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 REPLY 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.

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.

References to Mr. Joy's "Answer Brief on Petition and Initial Brief on Cross Petition for Review of Referee's Report" or "Answer/Initial Brief" are denominated by a "AB/IB" followed by a page reference.

References to The Bar's "Reply Brief and Answer Brief to Cross Petitioner's Initial Brief" or "Reply/Answer Brief" are denominated by a "RB/AB" followed by a page reference.

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SUMMARY OF ARGUMENT

Try as it might, The Bar fails to address the threshold inconsistency in the referee's finding that Mr. Joy did not violate Rules 4-1.13(d) and (e) but did violate Rules 4-1.7(a), (b), and (c). That defect aside, The Bar fails to explain how the interests of Morrison Court and Mr. Cohen were ever "directly adverse" to each other. Under the facts and the law they weren't and, thus, the conflict of interest Rules were not triggered. The Bar's continued claim and the referee's findings to the contrary ignore those facts and that law and remain clearly erroneous.

Try as it might, The Bar also fails to address the applicable law that demonstrates that the U.S. District Court's September 13, 1993, Order had significant effects on Mr. Joy's duties and Morrison Court and G & O's relationship. By virtue of that Order, the money Mr. Joy was holding devolved to Morrison Court. As the clear and convincing evidence demonstrated, Irwin and Joel Cantor became concerned enough about Morrison Court's creditors that they directed Mr. Joy to move the money into another trust account. They knew where the money was. G & O knew that the money was still available. It was, and G & O's second mortgage was ultimately satisfied.

Against the overwhelming weight of clear and convincing evidence, The Bar and the referee blithely cling to the testimony from an admitted perjurer which, even if true, does not prove the point for which it is cited. Against the overwhelming weight of clear and convincing evidence, The Bar and the referee overlook the simple fact that, in the end, everyone was satisfied. In the end, what Mr. Joy did was appropriate under the facts and the law. The Bar's continued claim to the contrary notwithstanding, the referee's finding that Mr. Joy violated the trust accounting Rules remains clearly erroneous.

Finally, try as it might, The Bar fails to explain how, by making what even The Bar must

concede is a completely true statement, Mr. Joy could have fraudulently failed to disclose a material fact to a negotiating adversary. It cannot because, under The Bar's own Rules, Mr. Joy had no duty to tell Mr. Smith anything more. It cannot because, under The Bar's own Rules, Mr. Joy had an obligation to maintain his client's confidences. It cannot because, under Florida law, Mr. Smith had no right to rely on an assumption about what was not said. In sum, it cannot because the facts and the law are to the contrary. The Bar's argument, just like the referee's findings, remains clearly erroneous.

ARGUMENT

IN VIEW OF A THRESHOLD INCONSISTENCY AND THE BAR'S FAILURE TO UNDERSTAND OR ADDRESS APPLICABLE FLORIDA LAW AND THE CLEAR, CONVINCING AND UNCONTROVERTED EVIDENCE THAT IRWIN AND JOEL CANTOR WERE INTENT ON DEFRAUDING MORRISON COURT AND ITS MINORITY SHAREHOLDER, THE REFEREE'S CONCLUSION THAT MR. JOY VIOLATED RULE 4-1.7 IS CLEARLY ERRONEOUS

THE THRESHOLD INCONSISTENCY REMAINS

The referee's specific and unchallenged finding that he did not violate Rules 4-1.13(d) and (e) remains inconsistent with the simultaneous conclusion that Mr. Joy violated Rules 4-1.17(a), (b), and (c). The Bar's feeble attempt to minimize the inconsistency merely emphasizes its existence.

In what has become a pattern of circular reasoning, The Bar begins its argument by stating that "Rules 4-1.13 and 4-1.7 are not dependent upon one another." (RB/AB at 8). Nevertheless, in the very next breath, The Bar acknowledges that conduct governed by Rule 4-1.13 is "subject" to the provisions of Rule 4-1.7 because Rule 4-1.13 is a "narrower application" of Rule 4-1.7. (*Id.*). Of course, it is. Rule 4-1.13(e), which is specifically applicable to the facts of this case and which The Bar quotes in support of the contrary conclusion, says as much.

