IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, CASE NO.: SC02-2563

v. TFB NO.: 2000-11,312(12A)

DARYL JAMES BROWN,

Respondent.
_____/

RESPONDENT'S AMENDED REPLY/CROSS ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND RULES OF COURT

RULES REGULATING THE FLORIDA BAR

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

CONSTITUTIONAL PROVISIONS

SECONDARY SOURCES

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.
RR.	=	Report of Referee.
T.	=	Transcript of Final Hearing before Referee on September 9-11, 2003.
IB	=	Initial Brief.
AB	=	Answer Brief/Cross Petition.

PRELIMINARY STATEMENT

Respondent's Amended Reply consists of the Argument sections I(A), I(B), I(C), II and III. Respondent's Amended Cross Answer Brief consists of the Argument section IV. The Summary of the Argument pertains to Respondent's Amended Cross Answer Brief pursuant to Florida Rule of Appellate Procedure 9.210(c).

SUMMARY OF THE ARGUMENT FOR CROSS ANSWER

The Florida Bar's proposed sanction has no reasonable basis in existing case law.[1] There is no authority supporting a two-year suspension because The Bar's argument that Respondent violated a "heightened duty" owed by lawyers in commercial transactions is unprecedented. The Referee did not find that Respondent made affirmative misrepresentations. Nonetheless, the Referee determined that Respondent had a duty to disclose a second security interest to the primary secured party even though non-lawyers had no similar obligation and also found that Respondent was obligated to adhere to contractual provisions whether or not he had a good faith legal contractual defense. In order to support the Referee's analysis, The Bar argues that lawyers have a "heightened duty." The Bar asserts that this "heightened" standard is applicable even if the lawyer is acting in his personal capacity in a jurisdiction in which he is not licensed.

However, The Bar is unable to cite to any cases supporting the imposition of sanctions for a violation of this "heightened standard." Each of the cases relied upon by The Bar to support a suspension refer to lawyers in commercial

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[1]This summary is prepared pursuant to Florida Rule of Appellate Procedure 9.210(c) addressing issues raised in The Florida Bar's Cross Petition. The summary does not address issues I through III of the Argument replying to The Florida Bar's Answer.

transactions who violate substantive law by making misrepresentations in loan papers, fabricating documents to mislead lenders or by violating a fiduciary duty owed to a partner. In contrast, The Bar acknowledges that Respondent's decisions on behalf of his corporation did not violate the law. Rather, it argues that Respondent violated the "heightened duty" owed in the business environment. Since The Bar is imposing a new standard heretofore not recognized, there are no similar cases supporting a suspension or any discipline.

Even if this Court finds that lawyers lawfully have a "heightened duty" to make disclosures not required by substantive law and have a "heightened duty" prohibiting the assertion of contractual defenses on their own behalf, a suspension is not warranted for a violation of these duties. The Standards for Imposing Lawyer Sanctions cited by The Bar are applicable to gross misconduct and are therefore distinguishable. If the Standards are properly utilized, a violation of a "heightened duty" would constitute minor misconduct. After consideration of the mitigating and aggravating factors, a public reprimand would be the only appropriate discipline.

ARGUMENT

I.(A) The Referee's finding that Respondent intended to act dishonestly was clearly erroneous because her conclusion depended on subsequent events rather than Respondent's intent at the time of the act.

The Bar misapplies the "knowing and voluntary" standard enunciated in Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999) and applied in Florida Bar v. Smith, 866 So. 2d 41 (Fla. 2004). Even if Respondent "knowingly and voluntarily" made commercial decisions, he did not "knowingly and voluntarily" violate Rule 4-8.4(c) or 3-4.3(a) because he had no notice that his lawful actions were "unethical." As Professor Alfieri explained, notice that a contemplated course of action is improper is essential to finding that the attorney knowingly and voluntarily violated the Rules Regulating The Florida Bar. (T. 482-83).[2] The Bar concedes that Respondent's conduct did not violate substantive law but instead, broadly charges "dishonesty" or "misconduct." (AB 13). As a result, The Bar transforms knowing and voluntary legal conduct into "unethical" acts despite Respondent's good faith belief that he was acting in accordance with the law.

In contrast to Fredericks (attorney breached the duty he owed to his client as

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[2] See Restatement (Third) of the Law Governing Lawyers, § 5 cmt. b, "[l]awyers are subject to professional discipline only for acts that are described as prohibited in an applicable lawyer code, statute or rule of court.").

required by Rule 4-1.4 by misrepresenting the status of his client's (nonexistent) lawsuit and judgment) and Smith (attorney violated trust accounting rules by depositing trust proceeds into operating account and paid personal expenses, despite her explanation that it was negligent), The Bar cannot identify any law violated by Respondent. Respondent was not prohibited from granting a second security interest; he was not compelled to disclose the second security interest; and, he was not proscribed from asserting a bona fide defense to indemnification. Respondent did not possess the requisite intent because he had no notice that his lawful actions were unethical.

