IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DARYL JAMES BROWN,

Respondent.

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Case No. SC96031

TFB No. 1999-10,255 (12A)

INITIAL BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar will be referred to as "The Florida Bar," or "the Bar." The Respondent, Daryl James Brown, Esq., will be referred to as "Respondent." Also:

"RR" will refer to the Report of Referee in Supreme Court Case No. SC96031, dated February 22, 2000.

"TR-1" will refer to Volume 1 of the record Transcript of testimony in Supreme Court Case No. SC96031 dated December 7, 1999.

"TR-2" will refer to Volume 2 of the record Transcript of testimony in Supreme Court Case No. SC96031 also dated December 7 and 8, 1999.

"TR-3" will refer to Volume 3 of the record Transcript of testimony in Supreme Court Case No. SC96031 also dated December 8, 1999.

"Bar Exh." will refer to Exhibits placed in evidence by the Complainant, The Florida Bar.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar.

"Standard" or "Standards" will refer to the Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE AND OF THE FACTS

On July 14, 1999, The Florida Bar filed a formal Complaint against Respondent, Daryl James Brown. The trial was held December 7 and 8, 1999, in Punta Gorda, Florida, at which the following witnesses testified: James Anthony Malone, Donald Dean Clark, Esq., the Hon. Frederick A. DeFuria, Wendy Resnick, Daniel Whiteman, Hon. Durand J. Adams, Guy M. Burns, Esq., John M. Dart, Esq., Ted Bogusz, William G. Christopher, Esq., and the Respondent, Daryl James Brown.

On December 23, 1999, the referee issued a preliminary, unsigned report describing her factual findings. The Bar timely moved the Court to reconsider the findings or to rehear argument regarding when Respondent became aware that the subject misconduct was dishonest and deceitful, and violated Florida law. The referee denied the motion. Immediately prior to the sanction hearing conducted January 24, 2000, the Bar moved to reopen the evidence on the same issue, citing newly discovered evidence. The referee denied that motion.

The signed Report of Referee was issued February 22, 2000. The referee found Respondent guilty of violating Rule 4-1.2(d), Rule 4-8.4(a) and Rule 4-8.4(c), Rules Regulating The Florida Bar, and recommended that Respondent be publicly reprimanded. The referee found Respondent not guilty of violating Rule 4-1.1, Rule 4-1.4(b), Rule 4-1.6(b), Rule 4-1.13(b), Rule 4-2.1, Rule 4-5.1(b), Rule 4-5.1(c), and Rule 4-8.4(b). On April 7, 2000, the Board of Governors of The Florida Bar issued its decision to appeal the referee's factual findings and the recommended sanction, whereafter this appeal was timely filed.

The Uncontroverted Facts:

The following facts are uncontroverted: In late June, 1994, Respondent received a telephone call from James Anthony Malone ("Malone"), then-president of Riscorp, Inc. ("Riscorp"), a Sarasota-based insurance company. At the time, Respondent owned about 65% of the shares of his law firm, Brown, Clark & Walters, P.A., and Riscorp was the law firm's single biggest client in terms of revenue. In this phone call Malone asked Respondent to assist Riscorp in providing money to two political campaigns that Riscorp's founder and chairman, William Griffin, wished to favor. The two candidates were Bill Nelson, who then was running for insurance commissioner, and Tom Gallagher, who was running for governor. Malone asked Respondent to solicit and gather $20,000.00 in personal checks made payable to the two campaigns; i.e., $10,000.00 directed to each. Malone advised Respondent that each check could not exceed $500.00.

As a result of this conversation, Respondent and Malone both understood and expected that Respondent, upon collecting these contributions, would reimburse the contributors for the full amount of their "contributions." Respondent and Malone also agreed that Respondent could recoup his firm's reimbursement expense by falsely inflating the hours Respondent claimed on invoices for legal work, which the firm routinely submitted to Riscorp for payment. Thus, both men understood and agreed that Riscorp would be the true source of the campaign contributions.

Not long after this communication with Malone, Respondent did exactly as he had been asked: He solicited the requested campaign contributions from six of his subordinate attorneys,

five of whom were minority partners in his firm. Each attorney wrote a $500 personal check to each of the two campaigns, and their spouses and/or family members did likewise. For his part, Respondent wrote a $500 personal check to each campaign, as did his wife, his daughter, her husband, and each of the husband's parents. All told, Respondent gathered 37 personal checks, all written for $500. He also wrote a law firm check to each campaign for $500. Respondent delivered these checks to Riscorp, and Riscorp later forwarded them to the two political campaigns.

On or about the same day Respondent collected these checks, i.e., June 28, 1994, Respondent directed the firm's bookkeeper to issue bonuses solely to himself and the six attorneys who had provided contributions. As majority shareholder, Respondent had broad discretion concerning bonuses. Respondent admitted that he calculated and intended each bonus payment to reimburse its recipient for the total dollar value of the checks the attorney had submitted, including himself. In Respondent's case, he reimbursed his in-laws and his daughter and son-in-law for the contributions they had made. Respondent admitted that he knew, at the time, that the net effect of his conduct would be that the two political campaigns would receive numerous checks from several people who had not made a bona fide contribution. (RR at 4, para. 10.)

Thereafter, Respondent inflated the number of hours that the law firm invoiced to Riscorp as legal services provided by him, roughly doubling his actual time worked on at least two such invoices, the first dated September 15, 1994 and the second dated October 15, 1994. He did so intending to recoup for his law firm

the reimbursement bonuses it had paid to himself and the other six lawyers. Riscorp paid the inflated invoices.

Ultimately, Riscorp and five of its officers, including James A. Malone and William Griffin, were indicted in the Northern District of Florida and later pleaded guilty to engaging in a scheme to collect and deliver fraudulent campaign contributions to candidates for federal office. (The acts that formed the basis of the federal criminal case were similar to the Florida campaign contributions herein described in that the defendants had reimbursed such contributions through bonus payments to its employee/contributors.)

The federal authorities granted Respondent immunity from prosecution in exchange for his testimony. However, because the defendants pleaded guilty, Respondent never actually testified. The federal criminal investigation generated a rash of publicity adverse to Riscorp and its officers. This adverse publicity contributed to the ultimate demise of Riscorp as a viable entity.

The Findings Regarding What Respondent Knew and Should Have Known:

None of the above facts are disputed. As such, the referee found that "the evidence clearly and convincingly established that the Respondent knowingly or intentionally violated Rule 4-1.2(d)". (RR at 10.) The referee declared that, by participating in the aforesaid scheme, Respondent knowingly and intentionally assisted his client, Riscorp, in conduct that Respondent reasonably should have known was criminal or fraudulent. (See RR at 8.) The Bar does not dispute the above-stated facts nor the referee's conclusion as to what Respondent should have known.

Though she found that Respondent reasonably should have known that the convoluted reimbursement scheme he had assisted his client to engage in was criminal or fraudulent, the referee also considered that Respondent "may not have known" that the subject misconduct was criminal or fraudulent when Malone explained it to him, or when he engaged in it himself. (RR at 5, para. 13.)