It is because the conduct governed by Rule 4-1.13 is "subject to" Rule 4-1.7, that to find a violation of Rule 4-1.13 a referee would necessarily have to find a violation of Rule 4-1.7. Otherwise, by its own terms, Rule 4-1.13 is not violated. By the same token, it necessarily and logically follows that when, in case involving the concurrent representation of an "organization" and its "constituents," there is no violation of Rule 4-1.7 either.

In the instant case, the referee specifically found that there was clear and convincing evidence that Mr. Joy concurrently represented an "organization," Morrison Court, and one of its "constituents," Mr. Cohen. At the same time, however, the referee specifically found that Mr. Joy did not violate Rules 4-1.13(d) and (e). To do so the referee had to also conclude that Rule 4-1.7 was not implicated. But the referee didn't and that is what makes the referee's conclusion inherently and internally inconsistent and clearly erroneous.

Because the referee specifically found that Mr. Joy did not violate Rule 4-1.13(d) or (e), The Bar's argument that "Joel Cantor never consented to Respondent's concurrent representation of Morrison Court and Sam Cohen" is simply irrelevant. By its own terms, Rule 4-1.13(e) requires consultation and consent only if it is required by Rule 4-1.7. With the referee's unchallenged conclusion that Mr. Joy did not violate Rule 4-1.13(e), consent was not required.

Because the referee specifically found that Mr. Joy did not violate Rules 4-1.13(d) and (e), The Bar's argument that, in prior cases, this Court has found violations of Rule 4-1.7 without necessarily finding a violation of Rule 4-1.13 is simply unavailing. In the only case cited by The Bar, *The Florida Bar v. Marke*, 21 Fla. L. Weekly S113 (Fla., March 7, 1996), Rule 4-1.13 was not even mentioned, much less specifically addressed by the referee or by this Court.[1] Thus, it

[1]Of course in *Marke*, this Court approved a 30-day suspension for conduct involving a far more clear and egregious conflict of interest than that which The Bar in the instant case (continued...)

is not at all surprising that this Court did not find that Mr. Marke violated Rule 4-1.13. In the instant case, however, Rule 4-1.13 was an issue and was addressed and the referee's specific finding that Mr. Joy did not violate Rule 4-1.13 has gone unchallenged. That unchallenged specific finding stands in sharp contrast to the hotly disputed and inconsistent finding that Mr. Joy could have or did violate Rule 4-1.7. In this case, that inconsistent finding must, upon logical analysis, lead this Court to conclude that the referee's findings that Mr. Joy violated Rule 4-1.7 are clearly erroneous.

BECAUSE THE INTERESTS OF MORRISON COURT AND MR. COHEN WERE ALIGNED THE REFEREE'S CONCLUSION THAT RULE 4-1.7 WAS VIOLATED IS CLEARLY ERRONEOUS

Inconsistencies aside, The Bar's argument that there was clear and convincing evidence that the interests of Morrison Court and Mr. Cohen were "directly adverse" does nothing but demonstrate The Bar's continued misunderstanding of even the most fundamental principles of Florida law relating to corporations. Under Florida law, corporations are legal entities and are separate and apart from the persons that comprise them even where, as here, the corporation has only two shareholders, one of whom is president. *Hanisch v. Clark*, 200 So. 2d 601 (Fla. 3d DCA 1967). The law not only treats the corporation and its officers, directors, and shareholders as separate entities and precludes them from being considered as one, it imposes upon the officers, directors and majority shareholders certain responsibilities to the corporation and its minority shareholders. The guiding principle underlying all of those responsibilities is that officers and directors must act in the best interests of the corporation. *Flight Equipment and Engineering Corp. v. Shelton*, 103 So. 2d 615 (Fla. 1958). If they don't, Florida law provides that officers,

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[1](...continued)
argues warrants a ninety-one day suspension.

directors, and majority shareholders can be held legally liable. *See* §§607.0831 and 607.0832, Fla. Stat. (1993).

