IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DANIEL FOSTER JOY,

Respondent.
_____/

Case No. 85,422
TFB File Nos. 94-10,761(12C) and
94-11,328(12C)

RESPONDENT DANIEL FOSTER JOY'S ANSWER BRIEF ON PETITION AND INITIAL BRIEF ON CROSS PETITION FOR REVIEW OF REFEREE'S REPORT

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PRELIMINARY STATEMENT

For purposes of the following discussion, Petitioner, The Florida Bar is referred to as "The Bar." Respondent Daniel Foster Joy is referred to as "Mr. Joy."

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

References to the transcript of the hearing held August 7 and 8, 1995, are denominated by a "T" followed by a page reference and an identification of the witness or person speaking at the time. References to the transcript of the hearing held on January 8, 1996, are denominated by a "T2" followed by a page number and an identification of the witness or person speaking at the time. References to the exhibits introduced and admitted at the final hearing are identified by the offering party, *i.e.*, The Bar (TFB) or Mr. Joy (Joy), followed by the exhibit number.

References to the "Report of Referee" are denominated by a "RR" followed by a page reference.

Although The Florida Bar has filed a Petition for Review asking this Court to review the referee's recommended discipline, Mr. Joy has filed a Cross Petition asking this Court to review the referee's findings of fact, conclusions of law and recommended discipline. Because the question of discipline can only be properly considered in the context of the alleged violations, the alleged violations are discussed first.

STANDARD OF REVIEW

In an attorney disciplinary proceeding before a referee, The Bar has the burden of proving that the lawyer is guilty of *specific* Rule violations with "clear and convincing" and competent and substantial evidence. *The Florida Bar v. Rood*, 622 So. 2d 974 (Fla. 1993). The referee is charged with making findings of fact and making the initial determination whether The Bar has met its burden. While the referee's findings of fact are entitled to a presumption of correctness, they can and should be disregarded if shown to be clearly erroneous and without the support of "clear and convincing" and competent and substantial evidence. *The Florida Bar v. Rayman*, 238 So. 2d 594, 596-97 (Fla. 1970). The referee's conclusion that a lawyer violated a specific Rule, like all of the referee's legal conclusions, is subject to a broader review. *The Florida Bar v. Aaron*, 529 So. 685, 686 (Fla. 1988).

"Clear and convincing evidence" is something more than a "preponderance of evidence." *Rayman*, 238 So. 2d at 596. "Clear and convincing evidence" is also something more than the inconsistent and contradictory statements of the complaining party. *Id.* "Clear and convincing" evidence is not the testimony of one witness unless that testimony is corroborated to some extent by other facts or circumstances. *Id.* at 597. "Clear and convincing" evidence is not competent or substantial if it is shown that the record evidence clearly contradicts the conclusions. *The Florida Bar v. Rue*, 643 So. 2d 1080 (Fla. 1994), *citing*, *The Florida Bar v. Miele*, 605 So. 2d 866 (Fla. 1992). All of these considerations apply here.

SUMMARY OF FACTS

Mr. Joy acknowledges that most (but certainly not all) of the findings of fact in the referee's report are correct, even though in some instances they are totally irrelevant and in some instances totally overlook uncontroverted evidence that is relevant to the issues at hand. Nevertheless, Mr. Joy does contend that several material findings of fact are not supported by the requisite quantum and quality of evidence. Mr. Joy also contends that, in some material instances, the referee's findings of fact and conclusions are directly contrary to the clear, convincing and uncontroverted evidence. Rather than burdening this Brief with a recapitulation of what the record evidence showed and rather that isolating the referee's erroneous findings of fact in a vacuum, Mr. Joy will address them in context and in relation to the alleged Rule violations they purport to support.

SUMMARY OF ARGUMENT

The referee's conclusion that there was a conflict of interest between Morrison Court and Mr. Cohen is both inconsistent and clearly erroneous. Accepting on the one hand that the evidence was insufficient to prove a conflict under the facts presented, the referee concluded that the same evidence was sufficient to prove a conflict of interest. It wasn't. Ignoring the clear and convincing evidence and the substantial body of Florida law relating to corporations and disregarding the clear and convincing evidence that what Mr. Joy did was intended to benefit and did benefit both of his "clients," The Bar nevertheless argued and the referee nevertheless concluded that "logic" proves that their interest were "directly adverse." It doesn't.

The referee's conclusion that there were trust account violations is also clearly erroneous. Claiming on the one hand that Mr. Joy's receipt of funds for the benefit of Morrison Court and G & O created an "escrow" agreement, The Bar and the referee simply ignored the legal effect

of the U.S. District Court's dismissal of G & O's claim with prejudice. Mr. Joy couldn't. Arguing on the one hand that "all" of the evidence proves that funds were transferred without Morrison Court's permission, The Bar and the referee ignored the clear and convincing evidence that it was at least approved by Irwin Cantor and ratified by Joel Cantor. This Court shouldn't.

The referee's conclusion that Mr. Joy made misrepresentation by omission is likewise clearly erroneous. Claiming that Mr. Joy owed a duty to disclose client confidences, The Bar and the referee ignored the Rules that required Mr. Joy to maintain those confidences and the Rule that specifically states that Mr. Joy had no duty to disclose. Mr. Joy didn't. Arguing that Mr. Smith was mislead by Mr. Joy"s omission, The Bar and the referee disregard the clear and convincing evidence that Mr. Smith merely made an assumption. Mr. Smith couldn't. Arguing that Mr. Joy's intended to mislead Mr. Smith, The Bar and the referee ignored the clear and convincing evidence that Mr. Joy merely made a true statement about another true statement. Again, this Court shouldn't.

Starting with an admittedly false Complaint, relying on the testimony of a witness not even it believed, and supported by only the clearly erroneous findings of the referee, The Bar asks this Court to suspend Mr. Joy for doing, under any view of the evidence, what was always in the best interests of his client, Morrison Court. The Bar's argument is unavailing and its cited authorities are inapposite. Nevertheless, even to the extent that Mr. Joy's efforts may in retrospect have been misguided, and his violations merely technical, an admonishment is more appropriate than a public reprimand, and a public reprimand is more appropriate than the requested suspension.

ARGUMENT

THE ALLEGED RULE VIOLATIONS

Throughout the history of this proceeding, The Bar has repeatedly placed the alleged Rule violations into three general categories: Conflict of Interest, Trust Accounts, and Misrepresentations. While The Bar's categories too easily generalized and too readily permitted the referee to consider evidence out of context, they nevertheless serve as the framework for the referee's report and, thus, provide a framework against which to expose the errors in the referee's findings of fact and conclusions of law. Those errors are discussed in the same order they appear in the referee's report.

MR. JOY'S SIMULTANEOUS REPRESENTATION OF MORRISON COURT AND MR. COHEN WAS NOT DIRECTLY ADVERSE TO EITHER AND A THRESHOLD INCONSISTENCY IN THE REFEREE'S REPORT, FLORIDA LAW, AND THE CLEAR CONVINCING, AND UNREFUTED EVIDENCE DEMONSTRATES THAT THE REFEREE'S CONCLUSION TO THE CONTRARY IS CLEARLY ERRONEOUS

THE THRESHOLD INCONSISTENCY

In its formal Complaint, The Bar charged Mr. Joy with violations of Rules 4-1.7(a), (b), and (c) and Rules 4-1.13(d) and (e). (Complaint at 12-13). Of course, Rules 4-1.7(a), (b), and (c) deal with conflicts of interest in general - Rule 4-1.7 is titled "Conflict of Interest; General Rule." Rule 4-1.13 is more specific; it proscribes a lawyer's conduct when dealing with "Organizational Clients" such as corporations. Rules 4-1.13(d) and (e) deal with conflicts of interest in connection with the concurrent representation of a corporation and its "constituents."[1]

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[1]Rule 4-1.13(d) states:

> In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(continued...)

Rule 4-1.13(e) actually incorporates Rule 4-1.7 by reference.

As between the two sets of Rules, Rules 4-1.13(d) and (e) are clearly more applicable to the facts of this case. Mr. Joy represented Morrison Court, a corporation. Both The Bar and the referee contend that Mr. Joy concurrently represented a "constituent," Mr. Cohen, a minority shareholder with interests "adverse" to Morrison Court.

Although Rules 4-1.13(d) and (e) are more directly applicable to the facts of this case, The Bar always viewed them *in para materia* with Rules 4-1.7(a), (b) and (c). In other words, according to The Bar, if Mr. Joy violated Rules 4-1.13(d) and (e), then it necessarily followed that he also violated Rules 4-1.7(a), (b), and (c). (*See e.g.* TFB's Proposed Findings at page 30).

While The Bar always considered them together, the referee did not. At the final hearing, the referee specifically found that The Bar failed to prove by clear and convincing evidence that Mr. Joy violated Rule 4-1.13(d) or (e). In fact, in the closest thing to a specific finding found anywhere in the record before this Court, the referee specifically struck the reference to Rules 4-1.13(d) and (e) stating "I had some doubts as to that other part of it." (*See* T2-16). The reason for the referee's "doubts," as demonstrated by his response to a specific question by The Bar's counsel, is that The Bar had quite simply failed to prove a violation of either Rules 4-1.13(d) or (e) by clear and convincing evidence. (*See* T2-17). The Bar did not dispute, and is not now

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[1](...continued)
Rule 4-1.13(e) states:

> 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 is required by Rule 4-1.7, the consent shall be given by an appropriate official in the organization other than the individual who is represented, or by the shareholders.

disputing, the correctness of the referee's conclusions in this regard.

In view of the unchallenged conclusion that there was an absence of clear and convincing evidence that Mr. Joy violated Rule 4-1.13(d) or (e), how could that same referee find and The Bar could now argue that, based upon the same record, that there was clear and convincing evidence that Mr. Joy violated Rules 4-1.7(a), (b), and (c)? It can't. Remember, Rule 4-1.13(e) specifically incorporates all of Rule 4-1.7 by reference and is applicable in those instances where the simultaneous representation of a corporation and one of its shareholders has the potential for involving a conflict of interest. If The Bar failed to prove by clear and convincing evidence that Mr. Joy violated Rules 4-1.13(d) and (e), then, according to The Bar's own logic and the plain language of Rule 4-1.13(e), it necessarily follows that The Bar failed to prove by clear and convincing evidence that Mr. Joy violated any part of Rule 4-1.7. The referee's unchallenged finding that the evidence was insufficient to find that Mr. Joy violated Rules 4-1.13(d) and (e) should have quite simply foreclosed a finding that the evidence in this case was sufficient to prove a violation of Rules 4-1.7 (a), (b), or (c). Because it did not, the referee's conclusion in this regard is clearly both inconsistent and erroneous.

RULE 4-1.7, FLORIDA LAW AND THE CLEAR AND CONVINCING EVIDENCE

Even if not clearly inconsistent with the unchallenged conclusion that The Bar did not prove that Mr. Joy violated Rule 4-1.13(d) or (e) by clear and convincing evidence, the referee's conclusion that Mr. Joy violated Rules 4-1.7(a), (b) and (c) is not supported by either clear and convincing and competent substantial evidence or the law.

RULE 4-1.7(a)

Rule 4-1.7(a) provides that:

"A lawyer shall not represent a client if the representation of that client will be

> directly adverse to the interest of another client unless: (1) The lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and (2) each client consents after consultation."

According to Joel Cantor, Mr. Joy's client was Morrison Court and Morrison Court alone. (T-206, Cantor). As a purely legal matter, an attorney for a corporation does not "represent" and, thus, does not owe any separate duty (fiduciary or otherwise) to the corporation's individual shareholders. *See, Brennan v. Ruffner*, 640 So. 2d 143 (Fla. 4th DCA 1994); *Pelletier v. Zweifel*, 921 F. 2d 1465 (11th Cir. 1991). Accordingly, without more, Mr. Joy's representation of Morrison Court did not *ipso facto* give rise to representation of Irwin Cantor, Joel Cantor or Mr. Cohen individually as The Bar and the referee erroneously believe.

In the instant case, The Bar argued and the referee found that Mr. Joy also "represented" Mr. Cohen in connection with the distribution of Morrison Court's portion of the insurance proceeds. While Mr. Joy disagrees with that factual conclusion,[2] and would note that at least a portion of the purported evidentiary basis for that conclusion is directly contrary to the clear, convincing and uncontroverted evidence,[3] the real defect is the referee's legal conclusion is that the interests of Morrison Court and Mr. Cohen were "directly adverse." They weren't. In fact, under the law and the facts of this case, the interests of Morrison Court and Mr. Cohen could not have been "directly adverse."

