IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DARYL JAMES BROWN,

Respondent.

CASE NO.: SC96031

TFB FILE NO.: 1999-10,255(12A)

RESPONDENT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

Resp. Exh.	=	Respondent’s Exhibit from final hearing.
TFB Exh.	=	The Florida Bar’s Exhibit from final hearing.
R.R.	=	Report of Referee.
R.	=	Transcript Page of Final Hearing before Referee on December 7-8, 1999.

STATEMENT OF THE CASE AND OF THE FACTS

In March or April, 1992, Respondent and his firm began representing Riscorp in corporate matters. (R. 303). Riscorp was initially an insurance services company, but eventually evolved into an insurance company itself that bore risk as a policy issuer and insurer. (R. 33-34). Unbeknownst to Respondent, Riscorp had long previously engaged in a practice of soliciting campaign contributions from employees and others for political candidates Riscorp officials viewed as favorable to Riscorp's business. (R. 36-37, 72-75). As an inducement to prospective contributors, Riscorp offered to reimburse any contribution made at its request. (R. 84-85). According to Tony Malone, past president of Riscorp, this reimbursement practice dated back to 1987 or 1988. (R. 75).

Mr. Malone disclosed the practice in or about 1991, approximately one year prior to the time Respondent's firm first began representation of Riscorp, to a Riscorp attorney, Mr. Tom Maida, who practices in Tallahassee. (R. 76). Mr. Maida advised Mr. Malone to be careful, keep the number of employees involved select, and to keep the practice quiet. (R. 77). Mr. Malone testified that Mr. Maida (unrelated to Respondent) indicated that his law firm engaged in the same reimbursement practice. (R. 49, 91). Thereafter, Riscorp apparently continued its practice of reimbursing contributions it solicited.

In June, 1994, Mr. Malone telephoned Respondent and asked him to help raise money for two candidates for state offices. (R. 38, 39, 111, 187). During the same conversation, Mr. Malone offered to allow Respondent to "premium bill" or increase Respondent's hourly rate on a particular file Respondent was handling for Riscorp to which Respondent had expended extraordinary effort. (R. 190). Respondent agreed to assist in raising money for the candidates and to "premium bill" the file as suggested by Mr. Malone. (R. 46, 53,189).

Respondent testified at the final hearing herein that he had no knowledge of Florida Statutes, Section 106.08, which prohibits a person from knowingly and willfully making a contribution to a candidate for statewide office in excess of $500. (R. 215). Respondent was not politically active and had seldom made campaign contributions in the past. (R. 309-311) However, Respondent candidly acknowledged at the final hearing that, in retrospect, he should have recognized the potential impropriety of the request notwithstanding his lack of knowledge of the statute at the time. (R. 212).

Immediately after Respondent ended the phone call with Mr. Malone, Respondent asked six other lawyers to make contributions. (R. 191). After spending a few minutes during that same day soliciting the contributions, Respondent resumed his other responsibilities of his extremely hectic work day. (R. 212).

Respondent and six other firm members and their families and friends made contributions. (TFB Exh. 4). Respondent's law firm subsequently reimbursed each firm member for the contributions he or she gathered. (TFB Exh. 2B-2G). Respondent also reimbursed his daughter, her husband, and his daughter's in-laws, all of whom had contributed. (R. 358). Respondent testified that one firm member, who did not testify before the Referee, was very specifically advised of the reimbursement and had requested reimbursement in advance of making the contribution. (R. 197). Another firm member, Donald Clark, testified that he was not aware that he was reimbursed. No other contributors testified at the final hearing. (R. 154).

In October, 1994, Respondent became suspicious of Riscorp's political contribution activities after an unusual and alarming telephone call from a Riscorp secretary, well known to Respondent. (R. 219-224). As a result, Respondent asked another firm member to research the statutes concerning campaign contributions. (R. 225-226). That day, the researching lawyer advised Respondent of Florida Statutes, section 106.08. (R. 226). When Respondent learned of the statute's provisions, he immediately met with and handed Mr. Malone a copy of the relevant statute and its penalties. (R. 227-228). Respondent stridently advised Mr. Malone that Riscorp should immediately cease its activities. (R. 227-228). Mr. Malone confirmed that this

meeting took place and testified that Respondent was adamant in his admonition that the practice should cease. (R. 49, 96-97, 106).

In any event, Mr. Malone admitted that he did not rely on Respondent's advice concerning the illegality of the practice, as he deferred to Tallahassee counsel for all matters relating to politics. (R-109). Mr. Malone indicated that Tallahassee counsel was telling him what he wanted to hear; *i.e.*, "you can do it but be careful." (R. 107-108). Based upon the advice of Tallahassee counsel, Riscorp continued the practice from 1994 and until 1996 despite Respondent's strong warnings. (R. 74,78,109). Respondent testified that he had no knowledge that the practice continued after October, 1994. (R. 248).

Mr. Malone was subsequently federally prosecuted and was convicted in August, 1998 of the misdemeanor of illegally making a contribution in excess of $1,500 in the name of another. (R. 113). The United States Attorney's Office granted immunity to Respondent and the six other attorneys in his law firm; however, Respondent never testified in any proceeding because the other Riscorp officers pled guilty prior to trial. (R. 337). The Florida Bar returned no probable cause findings against Mr. Tom Maida and the subordinate attorneys in Respondent's law firm. (Resp. Exh. 4).

On July 14, 1999, The Florida Bar filed a Complaint against

Respondent. A final hearing was held on December 7 and 8, 1999. The Referee found Respondent guilty of violating Rules 4-1.2(d), 4-8.4(a) and 4-8.4(c). Following the sanctions hearing held on January 21, 2000, the Referee recommended a public reprimand and six months of probation with special conditions imposed during the probationary period. The Referee filed her report on February 22, 2000 and Complainant filed its Petition for Review on April 21, 2000.