The referee's rather diluted conclusion that Respondent lacked sufficient *mens rea* prompted her to recommend a public reprimand as the appropriate sanction for the two major rule violations she did find. The Bar contends that, given the uncontroverted facts, a reprimand is too lenient a sanction regardless of whether Respondent's scienter is proven.

The Conflict Between Respondent and James Malone Regarding Respondent's Scienter

One conflict in the evidence bearing directly on the issue of Respondent's guilty knowledge derives from Respondent's assertion that, despite having the subject behavior fully explained to him by Malone in late June, 1994, and despite engaging in the conduct himself at that time, he did not realize that the conduct was criminal, or fraudulent, or even improper, until early October, 1994. The referee credited this testimony by Respondent, which the Bar argues is unworthy of belief.

Conversely, James A. Malone testified as follows: In 1994, Riscorp encouraged a healthy, ongoing competition between Respondent's law firm and a Tallahassee law firm run by Thomas Maida, Esq. In essence, the two law firms were continually vying for the prize of being Riscorp's "favored" law firm. (See TR-1, pp.88-90.) Malone testified that William Griffin prompted him to ask Respondent to help out with the Nelson and Gallagher contributions because Riscorp couldn't raise the amounts needed through its own employee contribution/reimbursement practice.

Malone stated that, when he called Respondent in late June, 1994, he told Respondent that Riscorp solicited and collected political campaign contributions from certain of its trusted employees and had reimbursed those contributions by paying "bonuses". Malone further testified that, when he asked Respondent to engage in the subject conduct in June, 1994, Respondent demurred at first, and questioned the legality of the

described practice. Shortly thereafter, Malone testified, Respondent faxed over to him the text of Florida Statutes Section 106.08, which prohibits the practice Malone had described, and identifies it as a crime, which, if engaged in by a corporation, can result in forfeiture of the corporate charter.

Next, Respondent came over to Malone's office and forcefully communicated his concern that Riscorp had violated that law. Respondent and Malone discussed the statute in person, including the provision therein regarding forfeiture of a corporate charter as a possible penalty. Respondent strongly advised that Riscorp discontinue the practice, but Malone felt Respondent was overreacting. Malone suggested that Respondent contact Thomas Maida about his concerns. Malone testified that, in matters involving politics, he trusted Maida's advice, and Maida had never advised him that it was illegal to reimburse employees' political contributions using bonus payments. Malone said he was surprised at Respondent's reaction, and he urged Respondent to speak to Maida about the practice. (TR-1, pp.96-98.)

A short while thereafter, Respondent contacted Malone and told him he had, indeed, spoken with Maida about the matter, whereupon Respondent advised Malone that he would in fact engage in the conduct. As the uncontroverted facts show, Respondent did engage in the subject conduct in late June, 1994.

For his part, Respondent does not deny that he researched the pertinent statute and remonstrated with Malone about not

engaging in the subject conduct. Respondent, however, denies that this remonstration occurred when Malone says it did, i.e., in June, 1994, when Malone initially explained and requested, and Respondent ultimately engaged in, said conduct. Respondent asserts that he did not become aware of the illegality of the conduct until some four months after Malone had explained it and he himself had engaged in it. At its core, Respondent's testimony was that he negligently engaged in the conduct without realizing there was anything improper or wrong with it. As stated, the referee credited Respondent's version.

The Conflict Between Respondent and Donald Clark Regarding Respondent's Scienter

The evidence also diverged materially on another issue bearing on Respondent's guilty knowledge. This second testimonial conflict occurred between Respondent and his law partner, Donald Dean Clark, Esq. The issue is whether Respondent explained to his six junior attorneys in late June, 1994, that the law firm would pay them "bonuses" as reimbursement for their collected campaign contributions, and whether Respondent informed them that Riscorp would reimburse the firm for its bonus outlay.

Respondent testified that each of his six subordinate attorneys knew that their contributions would not actually cost them anything; i.e., they knew their contributions would be reimbursed by a check from the law firm, and also that the firm would be reimbursed by Riscorp. (TR-2, pp.199-202.) However, Donald Clark, one of the six contributors, testified that to his

knowledge, he and his family members were making legitimate campaign contributions at the behest of the law firm's biggest client in June, 1994. Mr. Clark, who remains Respondent's law partner, testified that Respondent never explained that the bonus given on or about that same day had been calculated and intended to reimburse the contributions, nor did Respondent explain that the law firm would in turn be reimbursed through false billings to Riscorp. In other words, Mr. Clark flatly denied that Respondent ever expressed any hint that his and his family's contributions would be reimbursed or that Riscorp would reimburse the firm for reimbursing him. (TR-2, pp.144-154.)

Ultimately, the referee found Respondent not guilty of violating Rule 4-5.1(b) and 4-5.1(c). She based that ruling on a lack of proof that any of the subordinate attorneys did anything wrong. (RR at 9-10.) As such, the referee tacitly credited Clark's testimony that his participation was unwitting, without any explanation by Respondent. Therefore, Respondent's testimony on this same point was not credited.

Thus, the Report poses a dilemma: How to reconcile the referee's finding of Respondent's credibility in the conflict involving Malone with her finding of Respondent's lack of credibility in the conflict involving Clark? The solution to this dichotomy can be found only by recognizing that the referee is incorrect on one of the two competing credibility calls herein described. This Brief will prove that the referee was correct in

crediting Clark’s testimony over Respondent, but clearly incorrect in crediting Respondent over Malone.

SUMMARY OF THE ARGUMENT

The arguments in this brief are fourfold, and proceed as follows:

1) The material testimonial conflicts (discussed supra) cannot be decided in favor of Respondent and in that respect the findings of the Report of Referee must be modified. The findings should reflect that Respondent actually knew that the subject conduct was fraudulent or criminal when he engaged in it in June, 1994, and that his testimony to the contrary, about experiencing a sudden epiphany of the wrongfulness of the conduct some four months later, is not credible.

2) Because the material testimonial conflicts cannot be decided in favor of Respondent, Respondent's scienter is established and he is thus guilty of violating several pleaded rules for which the referee found him not guilty; specifically, Rule 4-8.4(b), Rule 4-1.13(b), Rule 4-1.6(b), and Rule 4-2.1. Even if the Report should stand, Respondent nonetheless violated Rule 4-1.1 when he failed to recognize or advise his client that the proposed conduct was wrongful.

3) Even if the Report stands as is, the recommended sanction is not consistent with the purposes of Bar discipline, and it is not consistent with the Standards or relevant case authority; the appropriate sanction under the referee's findings is a 1-year suspension from the practice of law.

4) If the Report's findings are modified as the Bar urges

herein, disbarment is the appropriate sanction for Respondent’s misconduct.

