in The Florida Bar v. Marke, 21 Fla. L. Weekly S113 (March 1996), Marke represented two constituents in forming a corporation. He also represented the constituents on other unrelated matters. When the corporation merged with another corporation, Marke prepared the sale and purchase agreement and the employment and shareholder agreements between the constituents and the newly-formed corporation. Marke indicated that he considered himself to be the constituents' personal attorney, even though he billed the corporation for all of the above legal services. When a dispute later arose concerning the employment agreement, Marke prepared a termination agreement which protected the interests of the corporation even though Marke had previously represented the interests of the individuals. This Court found that Marke violated Rules 4-1.7(a), 4-1.7(b), and Rule 4-1.9(a). This Court did not, however, find that Marke violated Rule 4-1.13.

Respondent contends that he did not engage in a conflict of interest since he did not represent Joel Cantor, but only represented Morrison Court, which interest Respondent suggests was not adverse to Sam Cohen's. While it is recognized by the law that

a corporation is a legal entity that is independent from its constituents, a corporation cannot act on its own. As stated in Rule 4-1.13 (a), a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. The comment to Rule 4-1.13 further states that an organizational client cannot act except through its officers, directors, employees, shareholders, and other constituents.

Joel Cantor was the only person authorized to speak or act for Morrison Court, Inc., as its sole officer, sole director, and majority shareholder. Sam Cohen was a minority shareholder of Morrison Court and was not an officer or director of Morrison Court. Therefore, the best interests of the corporation were those interests as determined by Joel Cantor. Respondent was not permitted under Rule 4-1.13 to substitute his own interpretation of the best interests of his client, Morrison Court, as he did, for those determined by his client's sole officer, sole director, and majority shareholder, Joel Cantor.

The referee's finding of fact that Morrison Court's interests and Sam Cohen's interests were adverse and his recommendation that Respondent is guilty of violating Rules 4-1.7(a), 4-1.7(b), and 4-1.7(c) for engaging in a conflict of interest by concurrently representing Morrison Court and Cohen in the same matter is

supported by clear and convincing evidence in the record and should be upheld.

ISSUE II: THE REFEREE'S FINDING THAT RESPONDENT IMPROPERLY HANDLED MORRISON COURT'S SETTLEMENT FUNDS IN VIOLATION OF THE RULES REGULATING TRUST ACCOUNTS IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE IN THE RECORD AND SHOULD BE UPHELD.

Respondent contends that he transferred Morrison Court's settlement funds into an account wherein Respondent's wife, a non-attorney, was named as "trustee" of a non-existent corporation because he was ethically required to do so to protect Morrison Court's settlement proceeds from its creditors. (IB/AB, p. 27, T., p. 408).

Respondent's claim that he was required to transfer the settlement funds to an account in the name of a non-existent corporation in order to protect the funds from creditors clearly indicates that Respondent was attempting to assist Irwin Cantor in defrauding those creditors, including G & O. Respondent claims that he transferred the funds with Irwin Cantor's approval. At the time the funds were transferred, Irwin Cantor was no longer an officer, shareholder, or director of Morrison Court. Respondent acknowledged that he took direction from Irwin Cantor without Joel Cantor's consent, when Irwin Cantor was not authorized in writing to act for the corporation (T, p. 453).

The record herein clearly indicates that Joel Cantor never instructed Respondent to move the settlement funds out of his trust account into an account controlled by a non-attorney for the benefit of a non-existent corporation. In a memo faxed to Respondent on September 13, 1993, Joel Cantor stated as follows:

> "If we are within the law as you say, why play games with name changes, it just makes us look that much worse down the road." (TFB Exh. #9, T, pp.102-103).

In the final hearing before the referee, Joel Cantor testified that not only did he not approve the transfer, but that he was unaware that the funds had been transferred to an account in the name of Madeline Joy. (T, pp. 103-105).

Respondent claims that Irwin Cantor was a "de facto" officer of Morrison Court, and as such, he had apparent authority over Morrison Court affairs. Respondent maintains that his reliance on Irwin's apparent authority was reasonable (AB/IB, p. 31). The Doctrine of Apparent Authority has no relevancy here since Respondent had specific knowledge of the shareholders and officers of Morrison Court. Thus 'reasonableness' of Respondent's reliance is incomprehensible because Respondent had access to information sufficient to determine whether Irwin Cantor had authority over Morrison Court.