SUMMARY OF THE ARGUMENT

The Referee had an ample evidentiary basis upon which her findings and recommendations were based. The Referee's findings are entitled to a presumption of correctness and are not to be disturbed by this Court unless clearly erroneous or totally lacking in evidentiary support. Because there is significant evidentiary support for the Referee's findings, The Florida Bar in its Initial Brief ignores the proper review standard and attacks the Referee's findings (and the Referee) by improperly rearguing the theories that it unsuccessfully argued at the trial below.

The Referee's recommendation of discipline is also supported by the Florida Standards and prior decisional law of this Court. The Florida Bar has failed to present any cogent argument or rational basis that would justify disturbing the Referee's recommendations.

I. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE REFEREE'S FINDING THAT WHEN RESPONDENT AGREED TO ASSIST RISCORP IN COLLECTING THE REQUESTED CAMPAIGN CONTRIBUTION FUNDS, HE DID NOT KNOW THAT THE CONTRIBUTION REIMBURSEMENT PRACTICE WAS POTENTIALLY INAPPROPRIATE AND DID NOT INTEND TO VIOLATE FLORIDA STATUTES, SECTION 106.08.

The Referee found that The Florida Bar did not prove, by clear and convincing evidence, that Respondent was aware, in June, 1994, of the potential impropriety of Riscorp's request that he solicit campaign contributions which would be later reimbursed. (See Florida Bar v. Marable, 645 So. 2d 438, 442 (Fla. 1994) ("In a disciplinary proceeding before a referee, the Bar has the burden of proving the allegations of misconduct by clear and convincing evidence." (citing Florida Bar v. Rayman, 238 So. 2d 594, 596-97 (Fla. 1970)). The Referee further found that in October, 1994, Respondent researched Florida's election laws and immediately advised Mr. Malone of the consequences of Riscorp's campaign practices under Florida Statutes, section 106.08, approximately four (4) months after he had delivered the contribution checks to Riscorp. The Referee found that after Respondent advised Mr. Malone, the president of Riscorp, of the serious consequences of its actions and stridently advised him to stop this practice, Respondent had no further involvement in campaign contribution-reimbursement activities. Accordingly, the Referee did not find that Respondent intended to violate Florida Statutes, section 106.08.

There is a presumption that a referee's findings of fact are

correct and the findings should not be overturned unless they are "clearly erroneous or lacking in evidentiary support." See Florida Bar v. Hayden, 583 So. 2d 1016, 1017 (Fla. 1991). In order for The Florida Bar to successfully contest the Referee's findings, it must show "that there is no evidence in the record to support the findings or that the record evidence clearly contradicts the conclusions." Florida Bar v. Pellegrini, 714 So. 2d 448, 452 (Fla. 1998) (citing Florida Bar v. Rue, 643 So. 2d 1080, 1082 (Fla. 1994). If the findings are supported by "competent, substantial evidence in the record," the Florida Supreme Court "is precluded from reweighing the evidence and substituting [its] judgment for that of the referee." Florida Bar v. Frederick, 756 So. 2d 79, 86 (Fla. 2000) (quoting Florida Bar v. Lange, 711 So. 2d 518, 520 n. 5 (1998)). There is abundant evidence in the record to support the Referee's findings.

A. The Referee's findings are supported by Respondent's limited involvement and experience in political activities.

The Referee properly considered evidence and testimony regarding Riscorp's political background and the extent to which Respondent was involved in campaigning activities. (R.R. 2, 6). Mr. Tony Malone, who was the former President and Chief Executive Officer of Riscorp, testified about the corporation's political involvement. Mr. Malone testified that, because Riscorp was

heavily regulated by the Department of Insurance and governed by Florida Statutes, the corporation found it necessary to "play a very active role in the legislative process and [be] very active in our interaction with our regulator." (R. 36). According to Mr. Malone, politicians put a tremendous amount of pressure upon Riscorp to make contributions and the task of securing the promised amount of campaign funds was an "endless effort." (R. 73-74).

Considering the $500 contribution limit, in order to meet its goals, Riscorp set up a framework in 1987 or 1988 for its employees to contribute to its selected political candidates and be reimbursed by the company's funds. (R. 75.) In fact, the solicitation of employee contributions was so pervasive that Riscorp routinely set aside an account of funds through which the employees could request their reimbursements in advance. (R. 72). Mr. Malone testified that in "different election cycles we might support twenty or thirty candidates and contribute to those candidates anything from a hundred dollars to $50,000 in an election cycle." (R. 37).

Riscorp had continued in these practices with the approval of and the active involvement of one of its attorneys whose responsibility it was to advise Riscorp in political and regulatory matters. Mr. Malone testified that Mr. Tom Maida, a Tallahassee attorney, was its political lawyer who was involved

in the regulatory process. (R. 64-65, 89, 109). Mr. Malone explained that it was a common practice of Mr. Maida's firm to solicit contributions from its employees, reimburse the employees and provide the checks to Riscorp to be delivered to Riscorp's selected candidate. (R. 49, 91). Mr. Malone testified that Mr. Maida did not advise him that the practice was illegal but told him that the practice was "fairly commonplace" and that he should keep the practice "among a select, small group of people." (R. 76-77; 108). Mr. Malone further testified that in political matters, Riscorp deferred to Mr. Maida's advice.[1] (R. 89).

In contrast, Respondent was not involved in politics and had very little experience in political matters. (R. 309). Respondent's involvement in campaigning was limited to hosting two cocktail parties to introduce two friends who were running for office to some of his other friends. (R. 310-311). In June, 1994, Respondent had a general sense that there were statutes that governed elections and campaigning, but he had not reviewed them and was not aware of any particular statute. (R.215).