With an understanding of Florida corporate law, the utter fallacy of The Bar's argument that Morrison Court's best interests "were those interests as determined by Joel Cantor" (RB/AB at 11), is exposed. What if Joel Cantor determined that it was in Morrison Court's best interests to pay Joel Cantor an exorbitant salary? While under The Bar's argument Joel Cantor would be insulated from liability to Mr. Cohen because Joel Cantor was only doing what Joel Cantor determined was best for Morrison Court, under Florida law liability could attach. *See International Insurance Co. v. Johns*, 874 F. 2d 1447 (11th Cir. [Fla.] 1989). What if Joel Cantor determined that it was in Morrison Court's best interests to simply give away Morrison Court's assets? Under The Bar's argument, Mr. Cohen would have no recourse because what Joel Cantor decided was best was, thus, best for Morrison Court. But Florida law is to the contrary. *See South End Improvement Group, Inc. v. Mulliken*, 602 So. 2d 1327 (Fla. 4th DCA 1992). What if, more germane to the clear and convincing evidence presented in this case, Joel Cantor determined that it would be in Morrison Court's best interests to simply breach the agreement among the shareholders to share *pro rata* in the net proceeds from the Midland Risk litigation (which Joel Cantor admitted entitled Mr. Cohen to some portion of the proceeds) and instead to simply allow Irwin and Joel Cantor to abscond with Morrison Court's funds to purchase apartments in Orlando? Again, under The Bar's logic, as long as Joel Cantor determined it to be in the best interests of Morrison Court, Mr. Cohen would have no recourse. Again, Florida law is clearly to the contrary. *Pruyser v. Johnson*, 185 So. 2d 516 (Fla. 2d DCA 1966); *See also* § 607.0832, Fla. Stat. (1993).

Accepting The Bar's logic would transform the so-called "business judgment rule" into

a rule of absolute immunity regardless of whether the challenged conduct constituted fraud, self-dealing, unjust enrichment, or betrayal of trust. Unless this Court is prepared to rewrite corporate law, disregard statutory pronouncements, and give *carte blanche* to officers and directors to commit corporate waste, steal corporate assets, and defraud shareholders, The Bar's argument that Morrison Court's best interests are synonymous with Joel Cantor's best interests must be rejected.

Unless this Court is also prepared to rewrite the Rules, The Bar's argument that Mr. Joy "was not permitted under Rule 4-1.13 to substitute his own interpretation of the best interests of his client, Morrison Court, as he did, for those determined by his client's sole officer, sole director, and majority shareholder, Joel Cantor," (RB/AB at 11), must also be rejected. The Bar's claims to the contrary notwithstanding, it would not have been ethically appropriate or legally prudent for Mr. Joy to sit back and allow Joel Cantor to breach Morrison Court's agreement with Mr. Cohen or to sit back and thus facilitate what Mr. Joy first suspected and then confirmed to be an attempt by Irwin and Joel Cantor to steal Morrison Court's funds. To the contrary, it was ethically incumbent upon and legally prudent for Mr. Joy to do something. *See* Rule 4-1.13(b); *International Community Corp. v. Young*, 486 So. 2d 629 (Fla. 5th DCA 1986). Importantly, The Bar does not argue that there may have been better was to carry out the ethical mandate, The Bar criticizes Mr. Joy for attempting to do something. If, however, under the Rules and the law Mr. Joy had an obligation to do something, then The Bar's argument that he should have just done nothing, must be rejected. To hold otherwise is to create a classic *Catch-22*, approve incongruity, and to guarantee conflict where none would otherwise exist.

For all of the exhibits, all of the transcript and all of the pages of findings and argument, neither The Florida Bar nor the referee have ever addressed how, either legally or factually, Mr. Joy's alleged representation of Mr. Cohen was "directly adverse" to Mr. Joy's representation of

Morrison Court. A demonstrated above, and as addressed in Mr. Joy's Answer Brief, it was not and could not have been. The referee's findings, because they run contrary to the law and ignore the facts, remain clearly erroneous.

IN VIEW OF FLORIDA LAW AND THE COMPETENT SUBSTANTIAL EVIDENCE, MR. JOY'S TRANSFER OF MORRISON COURT'S FUNDS FROM ONE TRUST ACCOUNT TO ANOTHER TRUST ACCOUNT ESTABLISHED FOR MORRISON COURT'S BENEFIT, WITH MORRISON COURT'S KNOWLEDGE AND AUTHORIZATION, THE REFEREE'S CONCLUSION THAT MR. JOY VIOLATED TRUST ACCOUNT RULES IS CLEARLY ERRONEOUS

Ignoring the law in favor of the testimony of an admitted liar and content to substitute rhetoric for reason, The Bar's argument that Mr. Joy improperly handled Morrison Court's settlement funds remains as unavailing as its attempts to assert new theories of liability are disingenuous.