Respondent attempts to justify his improper transfer of the

settlement funds to a non-trust account controlled by a non-attorney by relying on The Florida Bar v. Fitzgerald, 491 So. 2d 547 (Fla. 1986).

Fitzgerald is clearly distinguishable from the instant case. Fitzgerald represented clients after their employee was arrested by the Drug Enforcement Administration. The clients entrusted Fitzgerald with $18,000.00 in cash for safekeeping, and explicitly directed Fitzgerald not to place the funds in an identifiable account, but rather to retain the cash in a safe. Id. at 548. This Court held that there was no impropriety in an attorney safekeeping his clients' funds in other that an identifiable account, if the client so directs. The Fitzgerald Court also strongly urged that any such agreement between the attorney and his client be reduced to writing. Id.

The instant case presents a very different factual situation. Respondent was never explicitly directed by his client, Morrison Court, nor his principals, G & O and Midland Risk, to maintain the escrow funds in any way other than in an identifiable trust account.

In his brief, Respondent engages in a lengthy discussion regarding a mortgagee's rights to the benefits of an insurance policy purchased by the mortgagor. All of these arguments became

moot, however, at the point in time when Respondent, on behalf of Morrison Court, entered into a global settlement agreement with Midland Risk, the RTC and G & O, thereby creating in G & O a contractual claim to the settlement proceeds.

At the September 13, 1993, hearing before the federal district court, Respondent, on behalf of Morrison Court, represented to the court that Morrison Court's claim against Midland Risk had been settled and that the remaining proceeds in his possession were to be divided between Morrison Court and G & O, in amounts to be negotiated in good faith. Respondent also notified the court that, pursuant to the agreement, Midland Risk had paid the RTC its share directly.

Federal jurisdiction in the matter had been based on the RTC's involvement due to its claim to the insurance proceeds as the first mortgagee. Based on Respondent's representation to the court that the RTC's claim had been paid and that good faith negotiations would be carried on to resolve the dispute between Morrison Court and G & O as to the division of the settlement proceeds, the federal district court entered an order dismissing all claims with prejudice, thereby relinquishing federal jurisdiction over the matter. The district court specifically stated that G & O's right to foreclose its mortgage was dismissed without prejudice.

Respondent incorrectly interprets the dismissal to mean that the district court held G & O's claim to be merit less. The federal district court did not rule on the merits of G & O's claim, however, due to the Respondent's representation to the court that a settlement had been reached and that the remaining proceeds would be divided between Morrison Court and G & O in an amount to be agreed upon later. The district court's dismissal with prejudice did not destroy G & O's right to possibly bring an action against Morrison Court and/or Respondent for breach of fiduciary duty, misappropriation, fraud, or misrepresentation regarding the settlement agreement. Respondent was in a fiduciary relationship with Morrison Court and G & O, created through the escrow agreement, and the ruling of the district court did not address Respondent's fiduciary duties.

Respondent also erroneously contends that "the U.S. District Court's Order extinguished his 'escrow' obligations to Midland Risk and G & O". (AB/IB, pp. 25-26). This argument is clearly unsupported by the evidence. Respondent's realization of his continuing position as escrow agent for the settlement funds is evidenced by Respondent's own statement in the letter he sent to Joel Cantor on September 13, 1993, <u>after</u> the district court, had dismissed G & O claim with prejudice. In that letter, Respondent

stated that the steps Cantor proposed were "fraught with risk to me as **escrow agent**" (emphasis added). (TFB Exh. #10).

Respondent would have this Court believe that he was a "nice guy" who was merely attempting to protect the settlement proceeds on behalf of his client, that no one was ultimately injured, that he did not financially gain from the transaction, and therefore, he is not guilty of an ethical violation. In fact, Respondent had a substantial financial interest in the settlement proceeds, and ultimately the firm of Joy & Moran received $ 93,000.00 in legal fees and costs from the settlement funds. Respondent also retained the $266.57 in interest earned on the settlement funds while being held in the interest-bearing account in the name of Madeline Joy, Trustee. (T, pp. 465-467).