In June, 1994, Mr. Malone asked Respondent to do Riscorp a favor and solicit campaign contributions for two candidates for state office. (R. 187). It was a relatively short conversation in which Mr. Malone briefly told Respondent how Mr. Maida's firm

[1]. It is strange and inconsistent that The Florida Bar finds Mr. Malone credible in his allegations against Respondent and yet found no probable cause as to Mr. Malone's allegations against Mr. Maida. (Resp. Exh. 4).

solicited and reimbursed contributions from employees and authorized Respondent to premium bill one of Riscorp's client files to which Respondent was independently devoting extraordinary efforts and attention. (R. 187-189, 204-05, 243). Respondent agreed to solicit the contributions in that same conversation. (R. 188, 316). Immediately after hanging up the phone, Respondent asked other lawyers in his office if they would make contributions. (R. 191).

Although Respondent believed that he also advised the other lawyers that they would be reimbursed for their contributions, the other lawyers did not raise any concerns regarding the legality of the request. (R. 204-05, 207, 216, 319). However, one lawyer requested his reimbursement money in advance of the contribution, so Respondent immediately authorized the bookkeeper to issue the bonus checks to reimburse the contributors. (R. 198-99).

After soliciting the contributions, Respondent resumed his work in multiple matters during what he described as a very hectic work day. (R. 193, 212). Respondent testified that the phone call and the solicitations occurred over a short time span (less than 10 minutes) in an extremely busy day and at that time, he did not recognize the impropriety of what he was asked to do. (R. 193, 212, 215). Following the June, 1994 contributions, Respondent did not solicit and reimburse any other campaign

contributions even though Riscorp continued its practice until at least 1996. (R. 74,78, 246-247, 332-334). Respondent's lack of political experience and his limited involvement in the campaign contribution reimbursement activities support the Referee's findings.

B. The Referee properly credited Respondent's testimony over the testimony of Tony Malone.

The Referee found Respondent's testimony to be credible. The Florida Supreme Court's "role is not to reweigh the evidence and substitute [its] view of the credibility of the witnesses for that of the Referee." Pellegrini at 451. As this Court has repeatedly held, "[t]he Referee is in the unique position to assess the credibility of witnesses, and [her] judgment regarding credibility should not be overturned absent clear and convincing evidence that the judgment is incorrect." See Florida Bar v. Carricarte, 733 So. 2d 975, 978 (Fla. 1999).

The Referee evaluated not only the content of the testimony, but also the manner in which the witnesses testified and responded to the inquiries. The Referee specifically made the following statement concerning her credibility assessments:

> I had an opportunity to evaluate the witnesses who testified at that hearing of this matter in early December, and quite frankly, I found Mr. Brown's testimony to be very credible and candid, in that I could imagine him receiving, in the midst of a very busy day, a call from a client asking him to solicit checks, as happened in this case, and not pausing or stopping to give that further

> consideration immediately on request, which is what I found happened.

(Transcript of Sanctions Hearing, Jan. 21, 2000, pp. 49-50).

The Florida Bar solely relied upon the testimony of Mr. Tony Malone to argue that Respondent was aware of Florida Statute, section 106.08 before Respondent agreed to solicit contributions for Riscorp. Mr. Malone admitted that Respondent stridently advised him of the potential adverse consequences under Florida Statutes, section 106.08. In particular, Mr. Malone testified that Respondent was "very emphatic" and Mr. Malone was surprised at how strongly Respondent reacted to his discovery of Florida Statutes, section 106.08. (R. 49, 106.) Mr. Malone further acknowledged that he thought that Respondent was acting irrationally and was "fairly dramatically overreacting" to the situation. (R. 97, 106). However, Mr. Malone contended that Respondent subsequently agreed to participate in Riscorp's contribution reimbursement practice. (R. 51). Mr. Malone's and Respondent's testimony conflicted concerning when Respondent admonished Mr. Malone to cease the practice.

When testimony between witnesses is conflicting, "the referee is charged with the responsibility of assessing the credibility of witnesses based on their demeanor and other factors." Hayden at 1017. The Referee, who was in the best position to evaluate the credibility of these witnesses, determined that "Respondent's testimony concerning this phone

call and when he some months later, confronted Mr. Malone about the legality of the fund raising/reimbursement practice [was] more credible than Mr. Malone's testimony." (R.R. p. 2). The Referee based her credibility assessment of the witnesses on several factors which are discussed below.

1. The Referee properly found that Respondent's testimony concerning the sequence of events was more logical than Mr. Malone's version.

The Referee determined that it was not logical that Respondent adamantly warned Mr. Malone that the practice was illegal and could jeopardize Riscorp's corporate charter and then subsequently agreed to participate in the conduct. (R.R. 6). As set forth above, Mr. Malone and Respondent both testified that Respondent vehemently advised Riscorp to cease reimbursing campaign contributions due to the serious and potentially fatal consequences to Riscorp as delineated by Florida Statutes, section 106.08. It is not believable that Respondent would remonstrate with Mr. Malone and then agree to do the very thing that he strenuously counseled against.

The Referee's reasoning is especially compelling when one considers the extremely limited extent of Respondent's participation in the scope of Riscorp's longtime practice. Riscorp began reimbursing campaign contributions it solicited in the late 1980's. (R. 75). Respondent's first and only participation occurred in June, 1994 and Respondent did not

thereafter engage in these practices even though Riscorp continued the contribution reimbursement activities into at least 1996. (R. 74, 78,90, 246-247, 332-334). If Mr. Malone's testimony was accurate, one would expect Respondent to have continued his participation as well.

2. The Referee properly found that Mr. Malone had motivation to alter the date when Respondent advised him of Florida Statutes, section 106.08.

During his sentencing hearing in August, 1998, Mr. Malone first contended that Respondent advised him of Florida Statutes, section 106.08 in June, 1994. (R. 118-120). The Referee noted that Mr. Malone had the motivation to blame Respondent in an attempt to lessen his culpability during his federal sentencing. (R.R. 6). While The Florida Bar attacks the Referee's consideration of Mr. Malone's motivation by arguing that the Referee "[took] a kernel of fact and create[d] a fanciful theory," the record fully supports her reasoning. (Initial Brief, p. 25).