The Bar argued, and the referee blindly accepted, that solely because Mr. Cohen testified

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[2]*See* Mr. Joy's Motion for Directed Verdict at pages 24-26.

[3]Contrary to the referee's findings, there is no clear and convincing evidence that Mr. Joy dissuaded Mr. Cohen from seeking independent legal advice. Instead, Mr. Cohen testified:

> He didn't proscribe me from getting other counsel. He didn't say, I don't want you to get other counsel. He didn't say it would be stupid for you to get other counsel. (T-293, Cohen).

that his interests were adverse to Joel Cantor then, "it logically follows that the interests of Respondent's client, Morrison Court, which interests were determined by J. Cantor, as the president and director, were directly adverse to the interests of Respondent's other client, Cohen, a minority shareholder who held no office and was not a director." (RR at 18). That Mr. Cohen would so testify, that The Bar would so argue, and that referee would so quickly accept this "logic" which is clearly illogical demonstrates a fundamental misunderstanding by all three of the law relative to corporations and the impact of that law on the facts of this case.

Under Florida law, corporations are legal entities separate and apart from the persons comprising them. *See 111 Properties, Inc. v. Lassiter*, 605 So. 2d 123 (Fla. 4th DCA 1992). It matters not that the corporation has only two shareholders, one of whom is the president. *Hanisch v. Clark*, 200 So. 2d 601 (Fla. 3d DCA 1967). The law treats them as separate entities and precludes them from being regarded as one. *Id.* at 604.

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. *See* Rules 4-1.13(d) and (e) at fn. 1 *supra*; *see also* Rule 4-1.13 Comment. Because the law recognizes a distinction between a corporation and the persons that comprise it, the law also recognizes that the persons that comprise it (i.e. the officers, directors, and shareholders) owe certain duties to the corporation. For instance, officers and directors owe fiduciary duties to the corporation and its shareholders and must act in good faith and in the best interests of the corporation. *Flight Equipment and Engineering Corp., v. Shelton*, 103 So. 2d 615 (Fla. 1958); *Cohen v. Hattaway*, 595 So. 2d 105 (Fla. 5th DCA 1992). *See also* §607.0830(1), Fla. Stat. (1993). Accordingly, officers and directors are precluded from taking positions adverse to the corporation. *Independent Optical*

Co. of Winter Haven v. Elmore, 289 So. 2d 24 (Fla. 2d DCA 1974). Officers and directors are also prohibited from dealing in the funds or property of the corporation to their own advantage. *Pruyser v. Johnson*, 185 So. 2d 516 (Fla. 2d DCA 1966).

Because Mr. Joy knew that Florida law recognizes a distinction between a corporation and the persons that comprise it, and because he also knew that Florida law recognizes that officers and directors of a corporation owe fiduciary duties to its shareholders, Mr. Joy was concerned about Irwin and Joel Cantor. As the clear, convincing and uncontroverted evidence demonstrated, Irwin and Joel Cantor had a reputation for fraud, deceit and underhanded dealings and for breaching duties owed to shareholders of corporations they controlled. (Joy Ex. 1; T-306-22, Cohen).[4] That same evidence conclusively demonstrated that Irwin and Joel Cantor had had a falling out with Mr. Cohen. (T-133, Cantor; T-314; 335, Cohen). Mr. Joy suspected that Irwin and Joel Cantor had designs on Morrison Court's portion of the Midland Risk settlement proceeds. As the clear, convincing and uncontroverted evidence showed, Mr. Joy suspected that Irwin and Joel Cantor intended to abscond with Morrison Court's portion of the settlement proceeds without Mr. Cohen's knowledge, without Mr. Cohen's consent, and clearly without Mr. Cohen's best interests in mind.[5] Mr. Cohen had the same suspicions too. (T-322, Cohen).

Because Mr. Joy knew the law and because he knew the propensity of Irwin and Joel

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[4]According to Mr. Cohen, Irwin and Joel Cantor were "corrupt, disgusting criminals." (T-306, Cohen).

[5]Of course, the same evidence conclusively demonstrated that Mr. Joy's suspicions were reasonable. On September 13, 1993, Irwin Cantor wrote Mr. Joy a letter in which he expressed concern that "creditors" such as Mr. Cohen would attempt to "lien" Morrison Court's money. (Joy Ex. 19). Three days later, on September 16, 1993, Irwin Cantor wrote another letter to Mr. Joy in which he stated that he and his son wanted to take Morrison Court's portion of the Midland Risk settlement proceeds to set up other corporations and to buy other properties. (Joy Ex. 21). Mr. Cohen knew nothing of Irwin and Joel Cantor's plan. (T-318-19, Cohen).

Cantor to defalcate on their duties owed to Morrison Court and its shareholders, Mr. Joy insisted that all shareholders be kept informed. (T-379, Joy). Morrison Court and Mr. Cohen had coextensive interests in keeping everyone informed to prevent breaches of fiduciary duties by Irwin and Joel Cantor. The practice was not only appropriate in the eyes of Morrison Court (T-207, Cantor),[6] it was appropriate in the eyes of The Bar's own Rules. *See* Rule 4-1.13(b) and Comment (disclosure of information relating to the representation of an organizational client to "constituents" is appropriate where "explicitly or impliedly authorized by the organizational client."). Indeed, given the fact that Mr. Joy kept Mr. Cohen advised in order to prevent what both legitimately suspected to be Irwin and Joel Cantor's joint plan to defraud Morrison Court and Mr Cohen (which such suspicions were later confirmed in writing by Irwin Cantor), Mr. Joy's disclosure may have been required. *See* Rule 4-1.6(b)(1)("A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime."); *See also*, Rule 4-1.13, Comment ("If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 4-1.2(d) can be applicable."). Thus, even assuming keeping Mr. Cohen informed constituted the "representation" of Mr. Cohen by Mr. Joy, and further assuming that that "representation" was adverse to Irwin and Joel Cantor's announced plan to breach their fiduciary duties by misapplying corporate funds, that "representation" was not, and could not have been, "directly adverse" to the separate interests of Morrison Court. The clear and convincing evidence proves the point.

Because Mr. Joy knew the law and because both Mr. Joy and Mr. Cohen knew of the propensity of Irwin and Joel Cantor to defalcate on their duties owed to corporations with which

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[6]It is telling that while admitting that Mr. Cohen had every right to be informed, Joel Cantor was nevertheless angry that Mr. Joy was keeping Mr. Cohen informed.

they were involved, Mr. Cohen asked Mr. Joy to protect, and Mr. Joy agreed to protect, Mr. Cohen's interest in the settlement proceeds. As the clear, convincing and uncontroverted evidence demonstrated, there was an agreement by and between the shareholders of Morrison Court that all would each would pay the expenses involved in the Midland Risk litigation on a *pro rata* basis and that all would directly receive the net proceeds from any recovery realized from the Midland Risk litigation. Accordingly, as even Joel Cantor readily admitted, Mr. Cohen was always entitled to receive a portion of the net settlement proceeds commensurate with Mr. Cohen's *pro rata* share of the outstanding shares of stock in Morrison Court. (T-214, Cantor). While although unbeknownst to Mr. Cohen Joel Cantor diluted Mr. Cohen's shares,[7] and although Mr. Cohen had to ultimately sue to Joel Cantor to recover what was rightfully his, he was clearly was entitled to some portion of the proceeds from the Midland Risk litigation.

Because Mr. Joy and Mr. Cohen knew that Mr. Cohen was entitled to a portion of the settlement proceeds and because Mr. Joy and Mr. Cohen both had reasonable suspicions that Irwin and Joel Cantor would attempt to defraud Morrison Court and Mr. Cohen by absconding with the settlement proceeds for their own personal uses, Mr. Cohen asked Mr. Joy for help. Mr. Joy knew that, under the law and under the agreement between the shareholders, Mr. Cohen's *pro rata* share represented no greater or lesser obligation to Morrison Court in his hands than in Mr. Cohen's hands.[8] Thus, Mr. Joy suggested that one way to ensure that Mr. Cohen got that to which he was rightfully entitled was for Mr. Cohen to assign his stock to Mr. Joy. Both knew

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[7]Under the circumstances, Joel Cantor's dilution of Mr. Cohen's stock was, in and of itself, a breach of the fiduciary duties owed by Joel Cantor to Morrison Court. *See Biltmore Motor Corp. v. Rogue*, 291 So. 2d 114 (Fla. 3d DCA 1974).

[8]The referee acknowledged as much when he specifically found that Mr. Joy had not violated Rule 4-1.8(a) which prohibits an attorney from "knowingly acquir[ing] an ownership, possessory, security or other pecuniary interest adverse to client." (T2-16-17).

that Irwin and Joel Cantor would find it more difficult to steal from Mr. Joy. Because Mr. Cohen trusted Mr. Joy who saw it as his duty to protect Morrison Court and all of its shareholders from the anticipated defalcation by Irwin and Joel Cantor, Mr. Cohen agreed.

While in retrospect there may have been better ways to keep Irwin and Joel Cantor from looting Morrison Court, the assignment itself did not represent a violation of any Rule.[9] In addition, while perhaps imprudent in retrospect, the assignment did not create a situation where Mr. Joy's or Mr. Cohen's interests were adverse, much less "directly adverse," to Morrison Court. The assignment was only for purposes of protecting Mr. Cohen's interest as a minority shareholder from Irwin and Joel Cantor's long suspected (and later confirmed) plan to divert Morrison Court's funds. True, the assignment may have been adverse to Irwin and Joel Cantor's personal agenda. The fact that when Mr. Joy foiled their plan to divert Morrison Court's funds both Irwin and Joel Cantor physically assaulted Mr. Joy is pretty conclusive evidence that Irwin and Joel Cantor thought as much. But Mr. Joy did not represent either Irwin or Joel Cantor, he represented Morrison Court. While Irwin and Joel Cantor regularly disregarded it, and The Bar and the referee apparently did not understand it, Mr. Joy could not, and this Court should not, ignore the established principle of Florida law that recognizes that Morrison Court was a legal entity separate and apart from Irwin and Joel Cantor. Mr. Joy could not, and again this Court should not, ignore the fact that while Joel Cantor was the corporation's president, director and majority shareholder, he nevertheless owed legal duties to Morrison Court and to Mr. Cohen and was not free to simply pillage Morrison Court for his own personal gain. The clear, convincing and uncontroverted evidence established that Joel Cantor, with the help of his father Irwin

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[9]The referee concluded, and The Florida Bar does not dispute, that the assignment did not constitute a violation of Rule 4-1.8(a).

Cantor, planned to breach those duties and to profit at the expense of Morrison Court and Mr. Cohen. Because he represented Morrison Court, Mr. Joy was ethically obligated to do something. *See* Rule 4-1.13(b).[10] Because Mr. Joy did something, the interests of both Morrison Court and Mr. Cohen were ultimately protected. What Mr. Joy did was not only not directly adverse to Morrison Court, it was in Morrison Court's best interests.

For similar reasons, Mr. Joy's representation of Morrison Court was not "directly adverse" to any relationship Mr. Joy had with Mr. Cohen. In fact, Mr. Joy's representation of Morrison Court was crucial to Mr. Cohen's goal of protecting his interest in the corporation. (T-321, Cohen). Mr. Cohen enlisted Mr. Joy's assistance in this regard because Mr. Cohen knew Mr. Joy to be of the highest ethical fiber and trusted Mr. Joy to do what was best for Morrison Court, knowing that what was good for Morrison Court would be good for him, too. (T-284-85, Cohen).

With an understanding of Florida law regarding corporations and the context in which the comment arose, there can be no doubting that what Mr. Cohen meant when he testified he "intuited" that his interests were adverse to Morrison Court (T-289, Cohen), is that he knew his interests were adverse to those of Irwin and Joel Cantor. Without an understanding of Florida law regarding corporations and ignoring the context in which the comment arose, however, The

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[10]In pertinent part, Rule 4-1.13(b) provides that:

> If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of the law that might reasonably be imputed to the organization and is likely to result in substantial injury to the organization, **the lawyer shall proceed as reasonably necessary in the best interest of the organization.**

Mr. Joy wonders whether if he had done nothing The Florida Bar would have claimed that he violated this Rule.