ARGUMENT

I. THE REFEREE'S FINDINGS ARE CLEARLY ERRONEOUS REGARDING RESPONDENT'S SCIENTER IN JUNE, 1994.

A. Clear and Convincing Evidence Proves that Respondent Knew the Subject Misconduct was Wrongful When His Client Explained it to Him and When He Engaged In It.

The Report of Referee asks the reader to believe that when the "convoluted scheme" was explained to Respondent in detail by James A. Malone, in late June, 1994, and even when he actually participated in the scheme shortly thereafter, Respondent did not realize that the scheme was fraudulent or criminal. From an evidentiary, experiential, and logical basis, this finding strains credulity.

In attorney discipline proceedings, the referee is in a unique position to assess the credibility of witnesses, and her judgment regarding credibility should not be overturned absent clear and convincing evidence that her judgment is incorrect. The Florida Bar v. Thomas, 582 So. 2d 1177, 1178 (Fla. 1991). In this case, the Bar respectfully argues that the referee's judgment regarding Respondent's credibility was not correct, because clear and convincing evidence to the contrary proves that his testimony was not credible.

As the referee noted, Respondent admitted that he knew at the time, in June, 1994, after collecting the contribution checks, that he would reimburse the contributors for the full amount of their "contributions." Respondent understood that he

could recoup this reimbursement expense by falsely billing Riscorp. Thus, Respondent understood that Riscorp was the true source of the requested political campaign contributions. Most tellingly, Respondent admitted that he knew, at the time, that the net effect of his conduct would be that the two political campaigns would receive numerous checks from several people who had not made bona fide contributions. (TR-2, p.211, l.11-22.)

"In cases such as this one, in order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing." The Florida Bar v. Fredericks, 731 So, 2d 1249, 1252 (Fla. 1999) (referring to acts of dishonesty, fraud, deceit, or misrepresentation). The Bar will invite the Court to scrutinize Respondent's knowledge and deliberation in this record. Upon such thorough examination Respondent's intent will be proved by showing only that his conduct was knowing as well as deliberate, though the Fredericks analysis makes those disjunctive. Upon this thorough review a specific intent will be plastered onto Respondent despite his testimony disavowing that intent. In other words, the referee's affirmation of Respondent's credibility on the issue of his own intent must be reversed.

Logic, common sense and intuition direct the reasonable observer to conclude that Respondent did know the subject conduct was illegal at the time he engaged in it in June, 1994. It is uncontroverted that the proposed conduct was explained to him by Malone, and that Respondent did thereafter engage in the conduct.

It is inherently deceptive to reimburse any “contribution”, whether it is to a charity, a political campaign, or other, so that the contribution actually derives from a different source. Double reimbursement of contributions, as occurred here, is patently fraudulent, akin to money laundering. As such, any competent adult should have no trouble in identifying such conduct as fundamentally dishonest.

Respondent, however, denies that he realized such conduct was dishonest, or deceptive, or fraudulent, or criminal when Malone fully explained it to him, and when he himself engaged in it. He does not deny, however, that he intended to commit the many discrete acts necessary to perform the illegal conduct. The sum and substance of the record evidence, including Respondent’s testimony, is that Respondent intended to do each immediate act necessary to bring about the intended consequences. He made and executed a plan, and his efforts were successful, in terms of achieving the expected result.

That sure sounds knowing and deliberate. The distinction Respondent makes through his testimony is subtle, and ultimately unavailing. He denies that he became immediately leery of the conduct Malone proposed (as Malone says), and he denies researching the issue soon thereafter and warning Malone that it was a crime with serious consequences. Respondent contends that he did become leery of the conduct, but not immediately -- his leeriness came four months later. He agrees that he did research

the law and warn Malone that it was a crime -- however, that came four months later as well.

This then is the distinction Respondent makes by his testimony: Four months previous, when he completed all those requisite acts intending a certain result, when he made that plan and executed it, he didn't have actual knowledge that it was a crime, a *malum prohibitum*. The referee credited Respondent's assertions in this regard, and she incorporated this distinction into her view of this case, and apparently considered that it somehow mitigated or absolved Respondent's intent.

The Bar denies that this sophistic distinction carries any such force or effect, because *ignorance of the law is no excuse*. That is especially true for Respondent and any other responding attorney. Respondent doesn't stop with that distinction, though. Respondent testified that, not only did he not know that the proposed conduct was criminal, he didn't realize that anything might be wrong with it.

The Bar contends that the distinction Respondent created in this case, regarding his scienter, and upon which the referee relied, is unavailing in this matter. It is a distinction without a difference. If, for example, Riscorp had asked Respondent to do all the acts necessary to launder $20,000.00 in cash, and Respondent had knowingly and deliberately completed all the predicate acts necessary to comply with that request, his intent cannot be vitiated or excused merely by claiming he didn't

actually know it was a crime. He intended to do the crime.

It is as if Respondent admits to having a general intent to commit the crime, but he denies having specific intent. He asks the Court to consider as an excuse his assertion that he simply didn't realize anything was wrong with the conduct. That must mean that, in Respondent's mind, the conduct Malone proposed did not seem to be dishonest, or fraudulent, or deceitful, or a misrepresentation of any kind (cf. Rule 4-8.4(c)). To the Bar, it appears the referee did consider Respondent's ignorance of the law to be a legitimate excuse, and that she considered it proven. The Bar argues that this conclusion by the referee is clearly erroneous. This "excuse" or affirmative defense founded on abject stupidity is not legitimate in this case, and neither was it proven by clear and convincing evidence.

Respondent has a reputation of being a highly skilled and competent lawyer, as established at trial by witness after witness. Judge Durand Adams called Respondent an extraordinarily skilled trial lawyer who is very prepared in all respects. (TR-3, p.430, l.4-10.) Judge Adams further stated that Respondent's ability to correctly identify and analyze legal issues was "Great. Very Skilled. He's a very skilled lawyer." (TR-3, p.433, l.3-6.) Judge Frederick DeFuria reiterated that Respondent was "well prepared" at all times. (TR-2, p.176, l.18 and p.177, l.13-17.) Respondent's friend and longtime client, Daniel Whiteman, described Respondent as "an extremely competent attorney" and a

“very bright individual”, and agreed that Respondent is “intuitive when it comes to discerning legal issues.” (TR-2, p.289, l.1-8.) Respondent’s friend, John M. Dart, Esq., also stated that Respondent was a highly competent attorney who is highly skilled at identifying and analyzing legal issues. (TR-3, p.446, l.13-20.)

Perhaps most pertinent to the instant matter, Respondent’s friend and fellow lawyer, Guy Burns, Esq., related how Respondent previously had dealt with an ethical issue involving his then-law firm and a major corporate client. Mr. Burns told how Respondent had immediately consulted him about the issues involved, and related how concerned Respondent was about the potential for client harm in the matter. (TR-3, p.439, l.21 et seq.)