In The Florida Bar v. McClosky, 130 So. 2d 596 (Fla. 1961), McClosky was appointed as escrow agent whereby he was to receive and hold in escrow $ 35,000.00 that was to be disbursed in accordance with the terms of an agreement between the interest holders. After receiving the funds, McClosky knowingly and wrongfully disbursed and paid out the total sum of $ 35,000.00 contrary to and in violation of the terms of the agreement. The referee found him to have improperly and without authority disbursed moneys which had been entrusted to him as escrow agent

and recommended a suspension for six (6) months. On review, this Court held that a suspension for six (6) months was justified, even though McClosky did not financially gain from the disbursement and had done his best to make the injured party whole. This Court further said,

> ".....In the abuse of a trust like that involved here the damage a lawyer does to his profession in the eye of the public is immeasurable. Litigants to whom he is obligated are embarrassed and inconvenienced. In fact, such professional transgressions affect so many factors, it is impossible to measure their outreach in damages either to the public of those personally affected....."

Id. at 599. The case at bar and McClosky can be analogized in many ways. In both, the respondents were acting as escrow agents who were entrusted with a certain sum of money that was to be disbursed only according to the terms of the agreement. The McClosky opinion does not indicate whether McClosky had a record of prior discipline. Respondent had no prior disciplinary record.

The facts and conduct in McClosky could be distinguished from that of Respondent because the amount of money that was entrusted to Respondent was much more than the escrow amount in McClosky. Importantly, McClosky admitted that his conduct was in violation of the terms of the escrow agreement. However, Respondent to this date denies any wrong doing and adamantly maintains that his

conduct comes within the purview of the Rules of Professional Conduct.

The instant case and McClosky also differ with respect to aggravation. The referee in McClosky did not find any aggravating factors to be applicable. While the referee in the instant case did not list any aggravating or mitigating factors, other than lack of a prior disciplinary record, in his report of referee, as discussed in the Initial Brief of The Florida Bar, there are at least three aggravating factors present in the instant case. In McClosky the attorney engaged in a single misconduct, namely, violating his escrow duties. In the instant case, however, Respondent further engaged in conduct involving conflict of interest and misrepresentation by omission.

Finally, Respondent argues that this Court has never sanctioned an attorney for placing a client's funds at potential risk, such that the client's funds "could have been" misappropriated. (AB/IB, p. 33). Standard 4.12, Florida Standards for Imposing Lawyer Sanctions, regarding failure to preserve a client's property, clearly states that absent aggravating or mitigating factors, ..."suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client."

(emphasis added).

If as Respondent contends, an attorney may not be sanctioned for placing client funds in a position where such funds could be misappropriated, the language regarding potential injury to a client would be unnecessary.

The referee's recommendation that Respondent be found guilty of violating Rules 4-1.15 (d) and 5-1.1 (b) for improperly transferring the settlement funds into an interest-bearing account in a non-lawyer's name as trustee for a non-existent corporation without the consent or knowledge of his client or principals is supported by clear and convincing evidence in the record and should be upheld.

ISSUE III: THE REFEREE'S FINDING THAT RESPONDENT WAS GUILTY OF MISREPRESENTATION BY OMISSION OF A MATERIAL FACT IN VIOLATION OF RULES 4-4.1 AND 4-8.4(C) IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE IN THE RECORD AND SHOULD BE UPHELD.

Respondent contends that Mr. Smith, counsel for G & O, unilaterally assumed that Respondent had distributed the settlement funds directly to the Cantors. (AB/IB, p. 35). In support of the contention that impressions and assumptions, no matter how sincerely felt, cannot support a finding of fraudulent conduct, Respondent cites Iden v. Kasden, 609 So. 2d 54 (Fla. 3rd DCA 1993), *rev. denied*, 620 So. 2d 761 (Fla. 1993). However Iden is

distinguishable from the instant case. The contract in Iden distinctly provided that the attorneys were to act as escrow agents for only $ 40,000.00 portion of a $ 200,000.00 deposit. Also, in Iden, there were no written or oral misrepresentations from the attorneys/escrow agents to the seller that would have caused him to assume that any of the funds in excess of the $ 40, 000.00 were being held in escrow by the buyer's attorneys. However, in the instant case, as the evidence clearly demonstrated, through both written and verbal communications to Mr. Smith, Respondent made half-truth statements which resulted in misrepresentations by omission of a material fact regarding the disbursement of the insurance proceeds. (TFB. Exh. #11). While Respondent told a partial truth that the escrow funds had been disbursed from his trust account, Respondent omitted to disclose to Mr. Smith that the funds had been disbursed by deposit into an account in the name of a non-attorney, Respondent's wife, for the benefit of a non-existent corporation. Respondent made the statements to Smith knowing that the statements were not completely candid with the intent to cause Smith to believe that the proceeds had been disbursed to the Cantors. When Respondent received correspondence from Smith (TFB. Exh. #24) indicating that Smith understood the statement to mean that the funds had been disbursed to Morrison

Court, Respondent never took steps to correct Smith's misunderstanding.