Bar and the referee erroneously concluded that solely because Mr. Cohen said that he believed that his interests were adverse, then it must be so. In view of the fact that regardless of the context Mr. Cohen's comment would not even satisfy a preponderance of the evidence standard, there can be no question that his statement taken out of context could not and did not constitute clear and convincing evidence of the direct adversity sufficient to support the conclusion that Mr. Joy violated by Rule 4-1.7(a) by "representing" Morrison Court and Mr. Cohen. *Rayman*, 238 So. 2d at 597. The referee's contrary conclusion is clearly erroneous.

RULE 4-1.7(b)

Rule 4-1.7(b) provides that:

> "A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."

As stated above, there is the threshold question of whether Mr. Joy "represented" two "clients" such that the "representation" of one could be materially limited by the "representation" of another. Nevertheless, even assuming that Mr. Joy "represented" both Morrison Court and Mr. Cohen, the referee's conclusion that the assignment of Mr. Cohen's stock impeded the exercise of Mr. Joy's independent professional judgment on behalf of Morrison Court defies logic and again runs contrary to the clear and convincing evidence in the record.

As demonstrated by the clear, convincing and uncontroverted evidence, and as should be obvious from the most basic logical and legal analysis, it did not matter to Morrison Court who held Mr. Cohen's stock. The stock was freely transferrable; Joel Cantor had accumulated his majority share by accepting assignments from the other original shareholders including Irwin Cantor. (T-77, 79-80, Cantor). Those shares represented no greater or lesser burden or obligation

to Morrison Court in Joel Cantor's hands as they had in the hands of Irwin Cantor or the others. Likewise, whether representing 20% as Mr. Joy and Mr. Cohen believed, or 3% as Joel Cantor claimed, Mr. Cohen's stock represented no greater or lesser obligation to Morrison Court in Mr. Joy's custody than it would have, had the assignment never taken place. As a practical matter, the evidence was so clear, convincing and uncontroverted that, despite the assignment, everyone including Mr. Joy, Mr. Cohen, The Bar and the referee believed that Mr. Cohen still owned the stock. Under the original agreement between the shareholders, Mr. Cohen was entitled to a *pro rata* share of the net proceeds from the Midland Risk litigation.

Although as a legal matter it did not matter who owned the stock, it most certainly mattered to Mr. Joy and Mr. Cohen, and should have mattered to Joel Cantor if he was acting as the corporation's faithful and conscientious president, director and majority shareholder, that Morrison Court live up to its agreement to split the net settlement proceeds on a *pro rata* basis among the stockholders. A breach of the agreement by Morrison Court would have left Morrison Court exposed to an action by Mr. Cohen for damages. A breach of the agreement by Irwin and Joel Cantor would have left both of them and Mr. Joy exposed to a derivative action on behalf of Morrison Court for breach of fiduciary duties. *See International Community Corp. v. Young*, 486 So. 2d 629 (Fla. 5th DCA 1986)(corporate attorney who assisted officers in looting corporation's assets can be held liable to corporation for breach of fiduciary duty). Mr. Joy had an ethical obligation to the corporation to avoid having to bring or defend a lawsuit and most certainly had an ethical obligation to avoid being an accomplice to the intended fraud of Irwin and Joel Cantor. *See* Rule 4-1.13, Comment, and Rule 4-1.2.[11] By protecting the corporation,

[11]In pertinent part, the Comment to Rule 4-1.13 states:

(continued...)

Mr. Joy also protected the shareholders as shareholders. While it easy to lose sight of the fact that Mr. Joy was ethically obligated to protect Joel Cantor the stockholder from Irwin and Joel Cantor the officer and director, and that Mr. Joy had agreed to attempt to protect Mr. Cohen the stockholder from Irwin and Joel Cantor in whatever capacity, the indisputable fact is that Mr. Joy had to do something. An assignment was suggested and Mr. Cohen agreed.

While the assignment of stock may have limited Irwin and Joel Cantor's ability to steal Morrison Court's money, it never limited Mr. Joy's ability or willingness to give Morrison Court its due. The proof is in the clear, convincing and uncontroverted evidence. The first time that there was an agreement of any sort regarding how much of the insurance proceeds Morrison Court was to receive was on Friday, September 17, 1993.[12] On that date, Irwin and Joel Cantor negotiated a split with Mr. Smith and the principals of G & O during a meeting in Tampa. As the clear, convincing and uncontroverted evidence showed, Irwin and Joel Cantor were anxious

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[11](...continued)

> Decisions concerning policy and operations, including ones entailing serious risks, are not as such in the lawyer's province. However, different considerations arise when a lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be necessary for the lawyer to ask the constituent to reconsider the matter. if that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. . . [t]he lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest.

[12]At the final hearing, The Florida Bar intimated that Mr. Joy's obligation to protect the corporation and all of its shareholders may have impeded his ability to comply with Joel Cantor's September 13, 1993, memo directing Mr. Joy to disburse the settlement proceeds in specified amounts. But that directive was subject to a number of contingencies, not the least of which was that Joel Cantor would be providing further written instructions. Because those written instructions never came and the funds stayed undisbursed in Mr. Joy's trust account.

to get their hands on what they believed to be their money because they were traveling to Orlando the next Tuesday to bid on properties at an RTC auction. (Joy Ex. 21). They were so anxious to get the money before Mr. Cohen found out, that although it was after office hours on a Friday afternoon, they followed Mr. Joy back to Sarasota to claim Morrison Court's share of the insurance settlement proceeds as their own. While exactly what was said during the meeting at Mr. Joy's office in Sarasota on that Friday evening is far from uncontroverted, it is clear that neither Irwin or Joel Cantor in whatever capacities they were purporting to represent had any intention of ensuring that Morrison Court fulfilled its obligations to Mr. Cohen. Irwin and Joel Cantor physically assaulted Mr. Joy and then left with Mr. Joy's glasses but without the money after the police were called by Mr. Joy's office staff. The funds remained in Mr. Joy's possession not because Mr. Joy's independent professional judgment was limited by his responsibilities to Mr. Cohen, but because Irwin and Joel Cantor were unwilling to act in the best interests of Morrison Court and all of its shareholders.

After the fisticuffs of Friday, September 17, 1993, it was not the responsibilities owed by Mr. Joy to Mr. Cohen that impeded Mr. Joy's ability to disburse the money to Morrison Court, it was Morrison Court's express directive not to. (TFB Ex. 14). Exercising prudent professional judgment, Mr. Joy telephoned The Bar for advice. (Joy Ex. 57, T-493, Joy). The Bar told him what he already knew, he had to disburse the money to Morrison Court upon receipt of written instructions from Morrison Court. After a barrage of threats, attempted extortions, and other histrionics by Irwin and Joel Cantor and their "new" attorney Stanford Solomon, directed to Mr. Joy, Mr. Smith, G & O, and even Mr. McLain, Morrison Court finally gave those written

instructions.[13] The funds were distributed to Morrison Court the same day.

Under no view of the clear and convincing evidence did the assignment of stock to Mr. Joy impede Mr. Joy's independent professional judgment on behalf of Morrison Court. Although all Mr. Joy got for his efforts was a punch in the face, the fact of the matter is that the assignment assisted Mr. Joy in protecting what rightfully belonged to Morrison Court and derivatively to Mr. Cohen pursuant to the original agreement between the shareholders. The referee's conclusions to the contrary are clearly erroneous.

RULE 4-1.7(c)

Rule 4-1.7(c) provides that:

> "When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

Again there is the threshold question of how, if The Bar failed to prove that Mr. Joy violated Rule 4-1.13(e) by "clear and convincing evidence," The Bar could have possibly met its burden of proof with regard to Rule 4-1.7(c). That threshold question aside, however, the clear and convincing evidence simply refutes the referee's conclusions.

Assuming Mr. Joy "represented" both Morrison Court and Mr. Cohen at the same time, it is clear he could have done so only in connection with the settlement of the Midland Risk litigation and disbursement of Morrison Court's portion of the settlement proceeds. Rule 4-1.7(c), by its own terms, is designed to deal with those situations where there is a conflict or likelihood

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[13]It is noteworthy that those instructions came along with Irwin and Joel Cantor's written promise to protect Mr. Cohen's interest in the settlement proceeds. (TFB Ex. 17). Notwithstanding that written promise, Mr. Cohen ultimately had to sue Irwin and Joel Cantor. As the clear, convincing and uncontroverted evidence showed, it was Mr. Joy's failure to accede to Joel Cantor's extortion attempts and the receipt of the Summons and Complaint filed by Mr. Cohen by Joel Cantor that prompted Joel Cantor to file his Complaint with The Florida Bar. (T-549-550, McLain; Joy Ex. 59).

that a conflict may arise. *See* Rule 4-1.7, Comment. As stated above, there never was a conflict or likelihood of conflict between Morrison Court and Mr. Cohen in connection with either task.

As long as Mr. Cohen owned any stock in Morrison Court, his interests and those of the corporation in settling the Midland Risk litigation on the most favorable terms and in disbursing to the proceeds in a way to avoid the diversion of corporate assets by Irwin and Joel Cantor were always aligned. The advantages were obvious. The more Morrison Court got and could keep, the more Mr. Cohen stood to get. The risks were nonexistent. There was nothing that Mr. Joy could do to benefit Mr. Cohen that did not result in a commensurate benefit to Morrison Court and *vice versa.* As a factual matter, Mr. Joy's actions ultimately benefitted both.

For his part, Mr. Cohen was clearly advised, or was at the very least otherwise completely cognizant, of the advantages and risks of Mr. Joy's "dual representation." The advantages were that Mr. Joy would be able to protect the settlement funds from theft by Irwin and Joel Cantor. Of course, this was the very reason Mr. Cohen enlisted Mr. Joy's assistance in the first place. By the same token, the only risk was that Mr. Joy would be unable to keep Irwin and Joel Cantor from diverting Morrison Court's funds to pay for unrelated expenses or to buy unrelated property. By his own admission, Mr. Cohen was aware of this risk and was fully aware that the risk might materialize when, on September 19, 1993, Mr. Joy called to say that he had been physically assaulted by Irwin and Joel Cantor. (T-291-92, Cohen).

While it may be true that Mr. Joy never told Joel Cantor that he (Mr. Joy) was keeping Mr. Cohen advised and was intent on protecting Mr. Cohen's interest in Morrison Court, it is likewise true that none of Mr. Joy's actions were adverse to Morrison Court. Joel Cantor admitted that Mr. Cohen had every right to be kept informed, although even if Joel Cantor thought otherwise it would have been appropriate for Mr. Joy to do so. Mr. Joy should not have

had to tell Joel Cantor that he (Mr. Joy) was protecting the interests of Morrison Court and, by implication, all of its shareholders. That was implicit in the attorney-client relationship. Nevertheless, the clear, convincing and uncontroverted evidence did establish that on at least one occasion Mr. Joy specifically told Joel Cantor that he (Mr. Joy) represented Morrison Court and that Joel Cantor owed certain fiduciary obligations to the corporation and its minority shareholder. (Joy Ex. 9). The same message was communicated during the September 17, 1993, meeting at Mr. Joy's office. The response to that message was a punch in the face.

The Comment to Rule 4-1.7 states that:

> Conflicts of interest in contexts other than litigation may be difficult to assess. Relevant factors in determining whether there is a potential for conflict for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict may arise, and the likely prejudice to the client from the conflict if it does arise. The question is one of proximity and degree.

The Comment is particularly apt. For all of the allegations and all of the evidence, both The Bar and the referee have done nothing but demonstrate that they had some difficulty assessing whether and to what extent a conflict of interest existed between Mr. Joy's two "clients," Morrison Court and Mr. Cohen. Mr Joy didn't. The Bar and the referee had difficulty in making the legal distinction between Morrison Court and Irwin and Joel Cantor. Mr. Joy didn't. The Bar and the referee had difficulty determining whether there was prejudice to Morrison Court and Mr. Cohen. Mr. Joy didn't. The Bar and the referee had difficulty in understanding that, under the circumstances, it truly was a matter of proximity and degree. The only question was how Mr. Joy could best prevent the looting of Morrison Court's assets by Irwin and Joel Cantor. Mr. Joy chose a course of conduct that, while it is easy to second-guess in retrospect, was not unreasonable under the circumstances as presented. The referee merely

concluded that Mr. Joy violated Rule 4-1.7 by "representing" two "clients" whose interests were "directly adverse." Mr. Joy didn't. The referee's conclusion to the contrary is clearly erroneous under the facts and the law.