Against this history of Respondent’s proactive intervention and his reputation for thoroughness and professional competence, this Court is asked to believe that Respondent utterly and inexplicably failed to correctly identify or analyze any legal issues regarding the convoluted campaign contribution-cum-reimbursement scheme that Malone explained to him in June, 1994. The Court is asked to believe that it simply did not occur to Respondent that the anticipated conduct was in any way improper, unethical, fraudulent, or criminal.

It is entirely out of character for Respondent to be so utterly ignorant and uncomprehending of the all-too-obvious moral and ethical issues presented by Malone’s request and his own

compliance with it. It cannot be merely coincidental that Respondent's stark and sudden loss of ability came at a time that would turn out to be so hugely advantageous for him in this attorney disciplinary proceeding, some five years later. As such, it is unreasonable to infer that Respondent's remarkable professional acumen inexplicably abandoned him in late June, 1994. Yet, that is the inference the referee drew.

The essence of the referee's findings is that a "reasonable attorney" would have known that the proposed conduct was criminal or fraudulent. By finding that Respondent should have known, but maybe didn't know, the referee in effect calls him Respondent an unreasonable attorney. However, because this portrait of Respondent is the polar opposite of his stellar qualities, the referee should not have believed Respondent's assertion that he did not know. Moreover, the referee should have recognized Respondent's motive to deny his guilty knowledge in this regard. However, no analysis of these incongruities appears in the Report. As such, the Bar is not at all certain that the referee gave proper weight to these important considerations.

Respondent's unsupported assertions notwithstanding, all the other facts, testimony, and reasonable inferences require a referee to conclude that Respondent must have known of the essential wrongfulness of the subject conduct prior to, and while, engaging in it. The totality of circumstances surrounding his claim of "temporary diminished professional capacity" (as it

were) bespeaks a conscious design by Respondent to inject into this Bar proceeding a conflict in the evidence regarding the issue of when he gained actual knowledge of the wrongfulness of the conduct -- as if one must access a book or library to understand that contributions made by “straw men” using double reimbursements is actually immoral or unethical. Understanding that Respondent’s defense evinces conscious planning (and not serendipity) merely serves to illustrate the glowing testimony regarding his stellar legal abilities.

For these reasons, the referee should have rejected Respondent’s assertions as unreasonable and unsupported, and motivated by self-interest. Of course he did not momentarily lose his powers of analysis and discernment. All agree that Respondent is a thoroughly professional and extremely competent lawyer. His legal position in this case is akin to arguing “diminished capacity” in a criminal matter to negate specific intent, i.e., as an excuse. But Respondent was not on drugs, or drunk, or insane when he heard about the illegal scheme and then engaged in it. By his assertion of ignorance, Respondent has in effect pleaded “temporary incompetence,” and by crediting the assertion, the referee legitimized that excuse.

Perhaps the referee blanched at the stark alternative, which is to credit Malone’s testimony; i.e., to find that Respondent did research the law, did discover that the proposed conduct was illegal, and then proceeded to do it anyway, for purely

commercial and political considerations. The referee dismisses this alternate factual scenario as "illogical" and implies that Respondent could not have done that because, to her, it is illogical. (RR at 6, para. 17.) With all due respect, that amounts to circular reasoning based on a false premise.

As noted, the referee failed to discuss Respondent's obvious motive to testify falsely regarding his own guilty knowledge. However, the referee did ruminate on Mr. Malone's motive in trying to "blame" Respondent at his federal sentencing hearing. This dispute over the timing of when Respondent actually became aware of the fraudulent and criminal nature of the subject conduct is critical to the entire case. If Malone's testimony is credited on this issue, it would mean that Respondent engaged in the conduct despite knowing that it was both fraudulent and criminal, and despite having counseled Malone against it. Such intentional law-breaking is certainly egregious behavior.

The referee noted that Malone had provided the same testimony at his federal sentencing hearing over one year previous, in August, 1998. However, the referee concluded that, because Malone's assertions have remained consistent, it must be that he testified falsely at his federal sentencing hearing regarding this particular issue of Respondent's scienter. In doing so the referee ignored the eminently more reasonable explanation that Malone's testimony has remained consistent

throughout simply because it is true. Significantly, the referee did not consider any of Malone's other testimony to be false or incorrect -- only his testimony proving Respondent's scienter.

The referee imagines that Malone had the remarkable foresight to invent this particular kernel of testimony not for the instant Bar proceeding, where it the issue is central, but for his own federal sentencing hearing over a year previous, where the issue bore only a tangential relevance. Thus, the referee concluded that Malone's motive to invent this particular aspect of his testimony was to "blame" Respondent. (Presumably, Malone's real, selfish motive for inventing this testimony was to mitigate his own guilty knowledge regarding the crimes to which he was pleading guilty.) (See RR at 6, para.18.)

This imagined motive of Malone to "blame" Respondent finds no support in the evidence. The facts show that Malone's only interaction with Respondent in these campaign contribution matters involved contributions for statewide political office. Malone was pleading guilty to federal crimes. Though Respondent had once assisted Malone in similar conduct, that was not the conduct at issue before the federal court. Indeed, Malone testified, and the referee found, that Riscorp had engaged in such fraudulent campaign practices for years, both before and after this one event involving Respondent. (RR at 2, para.3.) None of these facts add up to Malone wanting to "blame" Respondent so much that he would offer perjured testimony on the

day of his federal sentencing.

This discussion shows that it is extremely unlikely that Malone would perjure himself in an attempt to indirectly mitigate his guilty knowledge as to this one event involving Respondent, a single episode in a sea of innumerable bad acts. Moreover, Malone knew that Respondent had received immunity, and thus could be called to impeach any such invented story. Under any rational risk-to-benefit analysis, Malone would not have taken the risk of inventing such tangentially relevant testimony at that time. For these reasons, and because the referee considered Malone's testimony to be truthful in all other respects, her supposition that Malone invented this one detail of his testimony -- over a year before regarding Respondent's guilty knowledge -- is not reasonable and should be disregarded.

The referee also discussed Malone's desire to avoid prison as a motive for him to invent this aspect of his testimony. The referee seems to have mentally filled in the foundation required to arrive at such a conclusion. No evidence was adduced showing any likelihood or probability that Malone <u>might</u> or <u>could</u> have been sentenced to prison. Malone was a first-time offender who pleaded guilty to misdemeanor election fraud. He did not in fact go to prison. No evidence was adduced showing that Malone's testimony about Respondent's knowledge of the subject events was causally connected in any way to the federal criminal matters at issue at the sentencing hearing. No evidence was adduced showing

that Malone's testimony on this issue bore any relation to the plea agreement that had been struck, or to the sentence that he received that day.

Apparently, the referee is imagining that Malone would think the issue bore some connection to his sentencing (or else why risk the perjury?). The referee is also imagining that Malone's testimony regarding Respondent's knowledge would have some material impact on the outcome of his sentencing proceeding. There is no evidence that it did. There is no evidentiary support for these unspoken yet palpable suppositions by the referee. Accordingly, her conclusion regarding Malone's "blaming" motive is clearly erroneous, as that theory finds no support in the record -- none that is, beyond Malone's thoroughly human admission that, on that day, he wished more than anything to avoid going to prison. Any honest person would admit to that.