Rather than examining the lawfulness of Respondent's conduct, The Bar infers dishonest intent from Pioneer's financial loss. (AB 18 arguing, "consequences to Pioneer are relevant to Brown's motive at the time he signed the security agreement.") Since the Referee found that Respondent believed there were adequate funds to secure both agreements at the time they were granted, The Bar must retroactively supply "dishonest intent" when Pioneer lost money two years later. (RR. 11-12, 18). In so doing ,The Bar ignores third parties' responsibilities for the loss. If Pioneer did not lose money (if the trial court had not increased the verdict and rejected the jury's recommendation, if Pioneer had conducted adequate investigation prior to paying the judgment, if Viele had not

pursued garnishment proceedings attacking Pioneer's security interest), then according to The Bar's logic, Respondent's exact same conduct would be "ethical." The possibility that intervening agents could, in hindsight, convert legal, ethical conduct into legal, unethical conduct underscores the importance of Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994), which requires examination of intent at the time of the act. Since the Referee found that Respondent believed that the funds would satisfy both security interests at the time he granted them, he did not have a dishonest intent regardless of the outcome. (RR. 11-12, 18).

In addition, The Bar does not directly refute the reasonable hypothesis of innocence that Respondent was engaging in legitimate commercial activity. Rather, The Bar asserts that the Marable standard only applies to circumstantial evidence of "criminal intent." In support, The Bar quotes Marable as follows, "[h]owever, our rejection of the finding of criminal conduct does not compel the conclusion . . . that there was no ethical misconduct." (AB at 18, citing Marable at 443). A closer reading shows that this excerpt refers to two separate acts by the attorney. Thus, The Bar's contention that the Court found the same act to be "non- criminal" but violative of Rule 4-8.4(c) is not supported by the full context of the opinion. Moreover, the Court has referenced the Marable standard in reviewing non-criminal conduct. See Florida Bar v. Fredericks, 731 So. 2d 1249, 1251-52 (Fla.

1999)(acknowledging, "circumstantial evidence *alone* may be insufficient to prove guilt unless it is inconsistent with any reasonable hypothesis of innocence" but finding direct evidence to establish misrepresentations to client). The Bar cannot rebut the reasonable hypothesis of innocence that Respondent was merely engaged in legal commercial enterprise.

(1) Granting Brown, Clark a security interest was not dishonest conduct.

The Bar's repeated assertion that Respondent acted dishonestly by "granting Brown, Clark a priority security agreement" is without any basis in the law. (AB 12, 18, 20). The Bar fails to perceive that even a "well crafted" second security agreement could not defeat Pioneer's interest unless Pioneer acted negligently. Pioneer was an experienced surety company who had sole control over the terms of its agreement with Hillview and its ability to attach and perfect its interest. (T. 56, 71, 93, 528). Absent a subordination agreement to which Pioneer consented, Hillview could not enter into an agreement with a second creditor that could harm Pioneer's first security interest. See Fla. Stat. § 679.316 (1997) (commenting, "[o]nly the person entitled to priority may make a [subordination] agreement: his rights cannot be adversely affected by an agreement to which he is not a party.")

Brown, Clark did not request a security agreement to defeat Pioneer's interest. (T. 405). Respondent fully advised Brown, Clark concerning Hillview's

agreement with Pioneer. (T. 365, 396-97, 402-03). Brown, Clark believed there would be excess funds in Hillview's assets after the judgment it reasonably predicted was satisfied, and believed it would be a prudent business decision to obtain a security interest in any remaining assets. (T. 398, 403-05, 408). Brown, Clark did not even file a UCC-1 until two years later after Viele filed its Petition for Writ of Garnishment and after Pioneer filed its UCC-1. (T. 365, 370).

(2) Respondent's decision to fight indemnification was not dishonest conduct.

The Bar does not directly answer the argument pertaining to Hillview's voluntary payment defense to the Indemnification Agreement. The Bar cannot dispute that its own expert recognized that "volunteering payment" was a defense to indemnification or that Pioneer's president testified that he would not have paid the judgment if he knew that the appellate time had not run. (T. 60-62, 64, 96, 450). The Bar avoids discussing the validity of the defense and instead, broadly responds that Respondent is "shifting the focus" from his own actions. (AB 13). To the contrary, Respondent's actions cannot be considered in a vacuum; he did not reject the indemnification agreement without defenses. On the advice of counsel, Respondent asserted a defense to indemnification because Pioneer paid the judgment without sufficient investigation. (T. 325-26).

Although The Bar does not answer the issue in its argument section, its Statement of Facts alludes to the validity of Hillview's defense. First, The Bar suggests Pioneer had to pay the judgment or face a bad faith suit. (AB 9). The Bar ignores the acknowledgment by Pioneer's president that the bad faith threat was a "toothless tiger" because the appellate deadline had not passed when Viele made its demand. (T. 66). Second, The Bar suggests that Hillview had the burden of informing Pioneer of its intent to appeal. (AB 9). The Bar argues that Hillview did not instruct Pioneer not to pay the judgment and argues that Pioneer's attorney believed that Hillview could not afford an appellate bond.[3] Setting aside the duty to investigate that Pioneer owed Hillview, Glen Krahenbuhl, Hillview's attorney, testified that Pioneer was placed on notice that Hillview disputed the judgment by its aggressive pursuit of post-judgment remedies. (T. 315-16, 321, 326). Inadequate investigation is shown by Pioneer's sole reliance on Hillview's perceived inability to post the appellate bond; a single phone call to Hillview would have prevented Pioneer from paying on the judgment. The Bar cannot defend the

[3]. The Bar disagrees that the trial court "unilaterally" added Pioneer to the judgment. (AB 8, fn 1). Colorado Rule of Civil Procedure 65.1 indicates that enforcement be brought by motion rather than separate action. In this case, the court added Pioneer to the judgment without any motion being filed, without any notice and without opportunity for Pioneer or Hillview to respond.