UNDER THE APPLICABLE LAW AND CLEAR AND CONVINCING EVIDENCE, MR. JOY'S TRANSFER OF MORRISON COURT'S FUNDS FROM HIS LAW FIRM'S TRUST ACCOUNT TO ANOTHER ACCOUNT FOR HIS CLIENT'S BENEFIT COULD NOT, AND DID NOT, VIOLATE THE RULES RELATING TO TRUST ACCOUNTS AND THE REFEREE'S CONCLUSION TO THE CONTRARY IS CLEARLY ERRONEOUS

RULES 4-1.15(c), 4-1.15(d) and 5-1.1(b)

Rule 4-1.15(c) provides that:

> "When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be treated by the lawyer as trust property but the portion belonging to the lawyer or the law firm shall be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute shall be kept separate by the lawyer until the dispute is resolved."

Rule 4-1.15(d) provides that:

> "A lawyer shall comply with The Bar Rules Regulating Trust Accounts."

Rule 5-1.1(b) provides that:

> "Any bank or savings and loan association account maintained by a member of The Bar to comply with rule 4-1.15, Rules of Professional Conduct, is and shall be clearly labeled and designated as a trust account..."

By its own terms, Rule 4-1.15(d) does not stand alone. To find a violation of Rule 4-1.15(d), the referee had to necessarily find a violation of some other Rule relating to trust accounts. In this case, he did by finding that Mr. Joy violated Rules 4-1.15(c) and 5-1.1(b). But as the following discussion demonstrates, the referee's conclusions cannot withstand legal or factual scrutiny.

Clearly, the common thread running through all of the referee's conclusions regarding trust

account violations is that by accepting the $500,000.00 in settlement proceeds from Midland Risk, Mr. Joy became an "escrow agent" for Midland Risk, G & O, and Morrison Court. and could not do anything with the money without the approval of Midland Risk, G & O and Morrison Court. That thread unravels and that logic disappears, however, under the weight of both the facts that were minimized and law that was never addressed by the referee.

First, the law. Under Florida law, a mortgagee has no rights to the benefits of a policy of insurance purchased by the mortgagor on the mortgaged premises for the mortgagor's benefit unless there is (1) an assignment of the policy to the mortgagee, (2) an agreement requiring the mortgagor to make such an assignment, or (3) an agreement to insure for the benefit of the mortgagee. 37 Fla. Jur. 2d *Mortgages*, §186. Where there is an agreement to make an assignment, the mortgagee becomes an intended third-party beneficiary of the insurance contract and can sue the insurer in his own right for the proceeds. *See DeMay v. Dependable Insurance Co.*, 638 So. 2d 97 (Fla. 2d DCA 1994). Where there is no assignment or any other indication that the mortgagee is an intended third-party beneficiary of the insurance contract (*i.e.* as an additional loss payee) but the mortgagor nevertheless binds himself to insure the mortgaged property for the benefit of the mortgagee, the mortgagee will have a right to assert an equitable lien on the money due under the policy, but only to the extent of the mortgagee's interest in the insured property destroyed. *Atwell v. Western Fire Insurance Co.*, 163 So. 27 (Fla. 1935). This is true whether the policy contains a loss payable clause or not because the right to assert an equitable lien arises from the mortgagor's failure to protect the mortgagee. *Id.*

Under Florida law, the right to assert an equitable lien on insurance proceeds is far different from having an absolute right to the proceeds themselves. Indeed, under Florida law, an equitable lien is not a property right at all and does not create an immediate right of

possession. An equitable lien is nothing more than a cause of action, or a right to bring an action in equity to establish some right to possession. The mortgagee's only remedy is to sue in equity to establish such a lien and to enforce it. *Atwell*, 163 So. at 31.

While a mortgagee's equitable lien can be established and enforced in an action against the mortgagor or in an action between the mortgagor and its insurer, the mortgagee's only remedy is against the mortgagor. *Paskow v. Calvert Fire Insurance Co.*, 579 F. 2d 949, 951-52 (5th Cir. [Fla.] 1978), *citing Atwell* and *Sumlin v. Colonial Fire Underwriters*, 27 So. 2d 730 (Fla 1946). The mortgagee has no direct claim against the insurer. But after notice by the mortgagee to the insurer of an alleged right to the insurance proceeds due the insured, the insurer cannot prudently pay the insured until the rights of the parties have been determined. *Id.* at 952.

In the instant case, the most that can be said is that both the RTC and G & O claimed an equitable lien on the insurance proceeds due Morrison Court under the Midland Risk policy, (T-253, Smith). But that is all it was, a claim. There is absolutely no evidence that Morrison Court assigned its Midland Risk policy to the first mortgagee, the RTC's predecessor, or to the second mortgagee, G & O. Likewise, there is absolutely no evidence that Morrison Court agreed to make an assignment to, or to buy insurance for the benefit of, either the RTC's predecessor or G & O. Instead, the only evidence that addresses this subject at all is the uncontroverted testimony of Messrs. Joy and Smith that, in the underlying litigation against Midland Risk, Morrison Court specifically denied that the RTC or G & O had any claim or right to the insurance proceeds. (Joy Ex. 51; T-253, Smith). Absent evidence that Morrison Court made or agreed to make an assignment and absent evidence that the RTC's predecessor or G & O were expressly intended third-party beneficiaries of Morrison Court's insurance contract with Midland Risk, Morrison Court's position (advanced by Mr. Joy) that neither had a right to any of the

insurance proceeds was, and still is, correct **as a matter of law.** *See CIGNA Fire Underwriters Insurance Co. v. Leonard*, 645 So. 2d 28 (Fla. 4th DCA 1994).

Even though neither the RTC nor G & O had a legally or factually supportable claim to any of the insurance proceeds, Midland Risk was understandably reticent about settling with just Morrison Court without disposing of the claims (albeit legally and factually insupportable) that it owed money to the RTC and G & O, too. Accordingly, Midland Risk prudently asked everybody, including the RTC and G & O, to sign releases.

Of course releases were never signed because, after he and his father were unsuccessful in extorting further concessions from G & O, Joel Cantor began making ridiculous claims that the settlement was unauthorized. Joel Cantor's allegations (which not even The Bar believed) prompted Midland Risk to file the "Motion to Enforce Settlement." That motion prompted the hearing on Monday, September 13, 1993, where Joel Cantor withdrew his objections and the U.S. District Court entered the Order approving the settlement and dismissing all of the claims, except G & O's foreclosure claim, with prejudice. (Joy's Ex. 52).

If Midland Risk's forwarding of the settlement proceeds to Mr. Joy "for the benefit" of Morrison Court and G & O made Mr. Joy an "escrow agent" for Midland Risk, Morrison Court and G & O, and, under *Seligman,* imposed upon Mr. Joy the obligation to (1) know the provisions and conditions of the principal agreement and (2) to exercise reasonable skill and ordinary diligence in holding and delivering the funds in strict accordance with the principal's agreement, then clearly the U.S. District Court's Order dramatically changed Mr. Joy's duties. While apparently not ever understood by G & O, and while directly contrary to The Bar's argument and the referee's legal conclusion, the U.S. District Court's Order did constitute a decision on the merits. *See Citibank, N.A. v. Data Lease Financial Corp.*, 904 F. 2d 1498, 1501-

02 (11th Cir. 1990)("The phrases 'with prejudice' and 'on the merits' are synonymous terms. . . The district court's order dismissing Data Lease's third-party complaint against the directors with prejudice, entered by stipulation of the parties pursuant to [a settlement agreement], is a final judgment on the merits."); *See also Arrieta-Gimenez v. Arrieta-Negron*, 551 So. 2d 1184 (Fla. 1989); *Lomelo v. American Oil Co.*, 256 So. 2d 9, 11 (Fla. 4th DCA 1971)("Where a judgment dismissing an action 'with prejudice' is rendered upon stipulation of the parties, it operates as a bar to another action upon the same cause."); Rule 1.420(b), Fla.R.Civ.P.

Contrary to The Bar's arguments and the referee's conclusion, the U.S. District Court's order dismissing G & O's claim to the insurance proceeds with prejudice did have significant ramifications - ramifications that had been foretold and had been explained to and were understood by Morrison Court even before the September 13, 1993, hearing. (Joy Ex. 16). If to have an equitable lien means only that one has the right to bring an action to have an equitable lien declared and enforced, it necessarily follows that if an action is brought but is subsequently dismissed with prejudice, the right to bring an action for equitable lien disappears forever. In this particular case, the U.S. District Court's Order extinguished G & O's legal claim to any of the settlement proceeds Mr. Joy was holding in trust. (T-262, Smith; T-396-98, Joy). As even Mr. Smith acknowledged, the Order also had the effect of rendering any precondition imposed by Midland Risk, *to wit*, signed releases, moot. (T-265, Smith).[14] In sum, the U.S. District Court's

[14]The referee's conclusion that because Midland Risk conditioned disbursement of the funds by Mr. Joy upon the receipt of signed releases from both Morrison Court and G & O, the funds somehow belonged to both Morrison Court and G & O does not withstand scrutiny. Midland Risk clearly could not unilaterally create legal rights in G & O and impose legal obligations on Morrison Court and Mr. Joy where no legal rights and obligations existed under the law. That being said, what Midland Risk wanted or did not want, was rendered moot by the U.S. District Court's Order. To hold otherwise would mean that regardless of the U.S. District Court's Order, Mr. Joy had no authority to disburse any of the funds without first having obtained releases from (continued...)

Order extinguished Mr. Joy's "escrow" obligations to Midland Risk or G & O.[15]

Because G & O never had a legal right to any the $500,000.00 held in Mr. Joy's trust account, and because any claims of Midland Risk and G & O to the funds were extinguished as a matter of law by the U.S. District Court's Order, Mr. Joy's disbursement of the $500,000.00 to another trust account labeled "Madeline Joy, Trustee f/b/o 2311 MC Corp." after the September 13, 1993, hearing, could not have violated Rules 5-1.1(b), 4-1.15(d) or 4-1.15(c) unless it was done in derogation of Morrison Court's rights or directions or was otherwise improper. But, here again, The Bar's position and the referee's conclusions are unsupported by the clear and convincing evidence.[16] In fact, the clear and convincing evidence proves just the opposite.

As the evidence showed, even before September 13, 1993, Irwin and Joel Cantor were

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[14](...continued)
Morrison Court and G & O. But releases in favor of Midland Risk have never been signed by either Morrison Court or G & O. Taken to its logical extreme, the referee's conclusion means that Mr. Joy never had the authority to disburse the money to anyone and should still be holding it in escrow today. Surely no one is taking that ridiculous position.

[15]At the final hearing, The Florida Bar repeatedly asked Mr. Joy "Who made you the Judge?" (T-439-42, Bar Counsel). No one made Mr. Joy a Judge. But there was a Judge who entered an Order that extinguished G & O's rights to the settlement proceeds. As Mr. Joy attempted to explain, the simple fact is that, in the day-to-day practice of law, a lawyer has to determine what effect a court's ruling might have on his client's interests and on the interests of his client's adversaries. In this case, Mr. Joy not only correctly predicted the effect of the U.S. District Court's order before it was entered, he reasonably relied on its effect after it was entered. This should be a complete defense to The Florida Bar's claims that Mr. Joy's violated any trust account Rule. *See The Florida Bar v. Rubin*, 549 So. 2d 1000, 1003 (Fla. 1989)(lawyer's good faith reliance on a court's order is a complete defense to allegations of ethical violations).

[16]They are also inconsistent. On the one hand, the referee specifically concludes that "the directions of Respondent's client, Morrison Court, regarding the disbursement are irrelevant." Yet in the same breath, the referee finds a Rule violation because Mr. Joy did not take Morrison Court's directions into account. (RR at 22). If Morrison Court's directions were "irrelevant," then how could the presence or absence of such directions constitute clear and convincing and competent and substantial evidence of anything? That question aside, the real reason that The Bar and the referee were forced to characterize Morrison Court's directions as "irrelevant" is that, as will be seen, Morrison Court did direct the disbursement.

concerned that any money belonging to Morrison Court would be attached by creditors.[17] Their concern became more acute when, as a result of the U.S. District Court's Order, the money being held in Mr. Joy's account became unencumbered by the unfounded claim of G & O. According to the uncontroverted evidence, that concern was once again discussed by Irwin and Joel Cantor, Mr. Sweeney and Mr. Joy following the hearing. Morrison Court wanted its money protected from creditors. (TFB Ex. 9). Knowing of Morrison Court's concerns, Mr. Joy was ethically required to do something. *C.f. The Florida Bar. v. McLawhorn*, 505 So. 2d 1338, 1342 (Fla. 1987), *citing*, *The Florida Bar v. Wagner*, 212 So. 2d 770 (Fla. 1968)(an attorney who undertakes to assert and collect a client's claim cannot, in defiance of that client's instructions, withhold money to pay client's creditors).