Mr. Malone testified that at the time he was sentenced, his paramount concern was staying out of prison. (R. 118). Mr. Malone knew that the initial conversation with Respondent in which he proposed the funding/reimbursement practice and the Respondent's contributions occurred in June, 1994. (R. 90). Mr. Malone had an obvious interest in convincing the sentencing Court that although Respondent had advised him the practice was

unlawful in June, 1994, Respondent thereafter participated in the conduct, thus impliedly suggesting that the activity was acceptable.

During his sentencing hearing, Mr. Malone represented to the Court that he had previously rationalized his misconduct by reasoning that the Maida law firm and the corporation had been doing it for a long time. (R. 104). Since Mr. Malone continued the reimbursement activity into 1996, it would have been damaging to admit that one of Riscorp's attorneys stridently advised him of its illegality in October, 1994 and thereafter refused to participate in it. Certainly, Mr. Malone would then have been foreclosed from arguing that he did not fully appreciate the seriousness of his actions.

3. The Referee properly considered Mr. Malone's selective utilization of the attorney client privilege in assessing his credibility.

The Referee was alerted to Mr. Malone's random utilization of the attorney client privilege concerning attorney Tom Maida and attorney Martin Steinberg. (R.R. 6). Mr. Malone freely disclosed portions of Mr. Maida's advice to Riscorp concerning the propriety of the contribution reimbursement practice. Mr. Malone explained that Mr. Maida had not told him that it was illegal but had warned him to be very careful and keep the

practice among a select group of people. (R. 76-77, 91, 108). In an attempt to explain how Respondent could have agreed to participate in the activity after vehemently arguing against it, Mr. Malone suggested that Mr. Maida had been instrumental in changing Respondent's point of view. (R. 51, 109).

Mr. Malone testified that when Respondent had met with him and told him that the practice must cease due to the risk of Riscorp losing its corporate charter, Mr. Malone had told him to speak to Mr. Maida. (R. 51). The Florida Bar then elicited the hearsay statement from Mr. Malone that Respondent had told him that Respondent had spoken to Mr. Maida and that Respondent would make the contributions. (R. 51). In contrast, Respondent testified that Mr. Malone had not told him to call Mr. Maida and that he had not spoken to Mr. Maida under the circumstances that Mr. Malone had described. (R. 240, 317-318).

In its Initial Brief, the Florida Bar continues to argue "if one credits Malone's version of events, it is not hard to imagine that Respondent's rival may have steered him into an uncompromising position." (Initial Brief p. 37). And truly, one would have to imagine a conversation between these two parties since the only suggestion of this occurrence was Mr. Malone's hearsay statement that Respondent supposedly had told him that he had spoken to Mr. Maida. Respondent contradicted Mr. Malone's testimony and Mr. Malone refused to waive his attorney client

privilege so that Mr. Maida could be questioned concerning this alleged conversation and potentially be called as a witness in the final hearing. (R. 123).

In addition, Mr. Malone contended that, in June, 1994, Respondent had faxed him a copy of Florida Statutes, section 106.08 prior to their face to face conversation. (R. 48). Mr. Malone acknowledged that those copied statutory section pages were turned over to Mr. Martin Steinberg of the Holland and Knight law firm, who had represented Riscorp in its public offering. (R. 94). Again, Mr. Malone refused to waive his attorney client privilege in order to prevent the statutory pages from being inspected and to obstruct any questioning of Mr. Steinberg. (R. 121).

The Florida Bar argues that it was improper for the Referee to consider Mr. Malone's invocation of the attorney client privilege in assessing his credibility. However, the Referee's evaluation focused on the unreasonable manner in which he utilized this privilege. (R.R. 6). Mr. Malone referred to documents and evidence of other conversations but used his "privilege" as a way to prevent investigation of his contentions. On the other hand, Mr. Malone freely discussed Mr. Maida's advice when he could use the statements of his attorney as justification of his behavior.

While there are distinctions between invocation of the Fifth

Amendment privilege and the invocation of the attorney client privilege, Florida courts have repeatedly held that a litigant may not make allegations and at the same time hide behind the shelter of one's right against self incrimination. See Fassi v. American Fire and Casualty Co., 700 So. 2d 51 (Fla. 5th DCA 1997); Rollins Burdick Hunter of New York, Inc. v. Euroclassics Limited, Inc., 502 So. 2d 959, 962 (Fla. 3d DCA 1987). Similarly, Complainant elicited testimony from Mr. Malone concerning Mr. Malone's interactions and conversations with Riscorp's other attorneys and now defends Mr. Malone's invocation of his attorney client privilege to prevent the investigation of his allegations. The Referee properly considered Mr. Malone's selective use of the attorney client privilege in determining whether his testimony was credible.

4. The Referee properly found that Mr. Malone's testimony was not corroborated by any other evidence.

The Referee considered The Florida Bar's failure to corroborate Mr. Malone's version of when Respondent advised him of Florida Statutes, section 106.08. (R.R. 6). Even though The Florida Bar was aware of Mr. Malone's selective use of his attorney client privileges, it failed to conduct any investigation to verify whether Mr. Malone's statements could be corroborated or contradicted.

For example, Complainant did not explore whether Mr. Malone had waived his attorney client privileges by disclosing portions

of his attorneys' advice, whether the privilege pertaining to Mr. Maida's advice existed if his advice was obtained to enable Riscorp to commit a crime or a fraud under Florida Statutes, section 90.502(4)(a), or whether the privilege was actually his to assert since both Mr. Maida and Mr. Steinberg were corporate attorneys who represented Riscorp. Instead, it chose to simply rely upon Mr. Malone's representations as the sole proof of Respondent's knowledge of the illegality of these activities. Consequently, the Referee was not able to consider the testimony of Mr. Maida or Mr. Steinberg and could not inspect the copied statutory sections.