The foregoing discussion illustrates the referee's willingness to take a kernel of fact and create a fanciful theory explaining Mr. Malone's motives to provide perjured testimony showing Respondent's guilty knowledge. Remarkably, her analysis of this scienter issue included no acknowledgment or discussion of Respondent's obvious motive to deny Malone's assertions, i.e., to disavow his knowledge and intent. For the referee to find in Respondent's favor on this central issue of the case while not explaining his obvious motive to deny his guilty knowledge calls her conclusion into question.

The referee also clearly disliked Mr. Malone's refusal to waive his attorney-client privilege in order to assist in this Bar proceeding. The referee went so far as to suggest that a certain document only obtainable (supposedly) through such a waiver by Malone maybe could have established concretely when Respondent knew the conduct was illegal. (RR at 11.) Again, the support for this speculation by the referee is neither clear nor convincing. The actual existence of such a document was never established, and no evidence of what such a document might prove or not prove was ever adduced. The referee suggests that we would have this imagined evidence but for Mr. Malone's unreasonable decision not to waive his legal privilege.

The referee's discussion about what other evidence may be "out there" but for Mr. Malone's assertion of his legal rights is not only irrelevant and gratuitous, it is rank speculation that corrodes the integrity of the Report and betrays her contempt of Mr. Malone -- which appears to derive from his assertion of a privilege that he has every right to assert. Because the referee has improperly drawn conclusions based on assertion of a legal privilege, the discussion is inappropriate and should be ignored in any proper analysis of this case.

The referee's unspoken insinuation is this: Malone refused to waive his legal privilege because he knew if he did so, the "smoking gun" document (imagined by the referee) would be produced and Malone's lack of credibility on the issue of

Respondent's scienter would be exposed. That "theory" consists of nothing more than total conjecture without any evidentiary basis. The only thing it proves is that the referee is willing to theorize about Mr. Malone's motives using background "facts" that she supplies. Curiously, however, the referee is not willing to test Respondent's motives against the evidence that actually does exist in the record.

When Malone testified that Respondent knew all about the illegality of the scheme and even counseled against it before ultimately participating in it, the referee did not believe him. She believed Respondent when he said he had no idea the conduct was wrong. The referee's conclusion as to whose testimony was more credible is not rationally related to the facts and other evidence. No matter how convincing the referee considered Respondent to be (or how unconvincing Malone was), the issue is beside the point because Respondent's testimony on this issue is inherently unworthy of belief. No matter how much emphasis the referee placed on possible biases, real or imagined, or on personal demeanor, those matters cannot be dispositive of this credibility issue because Respondent's testimony that he had no idea simply is not worthy of belief.

For all the above-stated reasons, the referee's finding that Respondent did not actually know that the subject conduct was illegal at the time he learned of it and engaged in it cannot stand scrutiny. The finding should be reversed.

B. Respondent's Testimony is Unworthy of Belief Regarding His Later Epiphany that the Subject Conduct was Wrongful.

Respondent asserted at trial that he did not comprehend the wrongful nature of the subject conduct until October, 1994. To believe that, one must necessarily also believe his explanation of how and when he actually did become aware of the wrongfulness of the conduct, some four months after engaging in it without such awareness. According to Respondent, this is how his delayed knowledge came about:

In mid-October, 1994, Respondent was in his law office tending to business when he got a call from a red-haired secretary at Riscorp. Respondent does not recall the secretary's name. It seemed to Respondent that the secretary was upset about something; however, Respondent can't recall what, if anything, she revealed that would explain her being upset. The Riscorp secretary asked Respondent if he had any more checks for them. Respondent took her request to mean that she was asking for his law firm to provide additional campaign contribution checks. Respondent told her they had no such checks. (TR-2, pp.217-230.) The phone call was concluded. That is the sum and substance of Respondent's recollection of this event and conversation.

This conversation, Respondent testified, is what prompted him to think back four months to late June, to his involvement in the campaign contribution reimbursement scheme, and he began to wonder if there might have been something wrong with doing that.

(TR-2, pp.217-222.) With his legal antenna finally picking up signals again, Respondent asked one of his subordinate attorneys to research the Florida Statutes. (TR-2, p.222, l.3.) He then discussed that document with Malone, specifically the provision for forfeiture of corporate charter, and he strongly advised Malone to stop such practices immediately. (TR-2, p.228.)

Respondent wants this Court to believe that this enigmatic telephone call from an unnamed secretary produced a sort of epiphany in him, enabling him, at long last, to see this patent fraud for what it was. The Bar respectfully suggests that the epiphany scenario described by Respondent is unworthy of belief. For one thing, absolutely none of it is corroborated by any evidence. There is no sufficient evidence to conclude that this telephone call, occurring just as Respondent described it, would have logically prompted any reasonable attorney to initiate any legal research. Indeed, this supposed causal connection between the strange phone call and legal research is the tallest part of Respondent's tale. On the one hand, Respondent wants the Court to believe that having the subject conduct explained to him by Malone, and then participating in it himself, <u>did not</u> cause him to question the propriety of the conduct. On the other hand, Respondent wants the Court to believe that, four months later, an enigmatic telephone conversation he had with an unknown secretary <u>did</u> cause him to question the propriety of his prior conduct. Placing these two assertions next to each other on the page

reveals how preposterous both sound. And yet, each must be true if the referee's findings are correct.

Respondent's testimony includes several inconsistencies beyond this major, incomprehensible incongruity discussed above. Another, internal inconsistency in Respondent's testimony involves the actual date of this mid-October epiphany. At first, Respondent says he is certain that this phone call with the secretary occurred right around October 15, 1994. (TR-2, p.225, l.11.) When pressed as to how he is so certain of this date, Respondent dissembled, and offered obtuse answers. (TR-2, p.226, l.5 et seq.) Later, when shown the additional contribution checks that he had again solicited from his attorneys in October, 1994 (the first of which was dated October 12, 1994), Respondent revised his testimony to state that the phone call might have occurred up to a week before October 15. (TR-2 p.232, l.8 and Bar Exh. 4.) Ultimately, Respondent answered the direct question of how he could recall the date of this odd phone call so well: it was because he had written those additional contribution checks for Riscorp right at that same time. (TR-2, p.230, l.8.)

To believe the Respondent and the Report of Referee, this is what the Court must conclude occurred: Several days prior to October 15, 1994, Respondent had an enigmatic phone conversation with a female secretary of his client, Riscorp. This phone call caused him to question his own and Riscorp's conduct of some four months previous regarding the political contributions. When he

determined that the prior conduct was in fact a crime, he personally met with James A. Malone and strongly advised him to stop the practice. Thereafter, Respondent personally engaged in the solicitation and collection process again. The first of this second round of collected checks was dated October 12, 1994, meaning that Respondent's remonstration with Malone pre-dated that check.