Respondent also contends that his statement to Smith was a literally a true statement. This Court has previously recognized the misconduct of misrepresentation by omission. In The Florida Bar v. Webster, 647 So. 2d 816, 817 (Fla. 1994), this Court denied Webster's petition for reinstatement to practice law in Florida because Webster had "engaged in misrepresentation by omission" in his application for admission to the bars of Micronesia and Palau. Also, in Wadhams v. BOCC, Sarasota County, 567 So. 2d 414 (Fla. 1990), this Court found that a certain proposal of the County was deceptive because it failed to contain an explanatory statement which would have informed the public the chief purpose of the proposed amendment. This Court stated:

> ".....although it (proposal) contains an absolutely true statement, it omits to state a material fact necessary in order to make the statement made not misleading."

Id. at 416. Likewise, when Respondent made the statement that, "I can confirm to you that the funds held in my Trust Account have been disbursed from my Trust Account", Respondent told only the partial truth and failed to give an explanation that would have prevented Mr. Smith's misunderstanding.

Respondent also contends that absent a fiduciary duty there is no obligation on one party to a transaction to disclose anything to another party to the same transaction. As the uncontroverted facts clearly demonstrate, Respondent had accepted a fiduciary duty that arose from the escrow arrangement entered into by his client, Morrison Court, as well as Midland Risk and G & O.

The Referee's finding that Respondent misrepresented by omission a material fact in violation of Rules 4-4.1 and 4-8.4(c) is supported by clear and convincing evidence in the record and should be upheld.

ARGUMENT II

A NINETY-ONE DAY SUSPENSION IS THE APPROPRIATE SANCTION FOR THE RESPONDENT'S MULTIPLE MISCONDUCT.

Petitioner hereby incorporates and adopts by reference the arguments presented in its Initial Brief and supplements as follows:

The referee found the Respondent guilty of multiple ethical violations. The referee found that Respondent breached his ethical duty when he engaged in a conflict of interest by simultaneously representing a client with interests directly adverse to those of another client. (RR, pp. 17-18).

The referee found that Respondent breached his ethical and fiduciary duties when he placed escrowed funds entrusted to him at risk by transferring those funds, without the express authorization of his principals, from his law firm trust account to another interest-bearing account in the name of a non-attorney as "trustee" of a non-existent trust, for the benefit of a non-existent corporation. (RR, p. 21).

The referee found that Respondent told a half-truth when he represented to counsel for one of the principals that the funds held in his law firm trust account had been disbursed from that account without disclosing that the funds had been deposited into

an interest-bearing account in the name of his wife. The referee further found that Respondent had intended for the counsel to misinterpret his statement to mean that he had disbursed the funds directly to his client, and that Respondent failed to take any action to correct that misunderstanding. (RR, pp. 22-23). The referee found such conduct to constitute a misrepresentation by omission in violation of Rules 4-4.1 and 4-8.4(c), Rules Regulating The Florida Bar. (RR, pp. 23).

The referee recommended to this Court that Respondent receive a public reprimand and that he bear the costs of these proceedings. (RR, p. 24). At the sanction hearing, the referee also stated that "this is a case, even though it is not permitted, where a fine may be appropriate....." (T2, p. 61).

It is The Bar's position, as argued in its Initial Brief, that Respondent's multiple misconduct, coupled with the seriousness of that misconduct, and the aggravating factors, warrants a suspension of no less than ninety-one days.

Respondent takes the position that an admonishment would be the appropriate sanction, but a public reprimand would be more appropriate than a suspension. (AB/IB, p. 48).

An admonishment is clearly inappropriate in the instant case under Rule 3-5.1(b)(1)(E) since Respondent's misconduct included

dishonesty, misrepresentation, deceit, or fraud.