It is clear that The Bar's entire argument regarding trust account violations revolves around the conclusion 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 never do anything with the funds without the concurrence of all three. Just as clear is that The Bar's argument runs contrary to Florida law - law which The Bar either simply does not understand or chooses to ignore.

As discussed in greater detail in Mr. Joy's Answer/Initial Brief, all G & O ever had was a claim to an equitable lien. Under Florida law, a claim to an equitable lien is just that, a claim. It is not an entitlement nor does it create ownership rights until adjudicated to conclusion in a lawsuit. In the instant case, it is undisputed that G & O asserted its claim to an equitable lien as a crossclaim in the suit brought by Morrison Court against Midland Risk. In the instant case, it is also undisputed that G & O's crossclaim was dismissed with prejudice. Although The Bar

does not seem to understand or like it and, thus, chooses to ignore it altogether, a dismissal with prejudice, whether by reason of a consideration of the merits or by virtue of a stipulation of the parties upon settlement, does operate as a judgment on the merits. *Arrieta-Gimenez v. Arrieta-Negron*, 551 So. 2d 1184 (Fla. 1989); *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F. 2d 1498 (11th Cir. 1990).

If Mr. Joy was an "escrow agent," it was for the sole purpose of ensuring that the funds were maintained until Midland Risk got releases and until G & O's disputed legal claim to those funds was resolved. The U.S. District Court dismissed all of the claims except G & O's foreclosure claim with prejudice. That dismissal gave Midland Risk something better than the releases it had originally sought, *to wit*, a Court order with *res judicata* ramifications. Likewise, the U.S. District Court's dismissal of all of the claims except G & O's foreclosure claim with prejudice extinguished G & O's legal claim to the funds, however characterized and wherever held, forever. *See Dalbon v. Women's Specialty Retailing Group*, 21 Fla. L. Weekly D1095 (Fla. 4th DCA, May 8, 1996)(federal court judgment is *res judicata* and bars all subsequent state law claims arising out of or related to federal court action). Because the purpose of the "escrow agreement" had been served, the U.S. District Court's Order also extinguished whatever "fiduciary" or "escrow" duties Mr. Joy owed to Midland Risk or G & O.[2] The Bar's claims and

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[2]In its Answer Brief, The Bar claims that Mr. Joy's status as an escrow agent for G & O is proven by Mr. Joy's September 13, 1993, letter to Joel Cantor wherein he warns that the course of action proposed by Joel Cantor was fraught "with risk to me, as escrow agent." (RB/AB at 16-17 *quoting* TFB Ex. 10). When viewed in context, however, Mr. Joy's comment was part of a more extensive discussion intended to caution Irwin and Joel Cantor that the course of action they were proposing was contrary to their prior plan, contrary to Morrison Court's best interests, and contrary to Mr. Joy's statement to the U.S. District Court that Morrison Court and G & O would to attempt to negotiate in good faith. Thus, far from proving that Mr. Joy wilfully breached "escrow" duties to G & O, the comment, when considered in the complete context of the letter, evinces Mr. Joy's continued concern that Irwin and Joel Cantor were prepared to breach (continued...)

the referee's findings to the contrary, founded on a blatant disregard or inability to cope with unambiguous legal propositions, must be rejected.

Confronted with law directly contrary to its prior position and to the referee's finding, The Bar now claims that Mr. Joy's statement that Morrison Court and G & O would attempt to negotiate a split, created new rights such that G & O could "possibly bring an action against Morrison Court and/or Respondent for breach of fiduciary duty, misappropriation, fraud or misrepresentation regarding the settlement agreement." (RB/AB at 16). What "settlement agreement"? The "agreement" to negotiate in good faith? As a legal matter it can't be. *See Suggs v. Defranco's, Inc.*, 626 So. 2d 100 (Fla. 1st DCA 1993)(where essential terms remain open, subject to further negotiation, there is no enforceable settlement agreement). As a factual matter it wasn't. As the clear and convincing evidence showed, the U.S. District Court's order was less a settlement agreement than it was the catalyst for the further galvanization of the positions of both Morrison Court and G & O.[3] Indeed, both Morrison Court and G & O were so busy renouncing the "agreement" to attempt to negotiate a settlement in good faith, that neither could have accepted The Bar's present claim that a "settlement agreement" was created by virtue of Mr. Joy's statement or the U.S. District Court's dismissal of G & O's claims with prejudice. In point of fact, it was not until after September 28, 1993, that it could truly be said that there was an enforceable settlement agreement of any kind between Morrison Court and G & O. The

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[2](...continued)
their legal duties to Morrison Court and their moral duty to G & O to negotiate in good faith.