Referee's determination that Respondent was obligated to indemnify Pioneer regardless of any legal defense to indemnification. Respondent's assertion of a bona fide defense to indemnification is not dishonest or unethical.

I. (B) "Double Pledging" is not dishonest conduct.

The Bar concedes that Respondent did not violate the law by granting a second security interest in Hillview's certificate of deposit. (AB 19, 20). Instead, The Bar asserts that Respondent's conduct was "unethical" because Pioneer ultimately lost money. (AB 19). The Bar's position is over-simplistic for the following reasons. First, The Bar fails to address that Respondent had no notice that his lawful conduct would be viewed as "unethical." Indeed, Respondent had a good faith basis for believing that his conduct was ethical because he engaged in legal action. Professor Alfieri explained that the American Law Institute has long recognized that procedural due process is an integral part of the rules governing lawyer's conduct to protect against "subjective," "idiosyncratic," or "over-broad" interpretations of the more general disciplinary rules. (T. 482-84).

The Referee's findings and The Bar's argument is subjective, idiosyncratic and over-broad because it construes Rules 4-8.4(c) and 3-4.3 as prohibiting conduct not otherwise proscribed by specific disciplinary or substantive law. For instance, The Bar could not muster evidence to prove that Respondent's decisions

violated Rule 4-3.1 proscribing lawyers from asserting or defending a position without legal merit. Instead, it indirectly attacks his commercial decisions by asserting they constituted general misconduct or were dishonest. (AB 19-20). Such expansive interpretation rendered it impossible for Respondent to discover the peril of proceeding with a lawful course of action.

Second, The Bar overlooks the well-established practice of granting more than one security interest in a debtor's property. Despite The Bar's criticism of granting a second interest as "double pledging," The Florida Bar's own publication discusses competing priorities between security interests as follows:

> Article 9 is a 'race' type of statute because in most situations it adopts a concept, deeply rooted at common law, of a race of diligence among creditors. Thus, irrespective of actual or constructive knowledge of a competing security interest in the same collateral, the first creditor to perfect will have priority.

Michael G. Williamson, Secured Transactions in Florida, Chapter 9, (The Florida Bar ed. 1996) § 9.3. Although permitted by law, Brown, Clark did not "race" Pioneer to gain priority. Even though Pioneer waited two years to file its UCC-1, it still filed the UCC-1 before Brown, Clark. Brown, Clark did not file its UCC-1 until Viele filed its Petition for Writ of Garnishment. (T. 370).[4]

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[4] Pioneer filed its UCC-1 on April 29, 1999, Viele served its Petition for Writ of Garnishment on May 5, 1999 and Brown, Clark filed its UCC-1 on May 7, 1999. (TFB Exh. 24, p. 2; TFB Exh. 23, Exh. "C").

Third, The Bar's assertion that "Pioneer would not have suffered a loss if it had full use of the certificate of deposit" overlooks Viele's aggressive attack on Pioneer's interest in Hillview's asset. (AB 11). Viele and Pioneer's attorneys worked together to draft the written demand for payment of the judgment. (T. 139-41, 166, 172). Viele knew that Hillview was aggressively pursuing post-judgment remedies and knew the deadline to file an appeal had not passed. (T. 315-16, 321, 326). Nonetheless, Viele threatened bad faith litigation even though a surety could not act in bad faith for failing to pay a judgment until the appellate time had run. (T. 66). Further, at the time that Pioneer was "assisting" Viele draft a demand for payment, Viele had already prepared a Petition for Writ of Garnishment seeking to attack Pioneer's interest in Hillview's certificate of deposit. (T. 137, 164, 175, 187-88; Resp. Exh. 1). Viele ultimately succeeded in obtaining additional funds from the certificate of deposit pursuant to the settlement agreement. (TFB Exh. 24).

Fourth, assuming *arguendo* that Respondent's conduct caused a financial loss, bona fide commercial decisions are not converted into "unethical" behavior because the other party loses money. Most respectfully, prohibiting Respondent, as an attorney, or Hillview, as a corporation run by an attorney, from engaging in legitimate commercial transactions and raising valid legal defenses under the guise

of promoting "ethical" behavior is extraordinarily superficial and potentially devastating to the fundamental rights of Florida lawyers.

I.(C) Even if Complainant had proven the necessary element of intent, Respondent did not owe Pioneer a duty and thus, was not obligated to advise Pioneer of any defects in the March 28, 1997 agreement or of the security agreement with Brown, Clark.

The Bar does not cite any authority imposing either a commercial or contractual obligation compelling Respondent to inform Pioneer of Hillview's security agreement with Brown, Clark. (AB 21-24). The Bar does not address the legal basis for violating Rule 4-8.4(c) by making a "misrepresentation by omission" when the Rules Regulating The Florida Bar do not create heightened disclosure requirements for attorneys engaged in business negotiations.[5] The Bar simply argues that Hillview should have informed Pioneer of its second security agreement without rationale.