The relevant case law and Florida Standards for Imposing Lawyer Sanctions also justify a suspension rather than a public reprimand.

This Court's review of a referee's recommendation as to disciplinary measure is broader than that afforded to factual findings because the ultimate responsibility to order an appropriate sanction rests with this Court. The Florida Bar v. Rue, 643 So. 2d 1080, 1082 (Fla. 1994).

In its Initial Brief, The Bar relied on The Florida Bar v. Sofo, 21 Fla. L. Weekly S36 (January 1996), wherein this Court suspended Sofo for ninety-one days with reinstatement conditioned upon proof of rehabilitation, and that Sofo take and pass the Multistate Professional Responsibility Examination. Respondent attempts to distinguish Sofo by maintaining that unlike Sofo, Respondent's actions were not motivated by his own personal financial interests, and that Respondent did not own an interest in Morrison Court. (AB/IB, pp. 39-40).

All of Respondent's arguments are unsupported by the clear and convincing evidence in the record, and by the referee's extensive findings of fact regarding Respondent's conflict of interest and his financial interest in the settlement funds. While the referee

did not find Respondent to have actually acquired an ownership interest in Morrison Court, the evidence shows that Respondent at least temporarily, acquired legal title to a twenty percent (20%) interest in Morrison Court.

Respondent also argues that The Florida Bar v. Pahules, 334 So. 2d 23 (Fla. 1976) is inapplicable since Respondent did not have an "irreconcilable" conflict of interest, and he did not personally profit from his actions on behalf of Morrison Court and Mr. Cohen. (AB/IB, pp. 40-41). These conclusions are also unsupported by the record herein and by the referee's findings of fact.

Respondent notes in his brief that although this Court found a ninety-day suspension to be the appropriate discipline for Pahules' misconduct, "Justice Adkins thought a public reprimand was the appropriate discipline." (AB/IB. p. 41).

Respondent failed to also mention that Justice Adkins' opinion was based in misconduct significantly less egregious than that exhibited by the Respondent. Justice Adkins' concurring opinion in Pahules states as follows:

> "I concur in the finding of misconduct, but I would give a public reprimand as penalty, as there was no fraud, dishonesty, or misrepresentation." Id. at 26. (emphasis added).

Respondent attempts to distinguish The Florida Bar v.

Mastrilli, 614 So. 2d 1081 (Fla. 1993) by arguing that, "unlike Mastrilli, Mr. Joy knew a conflict when he saw one," and that, "unlike Mastrilli, Mr. Joy did not create the conflict." Respondent also maintains that he did not "represent clients with directly adverse interests" since the interests of his clients were "aligned." (AB/IB, pp. 41-42). Such arguments are unsupported by any of the evidence presented. Respondent still refuses to admit that a conflict of interest existed between Morrison Court, the sole director and shareholder, Joel Cantor, and the minority shareholder, Mr. Cohen, even though he opines numerous times in his testimony before the referee and in his Answer Brief that Cantor had designs on the settlement proceeds which belonged, at least partially, to Cohen.

Respondent contends that, unlike Mastrilli, he did not create the conflict. This contention reveals that Respondent had little understanding of the seriousness of his misconduct herein. It was Respondent who agreed to represent Cohen in the same transaction for which he already represented Morrison Court through the directions of its president, sole director, and majority shareholder, Joel Cantor. It was Respondent who failed to disclose the dual representation to Cantor. It was Respondent who provided Cohen with "blind copies" of letters and memoranda to Cantor. It

was Respondent who proposed to Cohen that he transfer title to his Morrison Court stock to Respondent. It was Respondent who misrepresented to Cantor that he had acquired an actual ownership interest in the corporation.

In imposing a six (6) month suspension on Mastrilli, this Court held that Mastrilli either knew or should have known of the conflict. Mastrilli at 1082. Likewise, Respondent either knew or should have known of the conflict when he simultaneously represented Morrison Court and the minority shareholder of that corporation. Respondent charges that The Bar has, with reckless abandon, attempted to impugn Mr. Joy's motives by comparing his conduct with that of Mastrilli. The evidence presented in the instant case, as well as the referee's findings, justify The Bar's reliance on Mastrilli.