This is the huge inconsistency: Respondent identified the wrongfulness of his and his client's conduct prior to October 12, 1994, and immediately thereafter repudiated the conduct and warned his client to cease engaging in it; however, he thereafter submitted the second fraudulent invoice dated October 15, 1994, with his falsely inflated work hours reported on the invoice. (Bar Exh. 5.) Thus, by his own admission, Respondent continued to further the original double reimbursement scheme just a few days after (he says) discovering that it was in fact criminal behavior. These actions are not merely inconsistent, they are at opposite ends of the personal integrity meter. Yet, this is what Respondent himself says he did.

The referee did not address this inconsistency. The existence of the October 15th invoice is irrefutable, and was not refuted. Moreover, there is no reason to disbelieve Respondent's admission that the October 15th invoice was indeed one of the inflated bills by which he sought and gained reimbursement. Thus, this second inflated invoice manifests Respondent's

specific intent to complete the double reimbursement scheme he had engaged in back in June. It goes without saying that the act of sending this second invoice is more highly probative of Respondent's true knowledge and intent than any testimony Respondent himself might give. The second inflated invoice is more reliable than any testimonial assertion regarding intent.

What this major inconsistency in Respondent's testimony reveals is the fact that Respondent was engaging in continuous and ongoing wrongful conduct in the summer of 1994. It is not correct to view the June events as separate from the September or October false invoices. These acts are inter-connected; they constitute the pattern of conduct in this case. Thus, it is error to judge these events as discrete, disconnected acts. They constitute seamless conduct directed toward the same original purpose.

The irrefutable fact of Respondent submitting the second fraudulent invoice clashes head-on with Respondent's assertion that he discovered the criminality of that conduct just days before. The essential inconsistency is between a known fact and an assertion. Even if we believe Respondent's version of the events, common sense still dictates that he would not continue to further this wrongful pattern of conduct after, finally, discovering it to be illegal. But we know he did further the original pattern of conduct. Accordingly, only one reasonable inference can be drawn from this incongruity, which is, simply,

that Respondent's assertion is false. He did not in fact research the issue and discover the criminality just days before. Because his testimony implodes on this critical aspect, the only other reasonable inference to make is that his whole story about the enigmatic phone conversation must be false as well.

Respondent's lack of credibility having been demonstrated regarding the central issue of his guilty knowledge, an objective factfinder has little choice but to accept Mr. Malone's testimony regarding when those events really happened. The dispute is not over <u>whether</u> Respondent discovered that the subject conduct was illegal and counseled Malone regarding it; all agree those events occurred. The dispute is over <u>when and how</u> Respondent became aware of the wrongfulness. The Bar has shown that Respondent's assertions on this issue lack credibility. Therefore, the referee's conclusion that Respondent was more credible than Malone in this regard is clearly erroneous and without sufficient support in the record. That finding must be reversed.

C. <u>Respondent's Testimony was Impeached by His Friend and Law Partner as to Matters that Prove Scienter.</u>

As explained in the Statement of the Case and in the Argument herein above, two major conflicts in the testimonial evidence appear in this record. The first conflict involves Respondent and Malone and has been thoroughly examined, supra. The other testimonial conflict involves Respondent and his friend and partner, Donald Clark, over whether Respondent told Mr. Clark about the reimbursement aspects of the original scheme.

Previously, Respondent had testified without equivocation that “everybody knew” at the law firm that their contributions would be reimbursed by the law firm, and that the law firm would then be reimbursed by Riscorp. Respondent testified that everyone knew that their “contributions” actually wouldn’t cost them anything. (TR-2, p.205-206.) At trial, Respondent adopted and affirmed that previous testimony. (TR-2, p.207, l.5-14.) For his part, Donald Clark flatly denied that Respondent had informed him at all about any reimbursement, either of his own and his family’s outlay, or of the firm’s. (TR-2, p.154, l.6-14.)

This second conflict is presented and examined in the Statement of the Facts, supra. Suffice it only to repeat here that the referee’s findings implicitly credit Clark’s testimony and not Respondent’s. In this way, the referee’s analysis and conclusions are inconsistent as to Respondent’s guilty knowledge (credible as to Malone; not credible as to Clark). In the matter involving Clark, the referee did not credit Respondent’s assertion that he had fully explained the double reimbursement plan to Clark and the other lawyers in late June, 1994. By her conclusions, the referee tacitly credited Clark’s claim that Respondent did not explain anything about reimbursement.

This means the referee felt that, in late June, 1992, Respondent must have consciously withheld material information regarding the campaign contribution scheme from his subordinate lawyers, and thereafter, Respondent must have testified falsely

about that very fact, now claiming that he did tell everyone that they and the law firm would be reimbursed.

The reality is that Respondent, by withholding from his employees the fraudulent aspect of the plan, could ensure that they would play their part in it without voicing any objection, precisely because they didn't know. It would be easy enough later for Respondent to claim that he told them everything, in attempting to minimize his own scienter. These considerations are perhaps why the referee disbelieved Respondent's assertion that the other attorneys all knew.

The referee's finding that Clark was more credible than Respondent reveals a great deal about Respondent's true knowledge and intent in June, 1994. It shows that Respondent purposely kept his partners in the dark about the real, deceptive nature of the conduct Malone had proposed. The most obvious motivation Respondent had for <u>not</u> telling Clark about the reimbursements is precisely because Respondent knew that such reimbursing is fundamentally dishonest, a deception. In other words, if Respondent was in fact oblivious (as he claims), and totally unaware that reimbursing such contributions might be wrong, then why would he withhold this innocuous information from Clark? The obvious answer is that Respondent would have no reason to withhold the information if he did not know it was wrong. Therefore, it must be concluded by the factfinder that Respondent did know of the wrongful nature of the conduct he was engaging in

during June, 1994.

The referee found that Respondent, the only person involved in both evidentiary conflicts, was truthful in the instance involving Malone and untruthful in the instance involving Clark. This inconsistent view of Respondent's veracity or credibility cannot go unchallenged. This stark dichotomy in the referee's conclusions is resolved by finding as the Bar herein suggests; i.e., denying Respondent's credibility in both instances.

D. Respondent Specifically Intended to Violate Florida's Elections Law.

Malone's testimony is a damning indictment of a lawyer first diligently pursuing, but then abandoning, his duty to uphold the law, and the lawyer's conscious decision to violate that law in order to please his client. The referee decided that things could not have happened as Malone described, because she felt it "illogical" for Respondent to intentionally choose to break the law after learning of it. Ergo, says the referee, Malone must be the one lying about these things. The referee seemed to preclude any possibility that Malone might be telling the truth because what he claimed about Respondent did not comport with the referee's own sense of rationality.