In defense of its failure to meet its burden and to investigate potential corroborative testimony or evidence, The Florida Bar asserts that the Referee's recognition of the lack of corroborative evidence was "irrelevant and gratuitous" and "rank speculation that corrodes the integrity of the report." (Initial Brief, p. 26). The Florida Bar then accuses the Referee of "imagining" that potential corroborative evidence existed. However, Mr. Malone clearly indicated that both Mr. Maida and Mr. Steinberg could confirm or contradict specific relevant portions of his testimony. (See *supra* subsection 3).

Moreover, both Mr. Malone and Respondent testified to the photocopy of section 106.08 that was provided to Mr. Malone by Respondent and Mr. Malone confirmed that Mr. Steinberg ultimately

had possession of those photocopies. (R. 94). If Mr. Malone's testimony was accurate and Respondent had indeed faxed those copies to him, the date of the facsimile transmission should have been printed on the top of Mr. Malone's received documents. Accordingly, that document could also have verified or discredited his testimony. The Referee logically and reasonably determined that the lack of corroboration contributed to The Florida Bar's failure to prove Mr. Malone's version of events by clear and convincing evidence.

II. THE FLORIDA BAR DOES NOT MEET ITS BURDEN OF SHOWING THAT THERE IS NO EVIDENCE TO SUPPORT THE REFEREE'S FINDINGS OR THAT THE REFEREE'S FINDINGS ARE CONTRADICTED BY THE EVIDENCE.

Clearly, The Florida Bar disagrees with the Referee's findings. Complainant asserts that "the Bar is not at all certain" that the referee analyzed the evidence properly. (Initial Brief, p. 19-20). In essence, The Florida Bar's argument is that the Referee's findings should be rejected because the Complainant has a different interpretation of the evidence. However, The Florida Bar is using an erroneous standard. As set forth above, Complainant, as the Petitioner, has the burden of proving "that there is no evidence in the record to support the findings or that the record evidence clearly contradicts the conclusion." Florida Bar v. Pellegrini, 714 So. 2d 448 (Fla. 1998) (quoting Florida Bar v. Rue, 643 So. 2d 1080, 1082 (Fla. 1994).

A petitioner does not meet this burden by merely "pointing to contradictory evidence where there also is competent, substantial evidence in the record that supports the referee's findings." Florida Bar v. Frederick, 756 So. 2d 79, 86 (Fla. 2000)(quoting Florida Bar v. Glick, 693 So. 2d 550, 552 (Fla. 1997). Moreover, this Court has held that the burden is not met by "simply repeating testimony and arguments thereon that the referee heard and rejected below." Frederick at 86. The argument contained in Complainant's Initial Brief is merely a continuation of its closing argument in the final disciplinary hearing and it urges this Court to reject the Referee's findings based on an impermissible reconsideration and reweighing of the arguments and evidence.

A. The Florida Bar's insistence that it finds Respondent's testimony "unworthy of belief" is not sufficient to overturn the Referee's findings.

Complainant contends that the Referee's finding that Respondent did not recognize the illegality of Mr. Malone's request "strains credulity" and that "logic, common sense and intuition directs the reasonable observer to conclude that Respondent did know the subject conduct was illegal at the time he engaged in it in June, 1994." [2] (Initial Brief pp. 13, 14).

The Florida Bar agrees that Respondent "is a thoroughly

[2]. Apparently, the corollary to its argument is the Florida Bar's assertion that the Referee was an unreasonable observer.

professional and extremely competent lawyer." (Initial Brief, p. 20). From that stipulation, it contends that Respondent was not capable of making a mistake, experiencing a lapse in judgment or incorrectly analyzing or identifying an issue in all matters even though he was not retained as an attorney. (See *infra* section I (c)). Complainant creates an impossible paradigm and then condemns Respondent as an intentional law breaker when he fails to meet that standard. Although The Florida Bar disbelieves Respondent, its opinion, no matter how strongly held, does not justify this Court's rejections of the Referee's assessment of Respondent's testimony.

Respondent testified that when Mr. Malone requested him to solicit contributions, Respondent's concern was whether it was proper for Riscorp to reimburse Respondent's law firm with corporate money. At that time, Respondent determined since Mr. Griffin, who was the sole owner of Riscorp, was the one authorizing the expenditure, Mr. Griffin could spend his money on whatever matters he found appropriate. (R. 210-212). This analysis resolved Respondent's immediate concerns and he did not recognize the other political issues.

Respondent testified about his failure to correctly identify the illegality of Riscorp's request. In particular, Respondent testified, "I received what at the time seemed to be a very simple, seemingly innocuous request from a very, very respected

client, and I wanted to please that client and simply did not think to question the propriety of the request, at least not until the election contribution statute was brought to my attention in October." (R. 343). Respondent stated that perhaps his vigilance was relaxed because he was receiving a request from a well-respected client whom he had found to be very credible and accordingly, did not fully analyze the potential problems. (R. 346-347). Moreover, Respondent explained that he quickly acquiesced because he wanted to help Riscorp and because Mr. Malone had indicated that Mr. Maida had already agreed to help. (R. 347). Respondent admitted, "I've certainly been guilty in my heart of a mental lapse, probably poor judgment, probably even stupidity, and probably all of the above." (R. 346). Respondent attempted to express his regret in failing to identify the correct problem during the short time frame when he agreed to help Riscorp and when he solicited the contributions. (R. 344-45).

Moreover, although Complainant states that Respondent must have been "utterly ignorant and uncomprehending," Respondent was not the only attorney who failed to identify the impropriety of the contribution reimbursement practice. (Initial Brief, p. 19). Respondent received campaign contributions from other lawyers in his firm who did not object to providing contributions from themselves and their family members and receiving reimbursements

for their contributions. (R. 204-05, 207, 216, 319). The Florida Bar argues that the other attorneys did not realize that they were going to be reimbursed and therefore, did not object to the practice. In support, Complainant relies upon the testimony of Mr. Don Clark, the only subordinate attorney called as a witness. Mr. Clark testified that Respondent did not advise him that he would be reimbursed for his and his family's contributions and he thought that his reimbursement check was simply a bonus check. (R. 154).