Respondent maintains that The Florida Bar v. Dancu, 490 So. 2d 40 (Fla. 1986) is not controlling since, unlike Dancu, the Respondent transferred the Morrison Court settlement funds to another account with what he believed to be Morrison Court's consent, and since he reasonably believed his actions were in the best interest of his client. (AB/IB. p. 44).

Respondent's argument completely ignores the fact and the referee properly found that, Respondent breached his fiduciary

duty, as well as his ethical duty, when he transferred the escrow funds from his trust account without the consent of all beneficiaries of those funds, even if he reasonably believed that he had the consent of Morrison Court.

The Respondent's misconduct is not only parallel to that of Dancu, but is even more serious than Dancu's misconduct. Dancu engaged in a misrepresentation, but ultimately refunded to his client the interest earned on his client's funds while he held those funds. Respondent has failed to return any portion of the interest earned on the Morrison Court settlement funds to any of the beneficiaries of those funds.

The Bar's reliance on The Florida Bar v. Fine, 607 So. 2d 416 (Fla. 1992) and The Florida Bar v. Weiss, 586 So. 2d 1051 (Fla. 1991) is also supported by the evidence presented herein and by the Referee's findings. Respondent attempted to differentiate the misconduct in Fine and Weiss with that of the Respondent by claiming that Respondent had his client's "apparent authority" to transfer funds from his trust account. Joel Cantor testified, however, that he was unaware that the settlement funds were being held in an interest-bearing account controlled by Respondent's wife. (T, pp. 103, 105). Additionally, the referee found that Respondent never received permission from Midland Risk or G & O to

transfer any of the escrow funds out of his law firm trust account. (RR, p.21).

With regard to Respondent's misrepresentation by omission, The Florida Bar v. Webster,647 So. 2d 817 (Fla. 1994) is clearly applicable. Respondent contends that, unlike Webster, he had no duty of disclosure at all "since Morrison Court and G & O were litigation adversaries." (AB/IB, p.49). This contention completely ignores Respondent's fiduciary duty to G & O as escrow agent. The referee correctly found that when Respondent deposited the escrow funds into his law firm trust account, he thereby accepted the terms of the escrow agreement and his fiduciary duty to all of the principals, including Morrison Court and G & O. (emphasis added). (RR, p.19).

Thus, Respondent's half-truth to Smith, as G & O's counsel, and his failure to correct Smith's misapprehension regarding the escrow funds constituted an intentional and willful misrepresentation of material fact. As the referee properly found, " Respondent's overall conduct in the course of his representation of Morrison Court demonstrates that like Webster, Respondent played fast and loose with facts." (RR, p. 24).

Respondent claims that The Bar's reliance on The Florida Bar v. Stillman, 606 So. 2d 360 (Fla. 1992), is unwarranted because,

unlike Stillman, Respondent did not lie to his client, did not ignore his client's instructions, did not engage in five separate acts of misrepresentations, and did not create false documents. (AB/IB, pp. 50-51).

The competent substantial evidence presented in the instant case indicates that Respondent lied to Joel Cantor, the authorized representative of his client, Morrison Court, when he represented to Cantor that he had obtained Cohen's twenty percent (20%) ownership interest in Morrison Court. Both Cantor and Cohen testified before the referee and Respondent argues in his brief that Respondent only obtained legal title to Cohen's stock, and never actually owned the stock. Similarly, Respondent in effect created a false document when he prepared the execution document that purported to transfer the stocks. The evidence also indicates Respondent's failure to follow Joel Cantor's directions.

At the Respondent's sanction hearing, The Bar cited Standard 9.22(i) as an aggravating factor since Respondent has had substantial experience in the practice of law, and should have thus been able to recognize and avoid his conflict of interest, his improper handling of the escrow funds, and his material misrepresentation. Despite his years of legal experience, Respondent completely misinterprets The Florida Bar v. Lord, 433

So. 2d 983 (Fla. 1983) when he argues that "it is because of his substantial experience that a suspension is inappropriate." (AB/IB, p. 52). In Lord, this Court defined one of the objectives of attorney discipline to be protection of the public from harm without denying the public the service of a qualified lawyer. Id. at 986.