Florida Bar v. Schultz, 712 So. 2d 386 (Fla. 1998)(disciplining lawyer for not accounting for partnership assets) is distinguishable because Schultz owed a

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[5]. See Restatement (Third) of the Law Governing Lawyers, § 5, cmt. c ("No lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule.").

duty to his partner compelling him to disclose and account for partnership assets. See Fla. Stat. § 620.8404(1)(2)(a)(1996)(creating a fiduciary duty between partners to account for and hold as trustee any partnership property). In contrast to Schultz, no special relationship existed between Hillview and Pioneer, two parties engaged in a commercial transaction, that required Respondent to disclose information that non-attorneys do not have to disclose. The Bar fails to support the Referee's determination that an omission between two commercial entities is unethical simply because one corporation is run by a lawyer.

Moreover, disclosure of the second security agreement could not have benefitted Pioneer. First, the disclosure would not have altered Viele's attack through the garnishment proceedings on the sufficiency of the March 28, 1997 Letter Agreement that Pioneer drafted. Second, even without the "disclosure," Pioneer still filed its UCC-1 financing statement before Brown, Clark and thus, the priority of the security interest would not have been affected. (TFB Exh. 23, 24) Third, disclosure of the second security agreement could not alter the bond agreement because it was irrevocable. (TFB Exh. 1). Fourth, the second security agreement would not affect a properly perfected and legally sufficient first security agreement. See Fla. Stat. § 679.316 (1997)(commentary).

Although the Referee did not find that Respondent made misrepresentations

to his law partners, The Bar appears to argue that the Brown, Clark security agreement misled Brown, Clark because it did not reference Hillview's agreement with Pioneer. (AB 13, 23). The Bar references Respondent's testimony that he disclosed Hillview's relationship with Pioneer to Mr. Clark, Brown, Clark's managing partner. (AB 6). However, The Bar does not also mention that both Mr. Clark and Mr. Christopher testified that the firm was fully aware of Hillview's obligations to Pioneer. (T. 365, 399, 402-03). Accordingly, Brown, Clark was not misled, notwithstanding the terms of the Brown, Clark security agreement.

II. The Referee erroneously found that Hillview's March 6, 1997 proposal to Pioneer defined Respondent's duties to Pioneer and erred in finding that Respondent should have known that Pioneer relied on Hillview's proposal rather than other commercially acceptable practices to protect its security interest.

Rather than supporting justifiable reliance, The Bar's answer shows that there was a failure to contract.[6] The March 6, 1997 letter is the only document that references "full cash collateral." The Bar does not refute the express terms of the March 6, 1997 letter stating it was a "proposal," which does not show a "meeting of the minds." See Cook v. Theme Park Ventures, Inc., 633 So. 2d 468 (Fla. 5th

[6]. This section assumes *arguendo* that Respondent's actions were inconsistent with providing "full cash collateral."

DCA 1994). The March 28, 1997 Letter Agreement, over which Pioneer had sole control, was the only agreement signed by all parties, it was the only document referenced in the settlement agreement and it did not prohibit subsequent security interests. (TFB Exh. 7, 23; AB 24-26). The Bar does not cite any authority permitting the incorporation of the proposal's term into the Letter Agreement and does not distinguish Cook. Moreover, The Bar does not address the propriety of finding Rule violations for not adhering to contractual conditions that were never imposed.

Instead, The Bar argues that Pioneer, a sophisticated surety company, did not need to incorporate the "full cash collateral" provision or prohibit Respondent from granting subsequent security interests in the Letter Agreement it drafted because it relied on Hillview's March 6, 1997 proposal. Because The Bar cannot defend Pioneer's diligence, it argues that Respondent is "shifting the focus." (AB 25). However, one must evaluate Pioneer's conduct to determine whether Respondent could have predicted Pioneer's reliance on proposed intentions rather than the final agreement.

The Bar attempts to buttress the reasonableness of Pioneer's reliance by misstating that Mr. Warburton relied on Respondent's substantial experience in construction law. (AB 12). However, Mr. Warburton testified that at the time, he

did not know that Respondent had any experience in construction law. (T. 36). Further, Mr. Warburton's subjective understanding that he would not have issued the surety bond without "full cash collateral" does not determine whether Pioneer and Hillview agreed that Hillview could not issue second security interests. The Bar failed to support Pioneer's "justifiable" reliance on Hillview's proposal and thus, Respondent should not be disciplined for not adhering to a nonexistent contractual obligation.

III. The Referee's finding that Respondent acted dishonestly by not adhering to Hillview's Indemnification contract with Pioneer and refusing to consider whether Hillview had bona fide defenses to indemnification violates the Equal Protection Clause by infringing on an attorney's right to redress private disputes.

The Bar does not dispute that the Referee's Report treats attorneys and non-attorneys differently nor does it disagree that the Referee's ruling directly impacts the rights guaranteed by Article 1, Section 21 of the Florida Constitution. (AB 27-28). The Bar appears to concede that attorneys are prohibited from raising the same contractual defenses as non-attorneys and relies on DeBock v. State, 512 So. 2d 164 (Fla. 1987) to support its contention that there is a "rational basis" for the disparate treatment. The Bar's argument misses the distinction and relevance between impacting a fundamental right and a non-fundamental right.

DeBock addressed whether a grant of criminal immunity extended to

attorney disciplinary proceedings. Since immunity from criminal prosecution is not a fundamental right, the Court used the "rational basis" test for evaluating disparate treatment of lawyers. Id. at 168. The DeBock Court found that fully investigating an attorney's criminal involvement in disciplinary proceedings was rationally related to protecting the public and promoting public confidence. Id.