The contention that the other attorneys did not understand that they were reimbursed is not supported by the record. First, and most obviously, Complainant only adduced evidence concerning Mr. Clark's understanding of whether he knew he was being reimbursed for his contributions. The Florida Bar did not present any testimony concerning the other attorneys' recollection or understanding regarding reimbursement.

Second, it is undisputed that the attorneys were immediately reimbursed by Respondent's law firm for their contributions. (TFB Exh. 2B-2G). The reimbursement checks were close to the amount that they contributed and were distributed soon after the attorneys delivered the contribution checks. Moreover, the attorneys could not have reasonably believed that the checks were bonuses, unconnected to the contributions, since the reimbursement checks were issued only three weeks after the

attorneys had received their actual bonus checks. (R. 325-326). Respondent explained and provided documentation indicating that two separate bonus checks in such a close time span would be highly unusual. (R. 325-326, Resp. Exh. 2). Accordingly, the reimbursement checks contradicted Mr. Clark's contention that he had not been aware that he was reimbursed.

Third, if the attorneys were willing to contribute without reimbursement, Respondent had absolutely no reason to covertly reimburse the contributions. In fact, Respondent would have every reason to not expend the law firm's funds for reimbursement since he was the majority shareholder.

Nevertheless, Respondent's testimony comports with the facts. He did not immediately recognize the impropriety of the contribution reimbursement practice. Similarly, the other attorneys in his law firm did not object to the practice but readily complied with his request. Respondent did not recognize the potential issues until approximately four months later.

Complainant also does not believe Respondent's testimony that he was prompted to research the propriety of the contribution practice four months later. Complainant finds it "preposterous" that Respondent could have been prompted to question the activity by some event other than Mr. Malone's request. However, different people can be alerted to or reminded of issues by any number of things. The Florida Bar's opinion

that something is unusual is not clear and convincing evidence that it did not occur.

Moreover, The Florida Bar mischaracterizes the October, 1994 phone call that alerted Respondent to a potential problem. Respondent explained that he had frequent contact with the Riscorp secretary and she was normally a very upbeat, bubbly, friendly person. (R. 218, 223). When she called him, she was noticeably upset, which was a stark contrast to her normal personality. (R. 219, 223). Respondent connected her distress with the contribution checks of which she was inquiring and got a "gut feeling" wondering what was going on at Riscorp. (R. 221-222, 224, 226). Respondent requested another attorney research any election contribution statutes and when he discovered the consequences of Riscorp's practices, he immediately contacted Mr. Malone. (R. 222, 226-227).

Complainant next attempts to create an inconsistency within Respondent's testimony by suggesting that Respondent advised Mr. Malone of Florida Statutes, section 106.08 and then subsequently agreed to participate in the same solicitation reimbursement practice in the Jeb Bush for Governor campaign. (Initial Brief p. 30). However, the Jeb Bush contribution checks were legitimate contributions. (R. 332-334). Respondent did not solicit any other attorneys to make the contributions. (R. 332-334). The checks were not reimbursed. (R. 333).

Complainant next uses Respondent's testimony that the

remonstration occurred before the October 15, 1994 premium billing invoice to argue that Respondent continued the reimbursement practice. However, The Florida Bar provided no evidence concerning how the invoices were prepared, when Respondent submitted his time sheets to bookkeeping or when the invoices were generated. Moreover, the invoice was never admitted into evidence and accordingly, is not a part of the record to this proceeding.

Further, had Riscorp paid this invoice (and there is no evidence that the invoice was paid), there were still contribution funds that had not been reimbursed. Although the law firm had not received full reimbursement, it is undisputed that Respondent did not submit any other premium billing invoices to Riscorp. (R. 237). Rather than highlighting his supposed culpability, the cessation of the premium billing invoices supports Respondent's testimony that the remonstration occurred in October, 1994.

B. The Florida Bar erroneously attacks the Referee's credibility assessments by arguing that the Referee "tacitly" or "impliedly" found Mr. Clark more credible than Respondent.

The Florida Bar appears to argue that the Referee "tacitly" credited Mr. Clark's testimony because she recommended that Respondent be found not guilty of Rule Regulating the Florida Bar 4-5.1(b) and (c). However, the Referee did not have to rely on Mr. Clark's testimony to return that recommendation. Since this

rule presupposes a rule violation has been committed by a subordinate attorney, it is more reasonable that the Referee's determination that there was no proof that the subordinate attorneys violated any rules was based on the no probable cause findings entered against those attorneys. (Resp. Exh. 4). In addition, The Florida Bar presented no other evidence that the other attorneys violated any ethical rules. Accordingly, even if one determines that Respondent's and Mr. Clark's testimony was conflicting[3], it was not necessary for the Referee to "tacitly" credit one over the other to resolve whether Respondent violated 4-1.5(b) or (c).

III. THE REFEREE PROPERLY FOUND THAT RESPONDENT HAD NOT COMMITTED THE OTHER PLEADED RULE VIOLATIONS.

A. There is not clear and convincing evidence that Respondent violated Rule Regulating The Florida Bar 4-8.4(b).

The Referee found that Respondent did not knowingly and willfully violate the provisions of Florida Statutes, section 106.08. The Referee had the opportunity to observe the witnesses first hand and properly determined that Respondent lacked the intent to violate any laws. See Florida Bar v. Fine, 607 So. 2d

[3]. Respondent consistently testified that he *believed* that everyone understood that they were being reimbursed; he did not remember the specifics of any conversation, with the exception of his conversation with Mr. Levine. (R. 197, 205-207).

416, 717 (Fla. 1992)(upholding a referee's finding that the lawyer did not act with any bad intent and explaining that, "[t]he referee who presides over the proceedings is in the best position to make judgments concerning the character and demeanor of the lawyer being disciplined.") The Referee's findings should not be disturbed.