With all due respect to the referee, her logic and Respondent's logic may not be an exact match. The Bar submits that Respondent did have a logical reason to engage in the subject conduct despite having discovered it was against the law. The answer lies in the competition for its legal business that

Riscorp fostered between Respondent's law firm and Thomas Maida's law firm. If one assumes, *arguendo*, the veracity of Mr. Malone's assertions, the answer reveals itself: Malone told Respondent that Thomas Maida knew about the company's campaign contribution reimbursement scheme, and that Maida had never said that it was illegal. In asking Respondent for the contributions, Malone informed that Tom Maida and his firm were contributing. (TR-1, pp.96-98.) Later, when Respondent met with and advised Malone that the proposed conduct was a crime, Malone thought Respondent was overreacting, and he suggested that Respondent talk to Maida about it. (Id.) In fact, Malone told Respondent that he believed Maida and his law firm had also engaged in the practice. (Id.)

It is not too difficult to see that Malone was "working" Respondent, playing Respondent and his law firm off of this rival law firm. From Respondent's perspective, he understood that his rival apparently was currying favor with Riscorp by assisting or engaging in conduct that Respondent has discovered is not legal. Respondent has been invited to join the party, but he is conflicted. The record shows that all Malone could report after this was that Respondent called him back after a day or two, and stated that he had indeed spoken with Mr. Maida. Then Respondent agreed to engage in the conduct himself. (TR-1, p.51, l.10-20.)

Respondent denies counseling with Maida over this issue. However, if one credits Malone's version of these events, it is not hard to imagine that Respondent's rival may have steered him

into an uncompromising position. In other words, it could well be that Respondent just got suckered. This conjecture is offered here merely to show that reasonable inferences do exist whereby Respondent could have a "logical" reason to break the pertinent statute despite knowing that it was indeed illegal to do so. That reason is competitive market pressures. Therefore, the referee is not correct that "logic" would preclude Respondent from pursuing a course of action he knew to be illegal.

Without belaboring these many points and arguments pointing to Respondent's lack of credibility on the central issue of his own guilty knowledge, his *scienter*, the Bar contends that Malone's testimony must be assigned the inherent credibility it deserves. Respondent's proven lack of credibility elsewhere means that he must lose the critical conflict (with Malone) by default if for no other reason. However, there are many other reasons, as expounded on herein. The main argument is that the credibility contest between Malone and Respondent does not exist in a vacuum. The bulk of the record evidence brings one to the conclusion that Respondent has been the untruthful one. As such, this Court should conclude that Respondent's researching of the law, and his remonstrating with Malone about the issue, occurred in June, 1994 and not October, 1994, meaning that Respondent engaged in the conduct after being aware of its illegality. Thus, he specifically intended to break the law.

II. BECAUSE RESPONDENT HAD SCIENTER IN JUNE, 1994, HE HAS VIOLATED OTHER PLEADED RULES.

A. The Evidence is Clear and Convincing that Respondent Violated Rule 4-8.4(b).

If the Court agrees that Respondent is not to be believed regarding his testimonial conflict with James Malone, then Malone's testimony provides clear and convincing evidence that Respondent willfully and knowingly committed a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects. Even if the Court approves the referee's findings, Respondent must be found guilty of violating Rule 4-8.4(b), because his ignorance of the law is cannot be excused, as that excuse is illegitimate and not proven, as discussed, supra.

B. The Evidence is Clear and Convincing that Respondent Violated Rule 4-1.13(b).

The referee found Respondent not guilty of violating Rule 4-1.13(b). However, the evidence was uncontroverted that Respondent never remonstrated with any other constituent of his corporate client. Respondent specifically did not speak with William Griffin, the sole shareholder in the corporation. (TR-2, P.245, l.22.) Regardless of whether this Court believes that Respondent remonstrated with Malone in June, 1994 or later in October, 1994, it is the Bar's position that Respondent had a professional duty, under this rule, to take his concerns higher up the corporate chain, to Mr. Griffin. But for Respondent's admitted failure to advise Griffin that the corporation had

committed, or was intending to commit, criminal violations that could affect its viability, the subject conduct may not have occurred. Respondent may have been able to dissuade Mr. Griffin with the specter of corporate charter forfeiture. We will never know this because Respondent did not make that effort.

The Bar argues that, in the type of situation Respondent found himself in, the one thing the lawyer representing the corporation must not do is join in the conduct. Conversely, one thing a lawyer in such a situation must do is go up the chain of command. Here, Respondent did what he must not do, and he failed to do what this rule requires. By that failure, Respondent has violated Rule 4-1.13(b).

C. The Evidence is Clear and Convincing that Respondent Violated Rule 4-1.6(b)(1).

This rule requires Respondent to reveal confidential client information to the extent the lawyer reasonably believes is necessary to prevent a client from committing a crime. Clearly, there is no evidence that he made any such reasonable efforts to prevent Riscorp from collecting and providing fraudulent contributions to the Bill Nelson and Tom Gallagher campaigns. If the Court determines that Respondent researched the law and gained his guilty knowledge in June, 1994, before assisting Riscorp in perpetrating this fraud, then he is guilty of failing in his professional duty to try to prevent or dissuade his client from committing the subject crime.

D. The Evidence is Clear and Convincing that

Respondent Violated Rule 4-2.1

If the Court agrees that Respondent is not to be believed regarding his testimonial conflict with James Malone, then Malone's testimony provides clear and convincing evidence that Respondent willfully and knowingly abandoned his independent professional judgment when he agreed to engage in the campaign contribution reimbursement scheme. Whereas Respondent initially rendered candid advice, and exercised independent judgment, his abandonment of the same a short while later violated Rule 4-2.1.

E. The Evidence is Clear and Convincing that Respondent Violated Rule 4-1.1

If the Court believes Respondent and affirms the referee's findings, then it must conclude that Respondent has violated Rule 4-1.1 (Competence). In affirming Respondent's testimony that he had the proposed conduct explained to him, and he then participated in it, without realizing it might be wrong, the Court must necessarily believe that Respondent temporarily lost his usual powers of professional discernment. If that is true, then it follows that Respondent fell below the minimum standard of professional competency when he failed to realize that his law client was engaging in a fraud -- and engaging him in a fraud.

III. BASED ON THE REFEREE'S FACTUAL FINDINGS, THE APPROPRIATE SANCTION IS A ONE-YEAR SUSPENSION.

A. Suspension is the Appropriate Sanction Under the Standards and Relevant Case Authority.

The following argument is based, *arguendo*, on the facts as found by the referee; thus it is not predicated on the arguments made previously herein. Even under the referee's factual findings, the recommended sanction of public reprimand is not appropriate in light of the adjudicated misconduct.

The referee found Respondent guilty of two serious rule violations, Rule 4-1.2(d) and Rule 4-8.4(c). The gist of these rule violations, as found by the referee, is that Respondent knowingly assisted his client, Riscorp, in conduct that Respondent reasonably should have known was criminal or fraudulent; i.e., by participating in the convoluted campaign contribution reimbursement scheme. In addition, Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation to the detriment of his own client, Riscorp, when he agreed with Malone, a constituent of the organization, to create and submit to Riscorp invoices containing knowingly false information; i.e., reporting work that he did not actually perform. This was done so that Respondent could recoup the money he had paid out in fraudulent bonuses to his attorneys.