In contrast, the fundamental right of access to the courts is impacted by the Referee's decision to restrict an attorney's ability to assert contractual defenses. (IB 43-46). As a result, the standard is elevated from a "rational basis" test to a "compelling governmental interest" test. Mitchell v. Moore, 786 So. 2d 521, 527 (Fla. 2001). No compelling governmental interest is satisfied by denying attorneys the opportunity to defend contractual obligations without fear that their lawful and good faith defenses would be the basis of a disciplinary violation.

Repercussions would be felt by any Florida Bar member. Not only would attorneys be hesitant to contract, non-attorneys would be incited to avoid contractual duties owed to a Florida attorney because the attorney's performance under the contract would never be excused. The Bar seeks to impose "ethical" obligations on commercial conduct without regard for whether the conduct is a bona fide course of action. The Referee's findings subject every attorney to uncertainty about their livelihood when making common commercial decisions.

IV. The Bar's Cross Petition arguing for a two-year suspension does not have a reasonable basis in existing law.

The Bar's Cross Petition seeking an increased sanction is inconsistent with its arguments pertaining to Respondent's alleged misconduct. The common theme throughout The Bar's discussion of Respondent's misconduct is that Respondent "confuses legalities with ethics." (AB 25).[7] The Bar asserts that even though Respondent did not violate commercial law, his commercial transactions were unethical because they did not comport with a "heightened standard" applicable to attorneys. [8] However, in order to support its request to increase the recommended sanction to two years, The Bar changes focus and analogizes the present case to disciplinary authority in which the responding attorney violated substantive law or

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[7] See AB at 13 (stating, "[t]he fact that Brown's conduct may not be prohibited by law does not preclude the conduct from being unethical."); AB at 19 ("Just because Colorado law did not prohibit Brown from pledging to his law firm the same CD he previously pledged to Pioneer as full cash collateral, this does not make the "double pledge" **ethical**.)(*emphasis in original*); AB at 20 ("Brown may not have violated the law, but he took advantage of Pioneer to secure legal fees."); AB at 25 (contending, "[d]isciplinary proceedings are not controlled by contract law or the Uniform Commercial Code.").

[8]. See AB at 27 (arguing that attorneys are held to a "different and higher standard than other citizens"); AB at 28 (asserting, "[a]s an attorney, Brown is held to a higher standard of conduct than non-attorneys. . .").

made misrepresentations to the tribunal. The Bar's argument does not have a reasonable basis in existing law nor does it provide a basis in the law supporting the Referee's recommended six-month sanction.

A. The Bar relies on inapplicable Standards for Imposing Lawyer Sanctions, erroneously refers to aggravating factors not found or inappropriately considered by the Referee and incorrectly analogizes to case law in petitioning this Court for a two-year suspension.

The Bar first contends that Standard 5.11(f) governs Respondent's conduct. (AB 30). Standard 5.11(f) calls for disbarment when a lawyer engages in "dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Fla. Stds. Imposing Law. Sancs. 5.11. The Court has applied Standard 5.11(f) to gross misconduct in which the attorney's conduct was clearly prohibited. See Florida Bar v. Massari, 832 So. 2d 701, 707 (Fla. 2002)(lawyer "misappropriated client's funds for his personal use and created a fraudulent document to conceal his misconduct"); Florida Bar v. Wolis, 783 So. 2d 1057, 1060 (Fla. 2001)(lawyer was convicted of a "felony involving false testimony, with predicate acts involving the preparation and filing of false reports to the SEC which could have resulted in personal gain for him."); Florida Bar v. Ross, 732 So. 2d 1037, 1043 (Fla. 1998)(attorney "requested payment for his testimony,

attempted to get a fee in exchange for avoiding giving testimony and ultimately avoided service by falsely representing himself to be out-of-town.").

In contrast to the Standard 5.11(f) cases, Respondent's conduct was lawful and could have been committed by any non-attorney without repercussion. According to The Bar, Respondent's legal commercial conduct did not comport with the "heightened" standard he owed as a Florida Bar member. (AB 27, 28). A lawyer's failure to conform to an elevated duty while he made lawful business decisions does not "seriously adversely reflect on his fitness to practice law." Fla. Stds. Imposing Law. Sancs. 5.11(f).

Moreover, Standard 5.12, pertaining to a suspension sanction is not applicable because Standard 5.12 refers to an attorney who "knowingly engages in criminal conduct which is not included within Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice law." Fla. Stds. Imposing Law. Sancs. 5.12. [9] Clearly, Respondent's conduct was not criminal and thus, a suspension is not warranted pursuant to Standard 5.12.

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[9] Even though The Bar is arguing for a suspension, it uses the disbarment standard because its language is much more general and is easier to superficially apply if one does not examine the Standard 5.11(f) case law. However, it is illogical for The Bar to argue that the disbarment standard is most applicable when Respondent's actions do not even rise to the severity of the conduct referenced in the suspension standard, which requires "criminal conduct."

Standard 5.13, relating to a public reprimand, is also not pertinent because it applies to attorneys who "knowingly engages in any other conduct that involves dishonesty, fraud, deceit or misrepresentation and that adversely reflects on the lawyer's fitness to practice." Fla. Stds. Imposing Law. Sancs. 5.13. Respondent did not have notice that The Bar would view Respondent's lawful business decisions as taking advantage of an experienced surety company. Respondent had a good faith belief that he was acting ethically because he was acting in accordance with the law and did not violate a Rule Regulating The Florida Bar prohibiting specific conduct. Respondent did not knowingly violate The Bar's heightened standard and thus, Standard 5.13 is not applicable.