[3]For instance, before the day was out, Mr. Smith on behalf of G & O stated that there was no agreement of any kind. (TFB 21). Irwin and Joel Cantor on behalf of Morrison Court began making additional demands, issuing ultimatums, and reneging on earlier promises. Mr. Smith responded by making additional demands and threats. (TFB 20; Joy 28).

Bar's new claim to the contrary is simply without factual or legal support.

The Bar's continued claim that Mr. Joy transferred Morrison Court's funds to an account for the benefit of a "non-existent" corporation is also without factual or legal support. The simple fact is that the money was always held in trust for Morrison Court by whatever name Morrison Court chose to be known. As the clear, convincing and uncontroverted evidence demonstrated, the whole idea of changing Morrison Court's name to "2311 MC Corp." was discussed at the meeting involving Irwin Cantor, Joel Cantor, Mr. Joy and Tim Sweeney, another attorney representing Morrison Court, following the September 13, 1993, hearing in U.S. District Court. The plan to change the name was confirmed in Mr. Joy's September 13, 1993, letters to Mr. Sweeney and Joel Cantor, was addressed in Joel Cantor's memo of the same day, and was referred to in Irwin Cantor's September 16, 1993, letter to Mr. Joy. (Joy 48, 55; TFB 9, 10).

That Mr. Sweeney failed to change the name as agreed is of no moment since to all who were interested, including Irwin Cantor, Joel Cantor, Morrison Court, Mr. Joy, and the bank, knew that the money belonged to Morrison Court. The proof is in the fact that Mr. Joy requested, and Joel Cantor willingly provided, Morrison Court's federal tax identification number, and in the fact that the bank put that number on the trust account. The proof is also in the fact that The Bar argues that the interest generated belongs to Morrison Court. Moreover, and perhaps even more important in view of referee's blind acceptance of The Bar's tortured version of events and plainly erroneous conclusions of law, G & O was aware that the money still belonged to Morrison Court. The proof is in Mr. Joy's September 15, 1993, letters and Joel Cantor's letter of September 18, 1993, both written to Mr. Smith, wherein he and G & O are assured that Morrison Court had the funds available to satisfy G & O's second mortgage. (TFB 11, 22). To all of this clear, convincing and uncontroverted evidence, The Bar remains mute.

The Bar's real argument seems to be that Mr. Joy did not have the authorization of Morrison Court to move Morrison Court's money from one trust account into another trust account for the benefit of Morrison Court. Ignoring both the facts and the law, The Bar's argument relies solely on Joel Cantor - an admitted perjurer and a person whom not even The Bar believed - and on testimony that does not address, much less prove, the point.

First the facts. It is uncontroverted that the idea of changing Morrison Court's name and moving the funds was discussed at the meeting following the hearing on September 13, 1993. Irwin and Joel Cantor were concerned that Morrison Court's funds could be attached by Morrison Court's creditors. Later that same day, in the letter The Bar contends constitutes "proof" that the transfer was unauthorized, Joel Cantor wrote "I am worried about many creditors that may come out of the wood work quickly." (TFB 10). To allay his concerns, Joel Cantor specifically directed Mr. Joy to deposit some of the money into another trust account to be controlled by Morrison Court. On the very same day, Joel Cantor received a copy of Mr. Joy's letter to Mr. Sweeney confirming that the name of Morrison Court Inc. would be changed. (Joy 55). Joel Cantor also received a copy of Irwin Cantor's letter wherein Irwin Cantor stated "I sincerely hope you moved the escrow before you send (sic) Smith's letter." (Joy 46). Most importantly, Joel Cantor also received a letter wherein Mr. Joy confirmed that the funds had been transferred in accordance with the earlier discussions. (TFB 10).[4] Joel Cantor did nothing because he knew that the money was being transferred - Joel Cantor had himself given Mr. Joy Morrison Court's federal tax ID number. Joel Cantor did nothing because he knew the money had been transferred

[4]The Bar has never attempted to explain, and therefore has never adequately explained, why if Mr. Joy did not reasonably believe that he was authorized to transfer the funds he would have run the risk of advising Morrison Court and Joel Cantor that the transfer had been accomplished.