It is uncontroverted that during that September 13, 1993, meeting Mr. Joy floated several ideas, including changing the name of Morrison Court to "2311 MC Corp." and moving Morrison Court's money into an account to be established in that name. (T-490, Joy). It is uncontroverted that the plan was agreed to. Mr. Sweeney was assigned the task of filing the necessary paperwork to have the name change effectuated. (Joy Ex. 55). Mr. Joy returned to his office in Sarasota. Upon arriving, Mr. Joy found a faxed memo from Joel Cantor which described a plan that was contrary to what had just been decided only one hour before. (TFB Ex. 9). Mr. Joy telephoned Joel Cantor to discuss what to do. Joel Cantor again agreed to Mr. Joy's proposed plan and gave Mr. Joy the federal tax identification number Mr. Joy needed to set up the new account. (Joy Ex. 56). The new account was set up and the money was transferred. Mr. Joy confirmed what he had done in writing the same day. (TFB Ex. 10). Joel Cantor saw

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[17]At least one of those "creditors" was The City of Tampa that had filed a lien on the real property. (T-469-71, Joy).

the letter and, until he filed his Complaint with The Bar, never questioned its contents or Mr. Joy's actions.[18]

Ignoring the clear, convincing and uncontroverted evidence to the contrary, the referee merely concluded that the transfer was not approved by Morrison Court because "all the correspondence to Respondent from J. Cantor, as president/director/shareholder of Morrison Court, indicated that he did not authorize the transfer of funds." (RR at 22). But "all" the correspondence is only Joel Cantor's September 13, 1993, memo wherein he not only suggests that Mr. Joy transfer some of the funds to a "new escrow account" to be controlled by Morrison Court, but, as to the rest of the funds, merely asks: "If we are within the law as you say, why play games with name changes, it just makes us look worse down the road." (TFB Ex. 9).

Far from constituting clear and convincing evidence that Morrison Court did not authorize the transfer, Joel Cantor's question actually dealt only with the proposed name change and was merely part of an ongoing dialogue between he, his father and Mr. Joy regarding how to best protect Morrison Court's funds from creditors. The clear and convincing evidence established that Mr. Joy answered Joel Cantor's question during a subsequent telephone conversation. (T-419, Joy). Joel Cantor's question does not constitute a directive any more than Joel Cantor's testimony constitutes clear and convincing evidence of anything. *Rayman, supra.* As even The Bar was forced to admit, Joel Cantor was not, and is not, to be believed. (T-211, Bar Counsel).

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[18]At the final hearing, Joel Cantor testified that he was "horrified" to learn that the funds had been disbursed and was surprised when, in 1994 or 1995, he first learned that the settlement proceeds had been transferred to another account established for the benefit of 2311 MC Corporation. (T-105, Cantor). In view of Joel Cantor's admission, however, that he received and reviewed Mr. Joy's letter of September 13, 1993, wherein Mr. Joy states that the funds have been transferred to an account established for the benefit of 2311 MC Corporation, and that he received and reviewed Irwin Cantor's letter of September 13, 1993, directing Mr. Joy to move the funds, Joel Cantor's testimony about horror and surprise is obviously false.

He admittedly perjured himself in his Complaint to The Bar. (T-179; 202, Cantor). He clearly lied when he testified that he never knew what Mr. Joy did with the funds. After all, it was he who provided Morrison Court's federal tax identification number to Mr. Joy; it was he who received Mr. Joy's September 13, 1993, letter explaining what had been done with funds; and it was he who received a copy of Irwin Cantor's letter of September 13, 1993, which implored Mr. Joy not to delay transferring the funds; and it was he who did nothing to dissuade Mr. Joy from following Irwin Cantor's directives. Importantly, it was Joel Cantor who on September 17, 1993, personally wrote to Mr. Smith and stated that he, Joel Cantor, knew that the money was safe and sound and available to pay G & O if and when Morrison Court and G & O agreed to terms. (TFB Ex. 26).[19] If "clear and convincing evidence" has to be something more than the self-serving uncorroborated testimony of a single witness, and has to be at the very least truthful, then it is certain that the referee's conclusion that The Bar satisfied its burden of proving that Morrison Court did not approve of the transfer simply because Joel Cantor said so must be erroneous.

Importantly, the transfer was clearly approved by Irwin Cantor. While both The Bar and the referee make much of the fact that Irwin Cantor was not a shareholder of Morrison Court, and while The Bar and the referee ignore it completely, the record is replete with uncontroverted evidence that Irwin Cantor was not only authorized to speak on behalf of Morrison Court, he was the predominate voice in Morrison Court's affairs. For instance, Irwin Cantor referred Morrison Court to Mr. Joy in the first place, and it was he who wanted Mr. Joy to resume the representation of Morrison Court. (T-75; 88-89, Cantor). It was Irwin Cantor who signed the

[19]Of course it was in the same September 17, 1993, letter to Mr. Smith, that Joel Cantor acknowledged that the deal with G & O was still on. This was written on the same day that in a separate letter to Mr. Joy, Joel Cantor stated that the deal with G & O was null and void. (*See* TFB Ex. 14). The contradictory statements further demonstrate the propensity of Joel Cantor to say whatever suits his purposes regardless of its truth.

April 13, 1993, fee agreement. (TFB Ex. 6). It was Irwin Cantor who with Joel Cantor's knowledge was giving Mr. Joy directives on behalf of Morrison Court. (T-139, Cantor). Irwin Cantor attended the first court-ordered settlement conference on behalf of Morrison Court. (T-92, Cantor). It was Irwin Cantor who attended the September 1, 1993, settlement meeting with G & O and proposed new terms and it was Irwin Cantor whom Mr. Smith believed was calling the shots. (T-254-56, Smith). Irwin Cantor attended the September 13, 1993, hearing and thereafter participated in the meeting with Mr. Joy where the idea of transferring Morrison Court's funds to another account was broached. (T-490, Joy). Irwin Cantor wrote to Mr. Joy later that same day and described Mr. Joy's performance as "brilliant." (Joy Ex. 46). It was Irwin Cantor who, in the same letter, wrote "I sincerely hope you moved the escrow before you send (sic) Smith's letter." (Joy Ex. 46, p. 2). The letter was faxed to Mr. Joy's from Joel Cantor's office. (*Id.*).

It was Irwin Cantor who on September 16, 1993, wrote to Mr. Joy, again using son Joel Cantor's company's letterhead, to demand that Morrison Court's money be released to him so that he and Joel could take it to Orlando to bid on other apartments. (Joy Ex. 48). It was Irwin Cantor who, in the same September 16, 1993, letter, directed Mr. Joy to draft the settlement documents between Morrison Court and G & O and to include a provision allowing "us (new corp.)" to win the bid at the foreclosure sale. (Joy's Ex. 48, p. 2). It was Irwin Cantor who attended the meeting in Mr. Smith's office on September 17, 1993, and spoke as he had on many prior occasions on behalf of Morrison Court. (T-255-56, Smith). It was Irwin Cantor who at the conclusion of that same meeting signed the memorandum of the agreement between Morrison Court and G & O. (Joy Ex. 50). It was Irwin Cantor who, when Mr. McLain became involved, called the shots. (T-550-51, McLain). In fact, it was Irwin Cantor who, to all the world, was the driving force behind Morrison Court. (T-310, Cohen). It was Irwin Cantor who, by virtue of

a side agreement with Joel Cantor, was going to be the ultimate recipient of at least some of the settlement proceeds. (T-196, Cantor). Although because its theory and credibility depended on The Bar's ability to distance itself and Morrison Court from Irwin Cantor, a convicted felon, the clear and convincing evidence put Irwin Cantor at the heart of Morrison Court.

In view of the all of the uncontroverted, evidence it is not surprising that Mr. Joy believed that, even if Joel Cantor had not expressly authorized the transfer himself, it had nevertheless been authorized by Irwin Cantor as a *de facto* officer or director of Morrison Court. Under Florida law, Mr. Joy's belief was reasonable.[20] The referee's conclusions to the contrary simply fail under the weight of the clear and convincing evidence and the substantive and applicable law.

The Bar's suggestion that the transfer of Morrison Court's funds from Mr. Joy's trust account to another account was improper is itself flawed. There is simply no ethical impropriety in keeping a client's funds in other than an identifiable account if the client so directs. *The Florida Bar v. Fitzgerald*, 491 So. 2d 547 (Fla. 1986). The client's written direction is preferred but is not required. *Id.* at 548; *See also* Rule 4-1.15(a). In this case, Mr. Joy kept his client's funds in an identifiable account as directed by his client both verbally and in writing. The Bar acknowledged as much when it dismissed its claim that Mr. Joy violated Rule 4-1.15(a) which, except for the provision allowing the lawyer to retain as much of the client's property as is necessary to pay the lawyer's fee, is substantially similar to Rule 4-1.15(c). (T-19-20, Bar Counsel). The referee tacitly acknowledged that the proof was inadequate to prove a violation of Rule 4-1.15(c) when he found that Morrison Court's directives were "irrelevant." In the face

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[20]Under the circumstances, it might correctly be said that if not an actual agent Irwin Cantor was an apparent agent of Morrison Court such that anything Irwin Cantor said would bind Morrison Court. *See Stiles v. Gordon Land Co.*, 44 So. 2d 417 (Fla. 1950); *Sugarland Real Estate, Inc. v. Beardsley*, (Fla. 2d DCA 1987)(agent's authority may be implied or apparent and can be created, among other ways, by principal's subsequent ratification of agent's acts).

of the acknowledged inadequacy, the referee's conclusion that Mr. Joy violated Rule 4-1.15(c) by transferring Morrison Court's funds without Morrison Court's permission is clearly erroneous.

The referee's conclusion that Mr. Joy violated Rule 5-1.1(b) is likewise erroneous. Rule 5-1.1(b) provides that an account maintained to comply with Rule 4-1.15 must be clearly "labeled and designated as a trust account." Setting aside the threshold question of whether the account established in the name of "Madeline Joy as Trustee f/b/o 2311 Corp." was a "trust account" maintained to comply with Rule 4-1.15, there can be no disputing that it was clearly "labeled and designated as a trust account." The Bar clearly admitted as much when it withdrew that portion of its Complaint dealing with Rule 4-1.15(a) and thus a violation of Rule 4-1.15(a) cannot serve as the basis for a finding that Mr. Joy violated Rule 4-1.15(d). *See The Florida Bar v. Lancaster*, 448 So. 2d 1019, 1023 (Fla. 1984)(referee cannot recommended that lawyer be found guilty of a claimed Rule violation that is abandoned by The Bar).

Clearly, The Bar's real complaint was that Madeline Joy was not a lawyer. But the Rule that requires a trust account to be maintained in the name of a lawyer or his law firm is Rule 5-1.2(b)(1) not Rule 5-1.1(b).[21] Importantly, The Bar never charged Mr. Joy with violating Rule 5-1.2(b)(1) and, at the final hearing, acknowledged that it was not alleging that Mr. Joy violated Rule 5-1.2. (T-532, Bar Counsel). More importantly, the referee never found that Mr. Joy violated Rule 5-1.2. If The Bar is obligated to prove a violation of a specific Rule by clear and convincing evidence, and if the referee is precluded from finding a violation that was never pursued, then it seems clear in the instant case that The Bar cannot argue, and the referee cannot

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[21]Rule 5-1.2(b)(1) provides, in pertinent part:

> [Trust accounts] shall be in the name of the lawyer or law firm and clearly labeled and designated as a "trust account."

conclude, that by establishing an account in the name of "Madeline Joy as Trustee f/b/o 2311 Corp." Mr. Joy violated Rule 5-1.1(b) when the conduct at issue is governed by a completely different Rule.