If the Referee's findings are upheld, Standard 5.14, pertaining to admonishments, would appear to be the most applicable. The Bar's view that Respondent's lawful conduct nonetheless violated general rules prohibiting "dishonesty" or "misconduct" requires application to a non-specific Standard for Imposing Lawyer Sanctions. Standard 5.14 referencing "any other conduct that reflects adversely on the lawyer's fitness to practice" is the only broad Standard that could conceivably apply to these unique allegations.

Standard 6.11, also cited by The Bar in support of the two-year sanction, is inapplicable because Standard 6.0 only applies to "dishonesty, fraud, deceit or

misrepresentations to a court." (*emphasis added*). The Referee did not find that Respondent made misrepresentations to a tribunal or during legal proceedings; indeed, Respondent was not even charged with a violation of Rule 4-3.3 (candor toward a tribunal) or Rule 4-8.4(d)(conduct prejudicial to the administration of justice). Respondent's granting a second security interest was not the subject of any court proceeding. While Respondent intended to assert the defense of "voluntary payment" to Pioneer's claim for indemnification, the matter was settled before formal legal proceedings commenced. (TFB Exh. 24). Accordingly, Standard 6.0 does not set forth the appropriate guideline to consider the proper sanction.

The Bar next asserts that Standard 8.1(b) supports disbarment in this case because Respondent had "been suspended for the same or similar conduct, and intentionally engage[d] in further similar acts of misconduct." (AB 31). However, the allegations against Respondent in this case are not the same or even similar to the conduct in Respondent's prior disciplinary action. In Florida Bar v. Brown, 790 So. 2d 1081, 1087 (Fla. 2001), the Court approved the Referee's finding that although Respondent was not specifically aware of Florida Statutes, section 106.08 (1993), Respondent should have known that the manner in which he solicited campaign contributions from other lawyers in his firm, at the request of his

corporate client, violated campaign contribution regulations. The Referee recommended a public reprimand, The Bar disagreed with the findings and sought disbarment and the Court ultimately imposed a ninety-day suspension. Id. at 1088. In contrast, Respondent's decisions in this case were not inconsistent with substantive commercial law. Respondent was engaging in a lawful course of action, but according to the Referee and The Bar, did not comport with a purported "heightened" standard of conduct. The Bar's allegations in this case are not similar to any other reported case, including Respondent's prior disciplinary action. Accordingly, Standard 8.1(b) does not justify an increased sanction in this case.

The Bar relies on the aggravating factors found by the Referee to support increasing the discipline. However, The Bar does not address whether it was improper for the Referee to consider Respondent's "refusal" to admit the charged conduct and does not distinguish Florida Bar v. Mogil, 763 So. 2d 303, 312 (Fla. 2000)(finding that the attorney's "claim of innocence cannot be used against him.") (AB 31). In this case, the Referee specifically found that "Respondent refused to accept responsibility" and when discussing the factual findings stated, "even more troubling is the fact that [Respondent] saw nothing wrong with any of this." (RR 18, 22). The Referee and The Bar improperly use Respondent's protestations of

innocence in aggravating the sanction.

In addition to the aggravating factors found by the Referee, The Bar argues that Standard 12.1, referring to actual harm to clients or third parties should be considered in aggravation. However, the Referee specifically found at the time he granted the Brown, Clark security interest, Respondent believed "that the certificate of deposit was large enough to pay Viele after the conclusion of the lawsuit, as well as attorneys' fees and costs to BC & W." (RR 11-12).[10] The actions of parties other than Respondent during the two years following the pledge caused Pioneer to enter into a settlement agreement in which it agreed to accept less than it had paid on the judgment. (TFB Exh. 24). For example, even The Bar's own expert agreed that Pioneer failed to act in a commercially reasonable manner by failing to properly attach and perfect its security interest in Hillview's assets, leaving it vulnerable to attack by Viele in the garnishment proceedings. (T 244-46).

Additionally, Viele worked with Pioneer's lawyer to convince him to pay the judgment while knowing that it was immediately going to try to obtain the assets which Pioneer would use to indemnify itself. Viele ultimately obtained $95,000 of Hillview's certificate of deposit. (TFB Exh. 24; Complaint para. 4a).

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[10] Respondent's pledge to Brown, Clark could not have "subjugated" Pioneer's interest in the certificate of deposit because a priority interest cannot be subordinated without the consent of the priority note holder.

Further, Pioneer's president acknowledged that it would not have paid the judgment if it knew that an appeal was pending and would have at least given Hillview the opportunity to pay the judgment before it paid Viele directly. (T. 60-64). Instead, Pioneer delegated the duty to investigate to its lawyer who did not investigate whether Hillview could still pursue an appeal, creating the defense to indemnification that Pioneer had "volunteered payment." (T. 55, 58, 246; TFB Exh. 27 pp. 36, 37).