- he told Mr. Smith as much on September 17, 1993 and told The Bar as much in his sworn Complaint filed in November, 1993! (TFB 26; Joy 49). That Joel Cantor would testify to the contrary in 1995, is just further evidence of the obvious falsehoods upon which The Bar's argument and the referee's findings rely.

Against the clear and convincing documentary evidence and Joel Cantor's statements and admissions to the contrary, The Bar persists in its misplaced argument that Joel Cantor's self-serving testimony, standing alone, constitutes competent sufficient evidence from which the referee could reasonably have concluded that Joel Cantor did not authorize the transfer of Morrison Court's funds into another trust account. According to The Bar, some testimony, irrespective of the fact that it is otherwise contradictory and inherently untrustworthy, is the same thing as competent sufficient evidence. Unfortunately for The Bar, that just isn't the law. As this Court recognized under similar circumstances in *The Florida Bar v. Rayman*, 238 So. 2d 594 (Fla. 1970):

> While we cannot say that there was no evidence to support the referee's findings, we are constrained to the view that much of the supportive testimony is itself evasive and inconclusive so that when it is considered together with the above recited inconsistencies, the evidence does not establish the charges with that degree of certainty as should be present in order to justify a finding of guilt on charges as serious as those made against these respondents.

Id. at 598. Similar considerations apply here.

It is because this Court recognizes that <u>some</u> testimony is not the same thing as competent substantial evidence that a referee's findings of fact can be reviewed - otherwise the presumption of correctness would be irrebuttable. In this case, it is because the referee's findings, as well as The Bar's advocacy, are based solely on the testimony of Joel Cantor, which unsupported testimony stand in stark contrast to the other and uncontroverted evidence, that the referee's

findings must be rejected.

Questions of contradictions and perjury aside, Joel Cantor never testified that he never approved or authorized the transfer. In fact, reference to the testimony relied on by The Bar and the referee, reveals that the only thing Joel Cantor testified to was that he was unaware that the money had been transferred into an account in the name of Mrs. Joy for the benefit of 2311 MC Corp. (T-103-05, Cantor). Even assuming that to be true, to testify that he was unaware that the funds had been transferred into an account bearing Mrs. Joy's name is far different than saying that Joel Cantor did not authorize or know about the transfer of the funds into some other trust account. At most, the testimony "proves" that Joel Cantor did not know how Mr. Joy had labeled the new account. But that is not what The Bar is claiming here.[5] The Bar is claiming that Mr. Joy transferred Morrison Court's funds to another trust account without Joel Cantor's permission. Inasmuch as Joel Cantor's testimony does not even address the specific point, it simply cannot constitute competent substantial evidence sufficient to support the referee's otherwise insupportable conclusion that the transfer was unauthorized.

To its credit, The Bar does not dispute that Mr. Joy did have the express authorization of Irwin Cantor to transfer Morrison Court's funds. To its discredit, however, The Bar once again ignores basic principles of Florida law and uncontroverted facts and argues that, just because Mr. Joy "had specific knowledge of the shareholders and officers of Morrison Court," Mr. Joy's

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[5]The Bar has admittedly made an issue of how the account was labeled, but that issue arose only in connection with the alleged violation of Rules 4-1.15(d) and 5-1.1(b). Nevertheless, as previously stated, Rule 4-1.15(d) does not stand alone - to find a violation of Rule 4-1.15(d) the referee had to find a violation of another specifically plead trust account Rule. That leaves Rule 5-1.1(b), but that Rule does not address the issue of labeling at all. Instead, that is the purview of Rule 5-1.2(b)(1) which The Bar never plead and which The Bar acknowledged was not part of its charges in this case. (T-532, Bar Counsel). It is noteworthy that in its Reply/Answer Brief, The Bar never addresses its glaring shortcoming in this regard.

reliance on his directives was unreasonable. (RB/AB at 13). Those basic principles of Florida law recognize that, in addition to officers and directors, corporations such as Morrison Court often act through agents such as Irwin Cantor. Agents do not have to be officers or directors or shareholders. Agents do not even have to be employees of the corporation. *Symons Corp. v. Tartan-Lavers Delray Beach*, 456 So. 2d 1254 (Fla. 4th DCA 1984). Under Florida law, agents can bind the corporation just like officers and directors, and, when in the usual course of business a corporation an agent is held out or has been permitted to act for the corporation or to manage its affairs, a third person is justified in relying on that agent's directives and can reasonably assume that the agent is acting within his authority. *Id.* In this case, Morrison Court not only held Irwin Cantor out as its agent but allowed Irwin Cantor to act for the corporation and manage its affairs. (*See* Mr. Joy's AB/IB at 29-31). Under the law and the facts, Mr. Joy's reliance on Irwin Cantor's directives was reasonable. The Bar's claims to the contrary, just like The Bar's claim that the transfer was unauthorized, must be rejected.