Rule 5-1.1(b), like all of the other trust accounting Rules, is designed to prevent lawyers from putting trust funds at risk and from using trust funds for other than their intended purpose. The Bar's misguided claims to the referee's unsupported conclusion to the contrary notwithstanding, the funds entrusted to Mr. Joy were never at risk.[22] More importantly, the funds entrusted to Mr. Joy were maintained for their intended purpose, although with the Order of the U.S. District Court and subsequent events the process for achieving that purpose changed. The bottom line, however, is that the funds were ultimately used for their intended purpose and no one, repeat no one, was injured or damaged. Rule 5-1.1(b) was not violated. The referee's conclusion that Mr. Joy violated Rule 4-1.15(d) by violating Rule 5-1.1(b) is, thus, clearly erroneous.

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[22]Both before and during the final hearing The Florida Bar was obsessed with the "possibility" that had she wanted to, Madeline Joy could have absconded with all of Morrison Court's money. Apart from the ludicrous presumption that Madeline Joy, Mr. Joy's wife of over 30 years and Mr. Joy's office manager of over ten years would just "go to Mexico" with the money, is the simple fact that the "possibility" of misappropriation existed wherever and however the funds were being held. There are legions of cases and hundreds of cases about which The Florida Bar is undoubtedly aware that involve a lawyer misappropriating client funds being held by that lawyer in trust. There are absolutely no cases, however, where a lawyer has been sanctioned because a client's funds "could have been" misappropriated. This should not be the first.

UNDER FLORIDA LAW AND THE CLEAR AND CONVINCING EVIDENCE, THE FLORIDA BAR FAILED TO PROVE THAT MR. JOY MISREPRESENTED OR IMPROPERLY FAILED TO DISCLOSE ANY MATERIAL FACT AND THE REFEREE'S CONCLUSION TO THE CONTRARY IS CLEARLY ERRONEOUS

RULE 4-4.1

Rule 4-4.1 provides that:

> "In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6."

The referee's contrary conclusion notwithstanding, there was nothing about Mr. Joy's September 15, 1993, letter to Mr. Smith that was the least bit false or misleading. In view of the foregoing discussion of the law regarding equitable liens, there was simply nothing false about Mr. Joy telling Mr. Smith that G & O's claim to the insurance proceeds had been terminated. While Mr. Smith, The Bar, and the referee might believe otherwise, Mr. Joy's statement was, and is, true as a matter of law.

Also true was Mr. Joy's statement that "I can confirm to you that the funds held in my Trust Account have been disbursed from my Trust Account." (TFB Ex. 11). By September 15, 1993, Mr. Joy had disbursed the funds from his trust account. Indeed, the fact that he had disbursed the trust funds from his trust account is the very focus of The Bar's claim that Mr. Joy violated the trust account Rules. Because the statement was true, Rule 4-4.1 is inapplicable.

The fact that Mr. Joy's statement was true also renders erroneous the referee's conclusion that "[Mr. Joy] intended for Mr. Smith to misinterpret his statement to mean that he had disbursed the funds directly to his client, Morrison Court, and that he no longer had control over the funds." (R & R at 22). According to the clear, convincing and uncontroverted evidence, Mr.

Joy intended that Mr. Smith interpret the language of the letter exactly as written. (T-430, Joy). As the clear, convincing and uncontroverted evidence demonstrated, it was Mr. Smith who nevertheless unilaterally assumed that Mr. Joy had distributed the funds directly to Irwin and Joel Cantor. (T-235, Smith). But, under Florida law, impressions and assumptions, no matter how sincerely felt, cannot support a finding of fraudulent conduct. *See Iden v. Kasden*, 609 So. 2d 54 (Fla. 3d DCA 1993), *rev. denied*, 620 So. 2d 761 (Fla. 1993).[23]

For many of the same reasons that what was said in Mr. Joy's September 15, 1993, letter did not constitute a violation of Rule 4-4.1, Mr. Joy's alleged failure to tell Mr. Smith that the funds had been transferred to an account established in the name of "Madeline Joy, Trustee, f/b/o 2311 MC Corporation" cannot constitute a violation of Rule 4-4.1 either.

The Comment to Rule 4-4.1 specifically states that:

> A lawyer is required to be truthful when dealing with others on a client's behalf, **but generally has no affirmative duty to inform an opposing party of relevant facts.**

In this regard, Rule 4-4.1 is in complete accord with Florida law generally which holds that, absent a fiduciary duty, there is no obligation imposed on one party to a transaction to disclose anything to another party to the same transaction. *See generally Hendry Corp. v. Metropolitan Dade County*, 648 So. 2d 140 (Fla 3d DCA 1995); *Green Acres, Inc. v. First Union Nat'l Bank*

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[23]In *Iden*, the seller of real estate sued the buyer's attorneys claiming that the attorneys fraudulently led the seller to believe that the attorneys were holding certain deposits in escrow. When the sale did not close, the seller complained that he was damaged because he could not make a claim against the escrowed amounts. Although there was never any affirmative written or oral misrepresentation, the seller nevertheless claimed that he *assumed* the deposits were being held by the attorneys in escrow because, in the field of real estate transactions, deposits are always held in escrow. On appeal from a jury verdict in favor of the seller, the Third District reversed with directions to enter judgment in favor of the attorneys, holding that in the absence of a false statement, the seller could not just reasonably rely on his own assumptions. *Id.* at 56-7.

Under *Iden*, had Mr. Smith and/or G & O sued Mr. Joy civilly for fraud or misrepresentation, Mr. Joy would have been entitled to judgment as a matter of law.

of Florida, 637 So. 2d 363 (Fla. 4th DCA 1994); *Watkins v. NCNB Nat'l Bank of Florida, N.A.*, 622 So. 2d 1063 (Fla. 3d DCA 1993); *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372 (Fla. 2d DCA), *rev. denied*, 626 So. 2d 207 (Fla. 1993). In actuality, Rule 4-4.1 may even be more limited than general Florida law because it requires disclosure only "when necessary to avoid assisting a criminal or fraudulent act by a client." *See* Rule 4-4.1, Comment.

In this case, there was no suggestion that the transfer of funds to a trust account in the name of "Madeline Joy, Trustee f/b/o 2311 MC Corp." constituted a "criminal or fraudulent act by a client." To the contrary, the transfer was designed to protect the funds from creditors. The transfer could not have defrauded G & O because, as discussed at length above, G & O had no legal right to those specific funds in the first place and because, at all times, G & O's position was secured by a mortgage on real property that was worth substantially more than the debt owed. Of course, this was stated in the very letter the referee found was misleading.

Lost on both The Bar and the referee is the fact that Rule 4-4.1's duty to disclose is specifically tempered by Rule 4-1.6. Rule 4-1.6 requires Mr. Joy to protect client confidences. Morrison Court and G & O were litigation and negotiation adversaries. Had Mr. Joy disclosed everything to Mr. Smith, then Mr. Joy would have undoubtedly violated Rule 4-1.6. Because Rule 4-4.1 is tempered by Rule 4-1.6, and because Mr. Joy was obligated to protect his client's confidences, there simply cannot be a violation of Rule 4-4.1 under the facts of this case. The referee's contrary conclusion is clearly erroneous.

RULE 4-8.4(c)

Rule 4-8.4(c) provides that:

> "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

At the final hearing, The Bar did not even attempt to describe what it believed constituted a violation of this Rule except to say the same misrepresentations that allegedly constituted violations of Rule 4-4.1 also constituted dishonesty, fraud, deceit or misrepresentation. (T-25, Bar Counsel). In the interest of brevity, Mr. Joy will simply refer this Court to the discussion of Rule 4-4.1 above. However, a couple of additional points specific to this Rule bear mentioning.

First, before there can be a violation of this Rule, there must be clear and convincing evidence that the lawyer acted with an intent to defraud, deceive, or misrepresent. *The Florida Bar v. Cramer,* 643 So. 2d 1069 (Fla. 1994); *The Florida Bar v. Neu*, 597 So. 2d 266 (Fla. 1992). Realizing that evidence of intent is difficult to come by, this Court has recognized that intent may be proved by circumstantial evidence. But this Court has also recognized that, even in the context of disciplinary hearings, circumstantial evidence must be inconsistent with any reasonable hypothesis of innocence. *See The Florida Bar v. Marable*, 645 So. 2d 438 (Fla. 1994).

Mr. Joy denied that he had any intent to defraud Mr. Smith and there was absolutely no direct evidence to the contrary. Nevertheless, The Bar argued, and the referee mechanically accepted, that just because Mr. Joy told Joel Cantor that his statement proposed statement would be "literally true," then he must have intended to mislead Mr. Smith. (RR at 23). The simple fact it that under The Bar's own evidence, what Mr. Joy proposed telling Mr. Smith <u>was</u> "literally true," *to wit*, that the funds had been disbursed from the law firm's trust account. If under Florida law and the Rules, a lawyer has no obligation to inform an opposing party of relevant facts, then how could Mr. Joy's true statement about another true statement possibly constitute clear and convincing evidence that Mr. Joy intended to mislead? It can't. The same evidence just as likely demonstrates that Mr. Joy was concerned enough about not misleading Mr. Smith that Mr. Joy carefully chose his words so that what he was saying would be true. If under

Florida law and the Rules, The Bar cannot rely on circumstantial evidence unless it is inconsistent with any reasonable hypothesis of Mr. Joy's innocence, then The Bar has not met its burden of proof. The referee's conclusion, which is based solely on that insufficient circumstantial evidence, is clearly erroneous and must be rejected. *Marable*, 645 So. 2d at 443.

THE FLORIDA BAR'S CHALLENGE TO THE REFEREE'S RECOMMENDED DISCIPLINE IS UNWARRANTED UNDER THE FACTS AND INSUPPORTABLE UNDER THE LAW

In view of the foregoing discussion regarding the alleged Rules violations there should be no question about discipline except to conclude that the referee's recommended public reprimand is unwarranted. Nevertheless, because The Bar has asked this Court to impose a ninety-one day suspension, Mr. Joy is forced to respond. As the following discussion should make clear, the discipline requested by The Bar is simply unwarranted.[24]

It is clear that discipline must serve three purposes. Discipline must: (1) be fair to society, (2) be fair to the attorney, and (3) be sufficient to deter other attorneys from engaging in similar conduct. *The Florida Bar v. Lawless*, 640 So. 2d 1098 (Fla. 1994). In meting out discipline, the Court must consider: (1) the duty violated, (2) the lawyer's mental state, (3) the potential or actual injury caused, and (4) the existence of aggravating or mitigating circumstances. With these considerations in mind, The Bar's arguments in favor of a ninety-one day suspension will be addressed in turn.

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[24]The requested discipline is also unexpected. As explained at the January 8, 1996, hearing, The Bar's lead counsel in this matter, Ms. Bonnie Mahon had previously indicated that The Bar would not be seeking a suspension of any sort in this case. (T2-53-54). In fact, Ms. Mahon was so disappointed in The Bar's presentation at the August, 1995 hearing, that she thereafter proposed stipulated finding of minor misconduct. It is indeed unfortunate that Ms. Mahon resigned her position as The Bar's Assistant Staff Counsel in October, 1995, and before Mr. Joy could respond to her offer. If she had not, it is likely that this matter would not even be before this Court.

THE ALLEGED CONFLICT OF INTEREST

In the instant case, there is a substantial question of whether Mr. Joy violated the conflict of interest Rules. Assuming *arguendo*, that he did though, he did so only in the most technical sense and any parallels between his conduct and the conduct of the attorney involved in *The Florida Bar v. Sofo*, 21 Fla. L. Weekly S36 (Fla., January 18, 1996), end there. In *Sofo*, Mr. Sofo served as general counsel for, drew a salary from, and was a shareholder in, two companies, Micro and Neetco. *Id.* Eventually, the interests of Micro and Neetco became directly adverse and the ongoing adversity threatened Mr. Sofo's investment in both companies. Instead of attempting to fulfill his obligations to both companies or attempting to extricate himself from the dispute altogether, Mr. Sofo wrote threatening letters to Neetco on Neetco's stationary that were signed by Mr. Sofo as general counsel for Neetco. In one of his letters, Mr. Sofo announced that the contract between Micro and Neetco was terminated. In other letters, Mr. Sofo told Neetco's customers that Neetco was no longer authorized to use Micro's technology. Both The Bar and the referee recommended that Mr. Sofo be found guilty of violating Rules 4-1.7(b), 4-1.8(b), 4-1.9(a) and 4-1.9(b). On appeal, this Court rejected the recommendation of The Bar and the referee and suspended Mr. Sofo for ninety-one days. *Id.*

Unlike Mr. Sofo, Mr. Joy did not represent two clients with directly adverse interests. Nor did Mr. Joy undertake a course of action on behalf of one client that was intentionally designed to harm another client. There can be no doubt that Mr. Joy thought that the interests of Morrison Court and Mr. Cohen were always aligned. Granted, Mr. Joy also thought that the interests of Morrison Court and Mr. Cohen might become adverse to the personal interests of Irwin and Joel Cantor, but Mr. Joy also knew that there is a distinction between corporations and the persons that comprise them. Mr. Joy also knew that, under Florida law, officers and directors

owed certain fiduciary duties to the corporations they served, and Mr. Joy told Joel Cantor as much in writing on at least one occasion.