While Respondent has candidly acknowledged that, in retrospect, he should have recognized the impropriety of Riscorp's request to participate in the contribution reimbursement practices, his negligence in failing to appropriately investigate the activity does not amount to a knowing and willful violation. Florida courts have repeatedly held that one may not negligently violate the election laws. See Fulton v. Division of Elections, 689 So. 2d 1180, 1181 (Fla. 2d DCA 1997)(*negligently* failing to adhere to requirements of Florida Statutes, section 106.19 is not sufficient to prove a knowing and willful violation); Sanders v. Florida Elections Commission, 407 So. 2d 1069, 1070 (Fla. 4th DCA 1981)("A careless and negligent failure to comply with § 106.143, Fla. Stat. does not constitute a 'willful' violation as required by the statute."); Johnson v. Harris, 188 So. 2d 888, 892 (Fla. 1st DCA 1966)(in order to impose sanctions for an elections law infraction, the violation must have been "knowingly committed."). Since there is insufficient evidence that Respondent intended to

violate Florida Statutes, section 106.08, Respondent should not be found guilty of Rule Regulating the Florida Bar 4-8.4(b).

B. There is not clear and convincing evidence to find Respondent guilty of 4-1.13(b) or 4-1.6(b)(1).

The Referee properly determined that Respondent did not violate Rule Regulating the Florida Bar 4-1.13(b) or 4-1.6(b)(1). When Respondent discovered the illegality of Riscorp's practices, he contacted Tony Malone who was the president of Riscorp, and the highest ranking officer. (R. 246-248). He vehemently told Mr. Malone that Riscorp must stop the contribution reimbursement activity. Respondent testified that he felt confident that Mr. Malone had understood the potentially fatal consequences to Riscorp should the practice continue.

Although Mr. Malone later testified that Riscorp deferred to its attorney in Tallahassee regarding all political matters and consequently did not follow Respondent's advice, Respondent did not know that Riscorp continued its campaigning contribution policies. Respondent did not participate in any other contribution reimbursement activities subsequent to June, 1994. Respondent had no reason to believe that Mr. Malone would act in violation of the law to the detriment of the corporation and therefore complied with Rule Regulating the Florida Bar 4-1.13(b) and 4-1.6(b)(1).

C. There is not clear and convincing evidence that Respondent violated Rule Regulating The Florida Bar 4-2.1 or 4-1.1.

Complainant contends that Respondent should be found guilty of Rule 4-1.1 (a lawyer shall provide competent representation to a client) because this Court concluded that Respondent should have questioned the legality of Riscorp's campaign fund raising scheme. However, as the Referee noted, Riscorp never sought Respondent's advice or legal opinion regarding its campaign practices. (R.R. 7). Instead, Tony Malone testified that he deferred to Mr. Maida or other Tallahassee counsel regarding political matters. (R. 89). This testimony is uncontradicted in the record.

Rule 4-1.1 presupposes a client lawyer relationship in which the client is seeking representation in a particular matter. Once a client requests legal advice on a specific issue, the attorney must then inquire into and conduct a thorough analysis of the legal and factual aspects of the problem. R. Regulating Fla. Bar 4-1.1. Since Respondent was not asked for legal advice concerning these practices and since he had no actual, independent knowledge of Florida Statutes, section 106.08 when he was asked to participate in the fund raising practices, Rule 4-1.1 does not contain the appropriate standard to analyze Respondent's conduct.

On the other hand, when Respondent discovered that Riscorp's campaign fund raising practices violated Florida Statutes, section 106.08, he immediately and stridently offered unsolicited

advice to Riscorp, as urged by the Comment to Rule 4-2.1, and informed Tony Malone that this activity was illegal and could potentially cause Riscorp to lose its corporate charter. Furthermore, Respondent refused to continue his participation in any illegal campaign contribution practices. Accordingly, the record does not support finding Respondent guilty of Rule 4-1.1 or 4-2.1.

IV. THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE PUBLICLY REPRIMANDED IS APPROPRIATE GIVEN THE FACTS OF THIS CASE.

The Referee below recommended that Respondent be publicly reprimanded with certain conditions attached to that sanction. The recommendation was based upon the referee's finding that Respondent, during a busy day, agreed to accommodate a respected client's request without sufficient reflection. Thereafter, when Respondent recognized the impropriety of the client's request and Respondent's subsequent compliance, Respondent ceased such activity, promptly and strenuously advised the client against any such further activity, and ceased seeking reimbursement from the client for the contributions previously made. In essence, the Referee found that Respondent negligently erred and took immediate remedial action when he recognized his error.

The Florida Standards for Imposing Lawyer Sanctions support the referee's recommendation. Florida Standard C.3.0 states that "[i]n imposing a sanction after a finding of lawyer misconduct, a

court should consider the following factors:

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

Fla. Stds. Imposing Law. Sancs. C.3.0.

The Referee considered these factors and further, appropriately found Standard 5.13 to apply to the instant situation. (R.R. 12). Standard 5.13 states:

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

Fla. Stds. Imposing Law. Sancs. 5.13.

Notwithstanding the Referee's reliance on Standard 5.13, the Complainant urges this Court to disbar Respondent relying on Standard 7.1, Standard 4.61 and Standard 6.11(a). (Initial Brief p. 46). Such reliance is misplaced given even a cursory review of the cited Standards.

Standard 7.1, as defined in Standard 7.0 applies to cases relating to the following subjects:

> false or misleading communication about the lawyer or the lawyers' services, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unlicenced practice of law, improper withdrawal from representation, or failure to report professional misconduct.

Fla. Stds. Imposing Law. Sancs. 7.0. Obviously, the misconduct found by the Referee below is utterly unrelated to the subject

areas covered by Standard 7.1.

Complainant's reliance on Standard 4.61 is equally unjustified. Standard 4.61 applies to situations where "a lawyer knowingly or intentionally deceives a client." The record below contains not a scintilla of evidence that Riscorp officials had been deceived by Respondent. Thus, Complainant's reliance on Standard 4.61 is puzzling and wrong.