The Bar's attempt to color Mr. Joy's motives by suggesting that his actions were driven by greed is as desperate as it is erroneous. The Bar simply fails to come to grip with the facts, facts which show that Mr. Joy's actions were driven by his concern for his client, Morrison Court. By protecting Mr. Cohen from Irwin and Joel Cantor's plan to steal corporate funds, Mr. Joy was protecting Morrison Court. By protecting Morrison Court's funds from the claims of creditors, he was protecting all of its shareholders. His fee was never an issue. Joel Cantor said as much in his September 13, 1993, memo, sent before the money was transferred, when he told Mr. Joy to "take your fee due." (TFB 9). His fee never became an issue until later, when Irwin and Joel Cantor attempted to force Mr. Joy and Mr. McLain to reduce it. It is both indicative of Irwin and Joel Cantor's lack of personal integrity and overwhelming greed and of Mr. Joy's personal

integrity and the absence of greed, that Mr. Joy actually ultimately accepted less than that to which he was entitled simply to be rid of Irwin and Joel Cantor.

The Bar's reliance on *The Florida Bar v. McClosky*, 130 So. 2d 596 (Fla. 1961) is simply misplaced. In *McClosky*, the attorney not only wilfully and wrongfully disbursed funds held in escrow, he co-mingled them with his personal funds and converted them to his own use and benefit. *Id.* at 597. In the instant case, Mr. Joy did not wilfully or wrongfully disburse the insurance funds. Even when viewed in a light most favorable to The Bar, it is clear that under the facts as he perceived them and the law as he understood it, Mr. Joy's transfer was done with the good faith belief that it was both authorized and legally appropriate. Nowhere was it alleged or proved and nowhere did the referee find that Mr. Joy commingled those funds or took any funds to which he was not legally entitled. Thus, *McClosky* is simply inapposite.

Finally, The Bar's claim that the retention of $266.57 in accrued interest implies an evil motive is as new as it is disingenuous. Nowhere in the Complaint was it alleged that this $266.57 balance was an issue and, at the final hearing, The Bar treated the whole issue as an afterthought. (T-463, Bar Counsel). The fact of the matter is that it was an afterthought insofar as Mr. Joy was concerned as well. As the clear and convincing and uncontroverted evidence showed, Mr. Joy left Sarasota on September 23, 1993, leaving the entire matter in the hands of his attorney, George McLain. (T-464-67, Joy). Thereafter, Mr. McLain negotiated a settlement with Morrison Court for which it received the funds (minus the fees and costs to which Mr. Joy was entitled) and gave a general release to Mr. Joy and his firm. The settlement was finalized on September 28, 1993.

Admittedly, the issue of accrued interest was overlooked by both Mr. McLain and Joel Cantor. Mr. Joy was unaware that the $266.57 remained until after Joel Cantor filed his

Complaint with The Bar. Under the circumstances, and upon the advice of counsel, Mr. Joy prudently left the money alone. It remains protected and is available to whomever it rightfully belongs - a fact consistent with Mr. Joy's pure motive and inconsistent with the picture The Bar attempts to paint the suspension The Bar argues should be imposed.

UNDER FLORIDA LAW, THE RULES AND THE CLEAR AND CONVINCING EVIDENCE, THE REFEREE'S CONCLUSION THAT MR. JOY MISREPRESENTED OR FAILED TO DISCLOSE A MATERIAL FACT WHICH HE WAS UNDER AN OBLIGATION TO DISCLOSE IS CLEARLY ERRONEOUS

The Bar's argument that Mr. Joy violated Rule 4-4.1 by "making half-truth statements which resulted in misrepresentations by omission of material fact" continues to ignore the facts and disregard the law. First, Mr. Joy's statement that "the funds held in my Trust Account have been disbursed from my Trust Account" was not "half-true," it was completely true. Indeed, The Bar's argument that Mr. Joy violated the trust account Rules depends entirely on the truth of Mr. Joy's statement. Because the statement was true, Rule 4-4.1 insofar as it relates to affirmative representations, does not apply.