Because Mr. Joy knew the law, he became concerned when Irwin and Joel Cantor began speaking and acting for their own personal gain and benefit. Mr. Joy reasonably felt that some action was required to protect Morrison Court and its shareholders from the personal agendas of Irwin and Joel Cantor. Mr. Joy reasonably believed that what was good for Morrison Court was good for Mr. Cohen and *vice versa*. Under Florida law it was.

Unlike Mr. Sofo, Mr. Joy's actions were not motivated by his own personal financial interests. Regardless of what Mr. Cohen thought or what Mr. Cohen intended with respect to compensating Mr. Joy, the uncontroverted evidence demonstrated that Mr. Joy never asked for, never expected, and never received anything (except a punch in the face from Irwin and Joel Cantor) for agreeing to help protect the concurrent interests of Morrison Court and Mr. Cohen from fraud and defalcation by Irwin and Joel Cantor.[25] Unlike Mr. Sofo, Mr. Joy never owned an interest in Morrison Court. The Bar's claims to the contrary, *Sofo* is clearly inapposite.

The Bar's reliance on *The Florida Bar v. Pahules*, 334 So. 2d 23 (Fla. 1976), is also misplaced. In *Pahules*, Mr. Pahules formed and owned stock in a corporation known as LCP Scientific which had as its sole asset a patent on a process developed by Mr. Pahules' client. Mr. Pahules then formed another corporation, Colorflame, of which LCP was to be the majority (51%) shareholder without consideration, and for whom Mr. Pahules was to serve as Secretary-Treasurer and general counsel. The other 49% of Colorflame's shares were to be sold to the public. In due course, LCP licensed its patent to Colorflame but in a subsequent "addendum"

[25]The fact of the matter is that Mr. Joy ultimately accepted less compensation for his services than he was entitled to under the original fee agreement.

agreement prepared by Mr. Pahules gave LCP the option to terminate the license in two years. Later, a dispute arose between Colorflame and its minority shareholders who claimed that not only had they not been made aware of the addendum agreement, but that the money they paid directly to Mr. Pahules for their shares had been misapplied and misappropriated by Mr. Pahules and other shareholders of LCP. The minority shareholders also discovered that Mr. Pahules had prepared phony documentation designed to deceive the minority shareholders into believing that Colorflame had other assets. The referee found that Mr. Pahules had engaged in conduct involving an "irreconcilable conflict of interest," had failed to apply money held in trust for the trust's purposes, and breached numerous other disciplinary Rules. The referee recommended, and this Court agreed, that the appropriate discipline was ninety days, although Justice Adkins thought a public reprimand was the appropriate discipline. *Id.* at 26.

Unlike Mr. Pahules, Mr. Joy did not have an "irreconcilable" conflict of interest. Nor did Mr. Joy personally profit from any of the actions taken by him on behalf of Morrison Court and Mr. Cohen. Instead, unlike the minority shareholders of Colorflame, the minority shareholder of Morrison Court was protected from the very malfeasance that Mr. Pahules not only condoned but facilitated in his dealings with the other majority shareholders of LCP. The Bar's claims to the contrary, *Pahules* is neither instructive nor applicable.

Finally, The Bar's reliance on *The Florida Bar v. Mastrilli*, 614 So. 2d 1081 (Fla. 1993), is truly misplaced. In *Mastrilli*, Mr. Mastrilli represented both the driver and her passenger in a car that was involved in an automobile accident. Mr. Mastrilli, on behalf of his passenger client, made a claim against his driver client for an amount in excess of his driver client's insurance limits. When his driver client's insurer did not pay, Mr. Mastrilli filed suit on behalf of his passenger client against his driver client. As this Court noted, "In effect, [Mr. Mastrilli]

filed suit against his own client for the same matter for which he had been retained." *Id.* at 1082. Not surprisingly, this Court rejected Mr. Mastrilli's argument that he had been negligent in failing to discover the conflict and that his actions had not prejudiced either client. This Court correctly noted that Mr. Mastrilli's actions exposed his driver client to personal liability. *Id.*

Unlike Mr. Mastrilli, Mr. Joy knew a conflict when he saw one. Mr. Joy knew that the interests of Morrison Court and Mr. Cohen were aligned against the threatened malfeasance of Irwin and Joel Cantor. Unlike Mr. Mastrilli, Mr. Joy did not create the conflict. Unlike Mr. Mastrilli, Mr. Joy did not represent two clients with directly adverse interests; the interests of Mr. Joy's "clients" were aligned. Perhaps most importantly, unlike Mr. Mastrilli, Mr. Joy did not create a situation in which either of his "clients" were exposed to liability. In fact, Mr. Joy's efforts were designed to prevent liability. That The Bar would attempt to compare Mr. Joy to Mr. Mastrilli evinces the reckless abandon with which The Bar has sought to impugn Mr. Joy's motives and actions in what to even the casual observer was a difficult factual situation. *Mastrilli* is simply not controlling.

Standard 4.32 states 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 4.33 states 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 4.34 states that:

> "Admonishment 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 little or no injury to a client."

As the clear and convincing evidence demonstrated, and as the applicable law dictated, Mr. Joy's representation of Morrison Court was not adverse to anything Mr. Joy endeavored to do to protect Mr. Cohen from the Irwin and Joel Cantor. While perhaps Mr. Joy's methodology could be questioned, his motives should not. Neither Morrison Court nor Mr. Cohen were ever injured, nor was their a potential for injury to either. The idea was to protect both and, through Mr. Joy's efforts, both were protected. Mr. Joy would submit that if, under the facts of this case, there was a potential for a conflict of interest, it was minimal and never materialized. Mr. Joy would submit that, under the facts of this case, an admonishment is more appropriate than a public reprimand and a public reprimand is, in any event, more appropriate than a suspension.

THE ALLEGED TRUST ACCOUNT VIOLATIONS

In view of the foregoing discussion, there is a substantial question as to whether Mr. Joy violated any of the trust account Rules. Again, however, even assuming *arguendo* that he did, he did so with the reasonable belief that his conduct was appropriate in the eyes of both the substantive law and Morrison Court. No one was injured and the potential for injury was, The Bar's claims notwithstanding, nonexistent.

It is Mr. Joy's motives and the absence of injury and potential injury that distinguishes the instant case from *The Florida Bar v. Dancu*, 490 So. 2d 40 (Fla. 1986). In *Dancu*, Mr. Dancu advised his client that his client's funds had been deposited into a trust account, when in actuality Mr. Dancu had deposited the funds into a money market account he had opened in his own name and without his client's knowledge and consent. In due course, Mr. Dancu gave his client her funds but did not turn over the $8,812.00 in interest that had been generated in the

interim. Instead Mr. Dancu converted the $8,812.00 to his own use and when his client inquired, provided his client with materially false bank records showing that the funds had been deposited in a non-interest bearing account. When the client's accountant inquired further, Mr. Dancu finally came clean. Contrary to The Bar's argument in the instant case, this Court did not expressly find that Mr. Dancu's transfer of funds to another account violated any disciplinary rule but rather found that Mr. Dancu's theft of his client's funds and subsequent attempt to cover it up by lying about it warranted a six-month suspension.

Unlike Mr. Dancu, Mr. Joy transferred Morrison Court's funds to another trust account with what Mr. Joy reasonably believed at least was Morrison Court's consent and with what was unquestionably Morrison Court's knowledge. Mr. Joy had spoken to Joel Cantor and gotten Morrison Court's federal tax identification number, had received a letter from Irwin Cantor, had opened an account and had sent at least two letters to Joel Cantor outlining exactly what needed to be done and what had been done all on the same day. (Joy Ex. 55 and 56; TFB Ex. 10). Unlike Mr. Dancu, Mr. Joy did not steal Morrison Court's money nor did Mr. Joy attempt to lie to Morrison Court to cover up a theft. Unlike Mr. Dancu, Mr. Joy reasonably believed that his actions were in the best interests of his "clients," Morrison Court and Mr. Cohen. Unlike Mr. Dancu, Mr. Joy's did not create a greater potential for injury to either Morrison Court or Mr. Cohen. The Bar's claim to the contrary, the transfer into an account bearing Mr. Joy's wife's name as trustee for Morrison Court, did not put the funds at risk any more than putting the funds into a law firm's trust account on which the law firms principals have signatory authority creates a risk that one or more those signatories will steal the funds for him or herself. Importantly, and unlike Mr. Dancu, Mr. Joy's actions did not cause injury to either Morrison Court or Mr. Cohen. In fact, to the extent that leaving the funds in his trust account would have exposed them to

claims of creditors, their interests were protected. *Dancu* is not dispositive of the issue of discipline in this case.

The Florida Bar v. Fine, 607 So. 2d 416 (Fla. 1992), is likewise inapplicable. In *Fine*, Mr. Fine received $9,400.00 on behalf of an estate and instead of depositing the money into a trust account for the benefit of the estate, deposited the money into his trust account and, through a series of transactions, into his operating account. There is no mention of whether Mr. Fine told the estate what he was doing or that the estate was otherwise aware. Ultimately, when called upon to do so, Mr. Fine repaid the money to the estate. The referee found that Mr. Fine had violated Rules 4-1.15(a) and 5-1.1 and recommended a suspension of ninety days. This Court agreed. *Id.* at 417.

Unlike Mr. Fine, Mr. Joy was not found to have violated Rule 4-1.15(a). The Bar acknowledged as much when it dismissed its claim before the final hearing even began. Unlike Mr. Fine, Mr. Joy did not move Morrison Court's money into Mr. Joy's operating account without the apparent knowledge of his client. Mr. Joy deposited Morrison Court's money into a trust account for the benefit of Morrison Court at what Mr. Joy reasonably believed to be Morrison Court's direction and with what Mr. Joy's letter ensured was Morrison Court's complete knowledge. Theses distinctions render *Fine* inapposite.

For similar reasons, The Bar's reliance on *The Florida Bar v. Weiss*, 586 So. 2d 1051 (Fla. 1991), is unavailing. In *Weiss*, Mr. Weiss was found to have violated Rules 4-1.15(a) and (b) by failing to supervise an accountant whose mistakes had resulted in a misuse and misappropriation of Mr. Weiss' clients' funds. This Court determined that Mr. Weiss' conduct represented "gross negligence" and suspended Mr. Weiss for six months. *Id.* at 1053.

Unlike Mr. Weiss, Mr. Joy's actions did not constitute a misuse or misappropriation of

anybody's money. Mr. Joy reasonably believed that the U.S. District Court's Order disposed of all but Morrison Court's claim to the insurance proceeds and reasonably believed that he had the express, if not implied, authority from Morrison Court to transfer the funds to avoid the potential claims of creditors. Unlike Mr. Weiss, Mr. Joy kept his client informed. Unlike Mr. Weiss' clients, Mr. Joy's clients knew exactly where Morrison Court's money was. True, Mr. Joy transferred the money at what he reasonably believed to be Morrison Court's direction for Morrison Court's benefit to, among other things, improve Morrison Court's bargaining power with G & O. But since when does following what an attorney reasonably believes to be his client's directives to protect his client's funds and to improve his client's bargaining position all within what Mr. Joy reasonably thought to be within the bounds of the law, constitute a violation of a disciplinary Rule? It does not and, unless this Court is prepared to repeal the Rules requiring zealous representation, it should not.