Respondent also incorrectly charges that " The Bar all but ignores the mitigating factors that clearly argue in favor of nominal discipline." (AB/IB, p. 52). During the sanctions hearing before the referee, Bar counsel cited Standard 9.32 and informed the court that Respondent had received no prior Florida Bar Discipline. (T2, p.54). Respondent states in mitigation that "his character and reputation are beyond reproach" and that "the uncontroverted testimony adduced at the January 8, 1996, hearing demonstrated, he is admired and respected by his clients, his peers, and the judiciary." (AB/IB, p.53). Such a conclusion must be viewed in light of the fact that Respondent failed to provide Bar counsel with any notice that he intended to call character witnesses or to provide The Bar with a list of such witnesses prior to the January 8, 1996, sanctions hearing. Bar counsel objected to the presentation of the testimony of the character witnesses because The Bar had no notice that the witnesses were going to be

called by Respondent nor the opportunity to call rebuttal witnesses. The referee overruled The Bar's objection and allowed the character witnesses to testify on behalf of Respondent. Therefore, the "uncontroverted testimony" to which Respondent refers was introduced during the sanctions hearing without prior notice to The Bar thereby preventing The Bar from having the opportunity to prepare for cross-examination of the witnesses or to call rebuttal witnesses.

The Bar challenges Respondent's reliance on Standard 9.32(b), (absence of a dishonest or selfish motive) since the record herein clearly demonstrates that Respondent had a substantial financial interest in the Morrison Court settlement funds and that his law firm in fact, received $ 93,000.00 from those funds.

In aggravation, it is also significant that Respondent has refused to acknowledge the wrongful nature of his conduct. Respondent continues to attempt to justify his actions by claiming that since no one was ultimately harmed, and since he was only doing what was best for Morrison Court, he did nothing improper. Respondent maintains that his only true transgression was his failure to use better judgment in the selection of his clients. (AB/IB, p.52).

In The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980),

this Court held that the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation. In furtherance of this purpose, strict standards of competence and ethical responsibility must be reached prior to admission to the practice of law in Florida, and once admitted, a person must continue to adhere to these standards or suffer the disciplinary powers residing in this Court by constitutional mandate.

Respondent's actions were intentional and deliberate. There is potential for great public harm whenever a lawyer takes it upon himself, as did the Respondent, to unilaterally decide what is or is not in the best interest of a client; when a lawyer decides to ignore his fiduciary and ethical duty of honesty toward clients and opposing parties; when a lawyer fails to avoid a conflict of interest; and, when a lawyer places at risk client or third party property entrusted to his care.

Based on the Respondent's serious and multiple misconduct, Respondent's failure to acknowledge the wrongful nature of such misconduct, Respondent's substantial experience in the practice of law, the relevant case law and the applicable Standards, The Bar respectfully requests that this Court reject the referee's

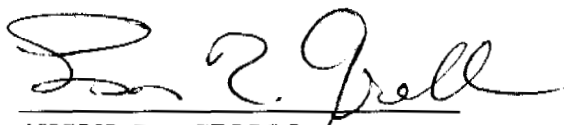
recommendations of a public reprimand and instead impose a ninety-one (91) day suspension with proof of rehabilitation required prior to reinstatement.

CONCLUSION

The referee's findings of fact and recommendations of guilt are supported by clear and convincing evidence.

WHEREFORE, The Florida Bar respectfully requests this Court to uphold the Referee's findings of fact and recommendations of guilt; reject the Referee's recommended discipline of a public reprimand; and suspend the Respondent, DANIEL FOSTER JOY, from the practice of law for ninety-one (91) days with proof of rehabilitation required prior to reinstatement, require Respondent to attend Ethics School, and impose against the Respondent the costs of these proceedings.

Respectfully submitted,



SUSAN R. GRALLA
Assistant Staff Counsel
The Florida Bar, Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Atty. No. 747130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of THE FLORIDA BAR'S REPLY BRIEF AND ANSWER BRIEF TO CROSS PETITIONER'S INITIAL BRIEF has been furnished by Airborne Express, Airbill No. 4575713074 to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-2300; a true and correct copy of same by U. S. Regular Mail to Hugh N. Smith, Counsel for Respondent, at Post Office Box 3288, Tampa, Florida, 33601, and a copy by U. S. Regular Mail to John T. Berry, Staff Counsel, The Florida, 650 Apalachee Parkway, Tallahassee, Florida, 32399; this 3rd day of May, 1996.

Susan R. Gralla