Rule 4-4.1, insofar as nondisclosures are concerned, does not apply either. The Bar's argument to the contrary notwithstanding, Rule 4-4.1 does not create a general duty to disclose. Instead, the Rule states that there is a duty to disclose only when "necessary to avoid assisting a criminal or fraudulent act by a client." The Comment to Rule 4-4.1 specifically provides that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts."

In the instant case, the transfer of Morrison Court's funds into another trust account was neither criminal or fraudulent, especially in view of the fact that G & O retained the right to foreclose on a parcel of property that worth far more than the mortgage it held. In any event, Mr. Joy was ethically obligated to follow what he reasonably believed to be Morrison Court's

directions to protect Morrison Court's funds from creditors. *The Florida Bar v. McLawthorn*, 505 So. 2d 1338 (Fla. 1987). In the instant case, one such creditor was G & O. In the real world of the law and litigation, debtors such as Morrison Court and creditors such as G & O are unquestionably "opposing" parties. Both before and after September 13, 1993, Morrison Court and G & O were negotiating adversaries and both were jockeying to improve their respective bargaining positions. Under the plain language of Rule 4-4.1, Mr. Joy had no duty to disclose anything to Mr. Smith. Accordingly unless this Court is prepared to abrogate the attorney/client privilege, rewrite the Rule, eliminate the Comment, and dispense with the adversarial system of justice altogether, The Bar's argument that Mr. Joy had a duty to disclose to Mr. Smith must fail.

Duty questions aside, the question of whether Mr. Joy knew the statement was false and acted with the requisite intent remains. Clearly, without knowledge of falsity and fraudulent intent there can be no violation of either Rule 4-4.1 or Rule 4-8.4. *The Florida Bar v. Neu*, 597 So. 2d 266 (Fla. 1992). The Bar's claim that Mr. Joy "made the statements to [Mr.] Smith knowing that the statements were not completely candid with the intent to cause [Mr.] Smith to believe that the proceeds had been disbursed to the Cantors" is made without a record citation because it is without factual support. The fact is that what Mr. Joy knew was that the statement was absolutely true (as The Bar must concede) and that what Mr. Joy intended to convey to Mr. Smith was the message that the funds had been disbursed from Mr. Joy's trust account - nothing more, nothing less. (T- 430, Joy). That Mr. Smith may have *assumed* something else no more proves Mr. Joy's knowledge and intent than it can prove Mr. Smith's reasonable reliance. *The Florida Bar v. Marable*, 645 So. 2d 438 (Fla. 1994)(in order for circumstantial evidence to establish intent, it must be inconsistent with any reasonable hypothesis of innocence); *Iden v. Kasden*, 609 So. 2d 54 (Fla. 3d DCA), *rev. denied*, 620 So. 2d 761 (Fla. 1993)(evidence of

impressions and assumptions does not prove reasonable reliance). Unless the clear and convincing evidence or competent substantial evidence standards can be satisfied by unsupported argument and assumption, The Bar failed to prove and the referee erroneously concluded that Mr. Joy misrepresented anything to Mr. Smith. The referee's conclusion that Mr. Joy violated Rules 4-4.1 and 4-8.4(c) remains clearly erroneous.

CONCLUSION

Nothing in The Bar's Reply/Answer Brief effects the inescapable conclusion that the referee's findings of fact and recommendations regarding guilt are unsupported by clear and convincing evidence and are contrary to the substantive law of Florida. In fact, in many material ways, The Bar's most recent arguments merely underscore the fact that the referee's findings of fact and conclusions of law are clearly erroneous and The Bar's pursuit of a ninety-one day suspension all the more inappropriate.

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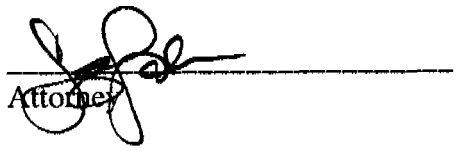
CERTIFICATE OF SERVICE

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 to JOHN T. BERRY, ESQ., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 28th day of May, 1996.



Attorney