Stripped to its core, The Bar's real complaint seems to be that Mr. Joy violated Rule 4-1.15(c) by transferring Morrison Court's money from his law firm trust account into another trust account which, although unquestionably established for the benefit of Morrison Court, failed to contain the name of a lawyer. After all, there can be no question that had Mr. Joy transferred the money to another trust account where either he or his law partner were named as trustees under the same circumstances, there could be no trust account violation. That being said, Mr. Joy admits that his wife is not an attorney, although as office manager she was certainly supervised by attorneys. If The Bar's real complaint is that her name as opposed to the name of a lawyer appeared as trustee for the benefit of Morrison Court, then Mr. Joy is guilty of a

technical violation only.[26]

Standard 4.12 provides that:

> "Suspension is appropriate when a lawyer knows of should know that he is dealing improperly with client property and causes injury or potential injury to a client."

Standard 4.13 provides that:

> "Public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client."

Standard 4.14 provides that:

> "Admonishment is appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client or where there is a technical violation of trust account rules or where there is an unintentional mishandling of client property."

In the instant case, there is no evidence that Mr. Joy knew that he was dealing with the settlement funds improperly. Mr. Joy reasonably believed that, under Florida law, the U.S. District Court's Order dismissing all but G & O's foreclosure claim with prejudice, voided any "escrow" obligations he had to Midland Risk and G & O. For his part, at the final hearing, G & O's attorney reluctantly agreed that Mr. Joy was right. Mr. Joy also reasonably believed that he had the authority from both Irwin and Joel Cantor to transfer what he thought was Morrison Court's money into another trust account for Morrison Court's benefit. Of course, Mr. Joy did so and then confirmed everything in writing to Joel Cantor the same day. Perhaps, in retrospect,

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[26]Although not part of the formal charges, and while at worst constituting merely a technical violation, The Bar intimated that Mr. Joy may have violated the trust account Rules by failing to pay out the $266.57 in interest earned on Morrison Court's funds while deposited in the account labeled "Madeline Joy, Trustee, f/b/o 2311 MC Corp." In point of fact, the interest was not credited until September 30, 1993 - two days after Mr. McLain and Mr. Joy's partner, Mr. Moran, finalized the settlement of Morrison Court's claim and exchanged releases. (TFB Ex. 35). Because its existence was apparently not contemplated by either Mr. McLain or Mr. Moran, no provision was made for interest, if any, to be paid at a later date. Contrary to The Bar's suggestion, the funds have not been converted and remain available for distribution if and when it is properly determined to whom they belong.

Mr. Joy should have had Joel Cantor commit Morrison Court's authorization to writing. *See Fitzgerald*, 491 So. 2d at 548. After all, who could have predicted that Joel Cantor would file an admittedly false Complaint? But Mr. Joy's failure was not intentional, it was at most careless. The referee acknowledged as much when he recommended a public reprimand. This Court should similarly recognize as much and conclude that insofar as the alleged trust account violations are concerned Mr. Joy's conduct was at most negligent and in fact constituted only technical violations of the trust accounting Rules. Under the applicable Standards, an admonishment is more appropriate than a public reprimand, and a public reprimand is more appropriate than the suspension urged by The Bar. *See McLawthorn*, 505 So. 2d at 1342 (Fla. 1987)(making misrepresentations and transferring client's funds without client's permission warrants public reprimand); *The Florida Bar v. Toothaker*, 477 So. 2d 551 (Fla. 1985)(breach of fiduciary duty while acting as an escrow agent and making misrepresentations to escrow's beneficiaries warrants public reprimand); *The Florida Bar v. Suprina*, 468 So. 2d 988 (Fla. 1985)(approving recommended discipline of public reprimand in case involving multiple trust account violations where no damage or injury resulted).

THE ALLEGED MISREPRESENTATIONS

As with the other alleged Rule violations, there is a substantial question whether, under Florida law and the applicable Rules, the failure by Mr. Joy to correct Mr. Smith's assumption about the whereabouts of Morrison Court's money could constitute an actionable misrepresentation, much less a sanctionable fraud. But even assuming *arguendo*, Mr. Joy's letter of September 15, 1993, misled Mr. Smith, not even a public reprimand, much less the requested suspension, is warranted.

The Bar's continued reliance on *The Florida Bar v. Webster*, 647 So. 2d 817 (Fla. 1994)

does nothing but demonstrate the difficulty The Bar has in understanding the facts of this case and the very Rules it is charged with enforcing. In *Webster*, Mr. Webster was suspended from the practice of law for eighteen months for various trust account violations to be followed a two-year probation. On petition for readmission, the appointed referee found that, during his suspension, Mr. Webster applied for admission to the Bars in the Federated States of Micronesia and the Republic of Palau but never revealed that he had been suspended from The Bar and was still on probation. The referee further found that Mr. Webster had failed to advise the Washington, D.C. Bar of his suspension, in contravention of the D.C. Bar's own Rules. The referee further found that Mr. Webster had failed to follow numerous preconditions for readmission. This Court agreed with the referee that Mr. Webster's failure to tell the bars of Micronesia and Palau that he was still on probation constituted a "misrepresentation by omission" and, in conjunction with his other conduct concluded that Mr. Webster had "failed to demonstrate his fitness to resume the practice of law." *Id.* at 818.

Given the clear duties imposed by this Court's order of suspension and probation and the duties of full disclosure undoubtedly imposed by the bars of Micronesia and Palau, there can be no disputing that this Court's decision in *Webster* was correct. But in the instant case, the duties of disclosure were far less clear. Indeed, under Florida law and under the Rules, there was arguably no duty of disclosure at all. Even before the settlement, Morrison Court and G & O were litigation adversaries. The adversarial relationship continued even after the settlement proceeds were received. In fact, while perhaps morally obligated to conduct "good faith" negotiations to settle their differences, there was a significant question as to whether the principals for either side would ever agree on anything. Until the very end, there can be no disputing that Morrison Court and G & O were adversaries. If the Comment to Rule 4-4.1 and

the authorities set forth above are to be believed, then Mr. Joy had no duty to tell Mr. Smith anything. It is the question of duty that distinguishes *Webster* from the instant case.

Duty questions aside, what Mr. Joy told Mr. Smith was more than just technically true, it was substantively true - the money had been disbursed from Mr. Joy's law firm's trust account. Granted, Mr. Smith assumed that Mr. Joy had simply handed the money over to Irwin and Joel Cantor to steal. The Bar's arguments notwithstanding, Mr. Smith's assumption did not require a response. Nevertheless, both Mr. Joy and Joel Cantor both wrote letters to Mr. Smith wherein Mr. Smith was assured that the funds were still available to consummate a settlement. For reasons that are not altogether clear,[27] that is all that G & O wanted. In the end, that is exactly what G & O received. No duties were breached, no harm was done.

It was because no duties were breached and no harm was done that distinguishes the instant case from *The Florida Bar v. Van Stillman*, 606 So. 2d 360 (Fla. 1992), too. In *Van Stillman*, Mr. Van Stillman's client was a lending institution that had instructed Mr. Van Stillman that it would not approve loans for purchases of real estate where secondary financing was involved. On five separate occasions, however, Mr. Van Stillman ignored his client's specific instructions, allowed secondary financing on real estate purchases, and created documents designed to cover up his fraud from his client. Acknowledging that misrepresentations to lending institutions generally warranted a public reprimand or ninety day suspension, this Court found that the repeated frauds required a stiffer discipline.

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[27]The Bar's claims notwithstanding, it was really Mr. Smith and G & O that held the upper hand in the negotiations. The U.S. District Court's Order specifically excepted G & O's foreclosure claim from its scope and effect. G & O retained the right to foreclose its second mortgage. It was a right which, in view of the satisfaction of the first mortgage, the equity in the underlying property, and the pending contract for sale for more than the unpaid amount of G & O's mortgage, was worth far more than G & O's claim to the money.

Unlike Mr. Van Stillman, Mr. Joy did not ignore his client's instructions. The letter to Mr. Smith was sent in accordance with Morrison Court's instructions. Unlike Mr. Van Stillman, Mr. Joy did not lie to his client. Mr. Smith was Morrison Court's adversary. Unlike Mr. Van Stillman, Mr. Joy did not engage in five separate acts of misrepresentation. If Mr. Smith was misled, he was misled by an assumption based on a single sentence in one letter. Unlike Mr. Van Stillman, Mr. Joy did try to assure Mr. Smith that his assumption was incorrect. Unlike Mr. Van Stillman, Mr. Joy did not create false documents. The conduct of the attorney in *Van Stillman* is so different than Mr. Joy's conduct in the instant case that reference to *Van Stillman* for any purpose is unwarranted.

There is no Standard that describes a suspension as the appropriate discipline in a situation such as this.[28] Instead, Standard 5.13 states that:

> "Public reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit or misrepresentation and adversely reflects on the lawyer's fitness to practice law."

Thus, even assuming Mr. Joy violated Rules 4-4.1 and 4-8.4(c), a suspension is inappropriate. Under the facts of this case, its is all the more inappropriate. *See Fitzgerald*, 491 So. 2d at 549 (Fla. 1986)(approving recommended public reprimand where, while attorney knowingly misrepresented material facts, no harm is done).

THE ALLEGED AGGRAVATING FACTORS

According to The Bar, a suspension is warranted because of the presence of "aggravating factors," including (1) substantial experience, (2) multiple violations, and (3) lack of remorse. Of course, it was because of Mr. Joy's substantial experience and understanding of the law that

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[28]Because the alleged misrepresentation was made to an adversary, Standard 4.6 which addresses misrepresentations toward a client and Standard 6.0 which addresses misrepresentations to a court, are clearly inapplicable.

he was able to protect Morrison Court and Mr. Cohen from Irwin and Joel Cantor. It is because of his substantial experience that a suspension is inappropriate. *See The Florida Bar v. Lord*, 433 So. 2d 983 (Fla. 1983)(the discipline must protect the public from harm but should not deny the public the services of a qualified lawyer).

While The Bar argues that there were "multiple violations", the alleged violations in the instant case, unlike the cases cited by The Bar, all spring from Mr. Joy's efforts to protect Morrison Court in connection with a single (albeit admittedly multifaceted) transaction. In the instant case, unlike the cases cited by The Bar, no one was harmed.

Finally, Mr. Joy does regret that he did not end his association with Irwin and Joel Cantor earlier. When all is said and done, Mr. Joy's only true transgression was the failure to use better judgment in the selection of his clients.

MITIGATING FACTORS

While The Bar attempts to justify its position by citing to aggravating factors, The Bar all but ignores the mitigating factors that clearly argue in favor of nominal discipline even in the event violations are found.

First, there is no question that Mr. Joy has no prior disciplinary record.

Second, there is a complete absence of a dishonest or selfish motive in anything Mr. Joy did. The common thread throughout the entire Morrison Court saga is that Mr. Joy's actions were always in the best interests of Morrison Court, his client. Despite his efforts, Mr. Joy was paid less than that to which he was entitled under the fee contract. Apparently nice guys really do finish last.

Third, Mr. Joy made timely good faith efforts to rectify the alleged consequences of his alleged misconduct. He hired Mr. McLain when he was fired for seeking assurances that Irwin

and Joel Cantor would abide by the original agreement with Mr. Cohen and would comply with their fiduciary obligations under the law. He telephoned The Bar to ask for advice on how to deal with the competing claims of Morrison Court and G & O. He interplead the funds to protect Mr. Cohen, and he wrote to Mr. Smith to assuage Mr. Smith's misguided concerns.

Fourth, Mr. Joy has been completely forthcoming. His cooperation and presentation stands in sharp contrast to The Bar's "star" witness, Joel Cantor, whom admittedly committed perjury during the course of the disciplinary proceedings and whom not even The Bar believes.

Fifth, and finally, Mr. Joy's character and reputation are beyond reproach. He has been a member in good standing of The Bar since 1969. As the uncontroverted testimony adduced at the January 8, 1996, hearing demonstrated, he is admired and respected by his clients, his peers, and the judiciary. (T2-3-14, Hon. G. Smith; Metcalfe; Spector). Ironically, it is because Mr. Joy was and is of the highest ethical fiber and felt compelled to protect Morrison Court and it shareholders that this entire disciplinary proceeding got started.

CONCLUSION

In conclusion, the referee's findings of fact and recommendations regarding guilt are unsupported by clear and convincing evidence and run contrary to the substantive law of Florida. Mr. Joy contends that no discipline is warranted. Nevertheless, even if this Court finds that his actions constitute violations of any Rule, then the purity of Mr. Joy's motives and the absence of injury or harm, forcefully argue against the Bar's requested discipline.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to SUSAN GRALLA, ESQ., Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, FL 33607, and JOHN T. BERRY, ESQ., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 11th day of April, 1996.

Attorney