Pioneer considered Viele's garnishment proceeding and Hillview's potential defense to indemnification and voluntarily agreed to settle the dispute and accept less money than it had paid on the judgment. (T. 100-02). Pioneer did not complain to The Bar about the outcome of the settlement. (T. 86). Rather, The Bar initiated its own inquiry after finding no probable cause on a separate complaint lodged by Viele. (T. 127). The Bar independently analyzed the equity of the ultimate settlement agreement and found it to be unfair and thus, unethical. Such subjective interpretations of what constitutes "financial loss" leaves every settlement agreement entered into by a lawyer vulnerable to attack through subsequent disciplinary proceedings. It is improper to find that Respondent caused financial harm to Pioneer when Pioneer's lack of diligence and Viele's attempt to garnish Hillview's proceeds convinced Pioneer to voluntarily settle the dispute.

The Bar argues that Florida Bar v. Siegel, 511 So. 2d 995 (Fla. 1987), Florida Bar v. Nuckolls, 521 So. 2d 1120 (Fla. 1988) and Florida Bar v. Stillman, 606 So. 2d 360 (Fla. 1992) are analogous to the present case. (AB 32-35). However, the primary distinction between the cited cases and this case is that Respondent's business decisions were lawful while Siegel, Nuckolls and Stillman potentially violated federal law by submitting fraudulent loan applications and making false statements in documents to conceal their deception. The Bar does not contend that Respondent violated the law; instead, it suggests that Respondent's conduct was inconsistent with a heightened duty expected of lawyers. As such, if Respondent committed misconduct, it was minor. Each case cited by The Bar is discussed separately below.

In Siegel, the responding attorneys entered into an agreement with Southeast Bank which prohibited secondary financing without the bank's approval. Siegel at 996. Siegel subsequently entered into an agreement for secondary financing without the consent of the bank. Id. In fact, Siegel made four separate misrepresentations in which he falsely responded to Southeast Bank's requests for information relating to his financial obligations. Id. On August 4, 1983, Siegel misrepresented the amount of the down-payment causing the lender to miscalculate the equity in the property. Id. On June 30, 1984, Siegel did not disclose the

secondary financing as a liability on a balance sheet that he provided to the bank. Id. On July 1, 1984, Siegel submitted a second financing statement without disclosing the second financing agreement reaffirming the bank's estimate of the cash equity available in the property. Id. Finally, on August 10, 1984, Siegel submitted a sworn affidavit in which he averred that there were no other liabilities or interests in the property. Id.

In contrast, the final Letter Agreement between Hillview and Pioneer did not prohibit the pledging of a second security interest although Pioneer could have included any condition in the agreement that it drafted. (TFB Exh. 7; T. 56, 71, 93, 244-46, 441, 444, 506-07). Further, Pioneer did not request Hillview to submit subsequent documents, financing statements or affidavits disclosing all of its liabilities. Accordingly, Respondent did not make affirmative misrepresentations. Assuming that this Court finds that Respondent had the duty to disclose his second security agreement to Brown, Clark, his conduct is much less egregious because he never falsely responded to a question pertaining to other security agreements.

In Nuckolls, the responding attorney created and submitted fraudulent documents to mislead the financing company, who would not agree to full financing. Nuckolls misrepresented the purchase price of each condominium unit in the loan agreement as $45,000 and misrepresented that he had paid a $9,000

down payment when the accurate purchase price was $36,000. Nuckolls 1121. To further his scheme, Nuckolls had one of his law partners write a check for $45,000 (supposedly representing the down-payment for five units) and submitted it to the bank as proof that he paid the down-payment, although he never cashed the check. Id. In addition, Nuckolls breached his duty as the land trustee by failing to consult with his principal prior to the transaction. Id.

The present matter is distinguishable because Respondent never misrepresented the terms of the agreement and never falsified any document to cover a deception. Even if this Court finds that Respondent should have known that Pioneer was relying on the terms of Hillview's proposal rather than the final agreement, Respondent had a good faith belief that the March 28, 1997 Letter Agreement drafted by Pioneer controlled the transaction. (T. 440). While Nuckolls submitted fraudulent loan documentation, Respondent's business decisions were lawful. Accordingly, the allegations against Respondent are substantially less serious than the charges against Nuckolls.

In Stillman, the attorney engaged in five transactions in which he disregarded his lender/client's written instructions prohibiting secondary financing and created four affidavits for the purchaser (falsely claiming that there was no subordinate mortgage agreements), five settlement statements (falsely representing that the

purchasers had paid cash when no cash had been produced or collected), wrote four mortgage title insurance policies (failing to disclose subordinate financing), and presented a Fannie May form to a purchaser that falsely stated that there was no subordinate financing. Stillman at 361-63. In contrast, Respondent did not create any fraudulent documents to mislead a client or to circumvent a written contractual term. (T. 440). Because Stillman references at least fourteen separate affirmative misrepresentations made to deceive the attorney's lender/client, it addresses much more serious misconduct and does not provide guidance in the present matter.

The Bar appears to cite Florida Bar v. Crabtree, 595 So. 2d 935 (Fla. 1992) to support the proposition that "legal" conduct can still be "unethical." After summarizing Crabtree's misconduct in its Cross-Petition, The Bar writes, "[t]here was no allegation that Crabtree's actions were illegal." (AB 36 citing Crabtree at 936 n. 2). The footnote to which The Bar refers actually states, "[t]here is no allegation that what Crabtree was employed to do was illegal." Crabtree at 936 n. 2). The Court did not discipline Crabtree for what he was employed to do (i.e.: to "repatriate $1.5 million from Europe for a client in Florida"). Id. at 936. Rather, the Court found that Crabtree committed several specific disciplinary violations and summarized the misconduct as follows:

We note that it is unrefuted that Crabtree was representing two

> different people in the same transactions without informing one of his representation of the other. Crabtree also took fees and an interest in the transactions without fully explaining his part and share in the transactions. Further, it is unrefuted that Crabtree wrote phony letters designed to mislead anyone who was looking into the transactions.