Finally, Standard 6.11(a), cited by Complainant, offers no guidance to this Court in this case. Standard 6.11(a) addresses where "a lawyer with the intent to deceive the court knowingly makes a false statement or submits a false document." In the instant case there is no indication that the Respondent made any false statement or submitted any false document to a court. Complainant's assertion that this Court must find that Respondent testified falsely if the Court accepts the Complainant's view of the evidence is stupefying. Under Complainant's theory of prosecution, every Respondent who denies misconduct and who is later found guilty of an ethical violation, is guilty of perjury and should be disbarred. Clearly, Standard 6.11(a) does not apply here.

Complainant's reliance on case law is similarly misapplied. Complainant compares the facts below to those facts in Florida Bar v. Kramer, 548 So. 2d 233 (Fla. 1989). In Kramer, the accused attorney was convicted of two felonies in New Jersey by

reason of converting a client's property for his own use and concealing the conversion with the use of false affidavits. Complainant perplexingly sees these felony convictions as similar to Respondent's actions in the instant case. (Initial Brief, p. 46).

Complainant's comparison fails in this regard. As the Referee noted, the billing statements of Respondent did not deceive the client, as the President and Chief Executive Officer of the company agreed to them. Thus, there can be no conversion or deceit. (R.R. 12). Further, as discussed above, Respondent's testimony was not irreconcilably inconsistent with Donald Clark's testimony. Accordingly, there was no false testimony as Complainant urges.

Moreover, Florida Bar v. Cramer, 678 So. 2d 1278 (Fla. 1996), cited by Complainant is dissimilar to the facts herein. Cramer perpetrated a fraud upon a financial institution by misrepresenting facts on an application to procure a lease. Cramer was disbarred in large measure due to his two prior disciplinary offenses also involving "subterfuge in money matters. Id. at 1281. The Court also noted that while not prosecuted, Cramer's misconduct was similar to misconduct resulting in a felony conviction. Id. at 1282.

The misconduct below pales in comparison to that in Cramer. Respondent was not found to have perpetrated a fraud but simply

made an error in judgment which he later sought to correct. Furthermore, Respondent's conduct did not constitute felony behavior, nor even a misdemeanor as found by the Referee.

Even, assuming *arguendo* that Respondent's conduct violated Florida Statutes, section 106.08, such conduct would constitute a misdemeanor for which this Court has previously determined the imposition of a public reprimand is appropriate. See Florida Bar v. Farinas, 608 So. 2d 22 (Fla. 1992); Florida Bar v. Levin, 570 So. 2d 917 (Fla. 1990); Florida Bar v. Levine, 498 So. 2d 94 (Fla. 1986).

Florida Bar v. Newhouse, 520 So. 2d 25 (Fla. 1988), relied upon by Complainant, provides no precedent or guidance here. Newhouse made statements to a court that he knew to be false, failed to abide by court orders, counseled and assisted his clients to violate court orders, and failed to maintain proper trust accounting records. Newhouse had a previous disciplinary history, engaged in a pattern of misconduct, non-cooperation, deceptive practices, failure to acknowledge wrongdoing, among other factors which resulted in his disbarment.

Obviously, Newhouse bears no resemblance to the case below. Here, Respondent admitted to a lapse in judgment which the Referee characterized as "a true aberration in the otherwise unblemished" legal career of Respondent. (R.R. 14). The Referee also noted that Respondent had no prior disciplinary record, made

full and free disclosure, demonstrated a cooperative attitude, provided pro bono legal services, supported charitable causes, had an enviable reputation among clients, community leaders, colleagues and distinguished jurists as a "highly competent and ethical attorney," expressed deep remorse and suffered public embarrassment which adversely affected his law firm and family life. (R.R. 13-14).

Complainant also cites Florida Bar v. Rood, 622 So. 2d 974 (Fla. 1993) in support of suspension of Respondent. (Initial Brief p. 45). Rood knowingly and intentionally encouraged his clients to execute false documents and Rood then filed the false documents with a probate court thereby perpetrating a fraud on the court. Rood also made false statements to a court in a separate proceeding.

Complainant draws a parallel between Rood and the case below ostensibly because both cases involve Rule 4-1.2(d) and Rule 4-8.4(c) violations. However, such comparisons are illusory. Rood's 4-1.2(d) violation was knowing and intentional by having clients sign false documents. Conversely, Respondent's violation of Rule 4-1.2(d) was predicated upon Respondent' failure to recognize "the potential impropriety of the clients' request." (R.R. 8).

Further, Rood's violation of 4-8.4(c) was based upon his misrepresentations to a probate court by the submission of false evidence. Here, Respondent' violation of Rule 4-8.4(c) was in a

"limited respect." (R.R. 11). That is, Respondent's billing statements while agreed to by the client were "false in that they did not accurately reflect the hours worked." (R.R. 11). In addition, Rood was found guilty of seven (7) additional rule violations in the referenced count.

Respondent's misconduct is significantly less egregious than Rood's as shown above. As noted in the earlier argument, this Court has decreed that the referee is in the best position to determine Respondent's intent or *mens rea*. The Referee found that Respondent did not knowingly and willfully violate Florida Statutes, section 106.08. Thus, while the Referee found a limited violation of Rule 4-8.4(c), the imposition of a public reprimand is the appropriate discipline. Florida Bar v. Bosse, 689 So. 2d 268 (Fla. 1997); Florida Bar v. Glant, 684 So. 2d 723 (Fla. 1996); Florida Bar v. Hollander, 607 So. 2d 412 (Fla. 1993).

CONCLUSION

The Referee's findings of fact, rule violations and recommendation of discipline are properly supported and should be approved by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Respondent's Answer Brief have been furnished by regular U. S. Mail to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and true and correct copies have been furnished to Brett A. Geer, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607 and John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, all this 10th day of July, 2000.

CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief if submitted in 12 point proportionally spaced Courier font.

_____
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