While a referee's recommendation regarding discipline is persuasive, this Court has the ultimate responsibility to determine and order the appropriate sanction in any given case.

The Florida Bar v. Reed, 644 So. 2d 1355, 1357 (Fla. 1994). A Bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Lawless, 640 So. 2d 1098, 1100 (Fla. 1994).

It is in the first and third aspects that the recommended sanction fails to serve the purposes of attorney discipline. As for the discipline being fair to society, the societal interest is served when substantially similar sanctions are imposed for essentially similar misconduct. Public confidence in the legal profession and system suffers when those who break the rules in a similar manner receive disparate sanctions. Here, Respondent assisted his large corporate client in a scheme designed to subvert the concept of free and fair elections. As such, the instant misconduct is a slap in the face to every citizen of this state. Issuance of a mere public reprimand in such a matter would undermine public trust in the judicial branch. Likewise, a public reprimand provides insufficient deterrence to other, similarly situated attorneys who may be tempted to assist their powerful clients in conduct known to be criminal or fraudulent. Given Respondent's misconduct, the objectives of Bar discipline will not be served by approving the recommended sanction.

Under Standard 7.2, suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed

as a professional and causes injury or potential injury to a client, the public, or the legal system. Here, Respondent admits he knowingly and deliberately engaged in the reimbursement scheme -- he just didn't know it was a crime. Respondent has a professional duty not to violate the law, and especially to avoid assisting his clients to violate it. While the harm to Riscorp may be difficult to quantify or empathize with, the referee did acknowledge that Respondent seems oblivious to the harms that befell the company as a result of its own participation in the scheme. The harm Respondent has caused the public and the legal profession is palpable. Accordingly, suspension is demanded, even under the referee's factual findings.

In addition, under Standard 4.62, suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. This standard pertains to Respondent conspiring with Mr. Malone to provide false invoices to the corporation, and receiving the benefit of those inflated billings. Under this standard, suspension is also called for under the facts as found by the referee.

The Florida Bar v. Burke, 578 So. 2d 1099 (Fla. 1991) is a case in which an attorney's "grossly negligent" state of mind caused him to mishandle client funds; however, the evidence was not clear and convincing that he knowingly, willfully or intentionally misappropriated the money. Id. at 1102. Accordingly, this Court suspended Mr. Burke for 91 days and

thereafter until proof of rehabilitation. Id. Thus, the fine evidentiary distinction regarding *mens rea* that Respondent relied on at trial is present in Burke. However, the case is not precisely applicable to the instant matter, because Mr. Burke did not assist his client in perpetrating the wrongful conduct.

In The Florida Bar v. Rood, 622 So. 2d 974 (Fla. 1993), the attorney was found guilty of violating Rule 4-1.2(d), by knowingly and intentionally assisting his clients to execute false documents in property transactions, and Rule 4-8.4(c), by propounding the false documents himself. This Court imposed a one-year suspension solely for the violation of Rule 4-1.2(d), though other misconduct was separately sanctioned. Mr. Rood had no prior discipline. Id. at 977. Here, Respondent, who has no prior discipline, knowingly and deliberately performed the acts required to assist his client in violating the law; accordingly, a one-year suspension is appropriate based on the referee's finding that Respondent violated Rule 4-1.2(d).

The temptation to circumvent or violate ethical standards in order to curry favor with a wealthy client can be great. When otherwise reputable lawyers succumb to this impulse, the Court must impose a rehabilitative suspension as sufficient deterrent.

IV. BASED ON THE EVIDENCE, THE APPROPRIATE SANCTION IS DISBARMENT.

A. Respondent's Decision to Join His Client in the Subject Misconduct Warrants Disbarment.

The points on appeal will not be belabored further here.

If, after considering all the facts and arguments, this Court determines that Respondent had guilty knowledge of the conduct when he engaged in it, then it must also find that Respondent falsely denied the same under oath. The combination of those two facts militates strongly for disbarment as the appropriate sanction. See Standard 7.1, Standard 4.61, and Standard 6.11(a), Fla. Standards Imp. Law. Disc.

This Court has disbarred a lawyer who converted his client's property and then submitted false affidavits to further a deceit. The Florida Bar v. Kramer, 548 So. 2d 233 (Fla. 1989). That is not far removed from Respondent conspiring with Malone to bilk extra fees out of his client, Riscorp, for work not performed, and then falsely testifying that he told Donald Clark all about the reimbursement scheme when he had not.

In The Florida Bar v. Cramer, 678 So. 2d 1278 (Fla. 1996), Mr. Cramer signed his client's name to commercial leases with the client's knowledge and assent. This Court concluded, however, that regardless of the client's awareness of the use of his name, Cramer's conduct was fraudulent misrepresentation. Id. at 1281. "It matters not that other persons were also guilty of fraud[.]" Id. at 1282. Mr. Cramer was disbarred. Id. Cramer applies to the instant facts in that Malone's knowledge of, and involvement in, the reimbursement scheme does not mitigate Respondent's liability for violating the Rules of Professional Conduct.

Finally, in The Florida Bar v. Newhouse, 520 So. 2d 25 (Fla.

1988), this Court disbarred the attorney for ten years for counseling and assisting his clients to violate court orders regarding disbursing settlement proceeds, and failing to himself abide by those orders, in addition to failing to maintain proper trust accounting records. Here, Respondent assisted his client to violate the elections law, as he himself also did.

The case authority and Standards are clear in their forceful repudiation of the type of egregious conduct Respondent has engaged in with his corporate client. The referee's finding that he did so with a selfish or dishonest motive argues for disbarment as the appropriate sanction in this case.

CONCLUSION

For all the foregoing reasons, the referee's finding that Respondent's testimony was credible and James Malone's was not must be overturned as clearly erroneous. Because Respondent's knowledge and intent are proven by clear and convincing evidence, this Court should disbar Respondent for five (5) years and thereafter until readmission through the Florida Board of Bar Examiners, including retaking the Florida Bar Examination and Multi-State Professional Responsibility Examination. If the findings of the Report stand, the Court should suspend Respondent for one year and thereafter until proof of rehabilitation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief have been furnished by regular U.S. Mail to Thomas D. Hall, Clerk, The Supreme Court of Florida, at 500 South Duval Street, Tallahassee, Florida 32399; a copy by regular U.S. Mail to Scott K. Tozian, Counsel for Respondent, at 109 N. Brush Street, Suite 150, Tampa, Florida 33602; and a copy by regular U.S. Mail to John Anthony Boggs, Staff Counsel, The Florida Bar, at 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 24th day of May, 2000.

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CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that the foregoing brief was produced in WordPerfect 6.1 software format using 12 point Courier New font. The accompanying computer diskette containing this brief in electronic format was scanned for viruses using Norton Antivirus.

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