Crabtree at 936. Crabtree directly violated Rules 4-1.7 (conflict of interest, general rule) and 4-1.8 (conflict of interest, prohibited and other transactions) and violated Rule 4-8.4(c) by dishonestly attempting to conceal his conflicts of interest by creating fraudulent documents. The context of the opinion does not support The Bar's contention that disbarment is warranted even when the attorney's conduct is otherwise lawful and not violative of specific disciplinary rule violations.

The Bar also asserts similarity because both Crabtree and the present matter involve "dishonesty, misrepresentation and the failure to disclose the attorney's personal interest in a financial transaction to all involved." (AB 36). However, The Bar fails to explain how Respondent "failed to disclose his personal interest" or why he would be required to make such a disclosure since he was not representing anyone but was merely acting on behalf of his private corporation. There is no allegation that Respondent violated Rule 4-1.7 or 4-1.8 or even that Respondent represented any client. Indeed, the present matter examines Respondent's personal business decisions, for which he was represented by both Florida and Colorado counsel and does not address duties owed to a client. Accordingly,

Crabtree is distinguishable and does not support the imposition of a suspension in this matter.

B. In the light most favorable to The Bar, a public reprimand is the appropriate sanction.

The Referee's findings and recommendations that Respondent violated Rule 4-8.4(c) and 3-4.3(a) would support an admonishment without consideration of aggravating and mitigating circumstances. Standard 5.14, pertaining to admonishments, appears to be the only standard that would apply to a violation of a lawyer's heightened duty requiring disclosures not required by law and prohibiting lawful business and legal decisions if they appear "unfair" or "inequitable" to another party.

Moreover, the sole disciplinary case in which multiple security interests are referenced, the Court imposed a public reprimand primarily for the improper use of a client's property to secure two separate transactions. See In re Byrd, 511 So. 2d 958 (Fla. 1987). While the Court did not comment on the propriety of what The Bar now calls "double pledging," the Court determined that it was improper for the judge to use his client's property without permission. Id. The present case is less serious since it is undisputed that Hillview owned the assets that were the subject of

Pioneer and Brown, Clark's security agreements. (TFB Exh. 7, "First Bank of Vail agrees to hold a Certificate of Deposit in the amount of $420,000 owned by Hillview Development Corporation.") Although judges are now subject to "suspension" as an intermediate sanction, it is respectfully submitted that even the former imposition of a public reprimand for more egregious conduct by a judge who had a prior JQC investigation does not support a lengthy suspension of an attorney for more minor misconduct.

Respondent concedes that his prior disciplinary case is an appropriate aggravating factor. However, Respondent's former case is not similar to the present matter and does not show a propensity for Respondent to act "unethically." In contrast to Florida Bar v. Brown, 790 So. 2d 1081 (Fla. 2001), Respondent had a good faith belief that his commercial transactions comported with his ethical requirements since they were lawful. Because this case does not address similar misconduct, it is not appropriate to increase his sanction from the non-rehabilitative suspension imposed in Brown, to a rehabilitative suspension in this case. Instead, the appropriate starting point is Standard 5.14 which calls for an admonishment. After considering the aggravating and mitigating circumstances, as well as the unique position asserted by The Bar, the appropriate sanction in the light most favorable to The Bar is a public reprimand.

CONCLUSION

Respondent acknowledges that an attorney can act "unethically" even though his conduct does not directly violate the law. Clearly, lying is not necessarily illegal but it can still form the basis of a Rule 4-8.4(c) violation. This case, however, does not charge affirmative misrepresentations or the creation of fraudulent documents. Rather, the "dishonesty" is premised on Respondent's commercial transactions on behalf of his private corporation. The Bar views Respondent's business decisions as "dishonest" because another entity agreed to accept less money in the ultimate settlement agreement resolving their commercial differences. The Bar's analysis ignores the conduct of third parties over which Respondent had no control. Neither the Referee nor The Bar would consider Respondent's good faith legal defense to indemnification nor the underlying commercial law pertaining to security interests. Instead, The Bar argues that attorneys cannot make the same lawful commercial decisions as non-attorneys because attorneys must comply with a "heightened" standard, without defining the parameters of this standard. The Bar

and the Referee's application of Rules 4-8.4 (c) and 3-4.3(a) is impermissibly vague and over-broad, giving no guidance to attorneys whose business decisions are made in accordance with the law. Respondent respectfully requests this Court to dismiss the charges against him.

Respectfully submitted,

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CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.

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SCOTT K. TOZIAN, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Respondent's Amended Reply/Cross Answer Brief has been furnished by UPS overnight delivery to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1926 and true and correct copies have been furnished by U. S. Mail to Jodi Anderson, Esquire, Assistant Staff Counsel, The Florida Bar, Suite C-49, 5521 W. Spruce Street, Tampa, Florida 33607 and Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 this 8th day of June, 2004.

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SCOTT K. TOZIAN, ESQUIRE