IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC03-909

v.

TFB File No. 2001-00359(8B)

FRANCISCO RAMON RODRIGUEZ,

Respondent.

_________________________/

THE FLORIDA BAR'S ANSWER BRIEF
and
INITIAL BRIEF ON CROSS APPEAL

Donald M. Spangler, Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 184457

James A. G. Davey, Jr., Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 141717

John Anthony Boggs, Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 253847

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390

TABLE OF CONTENTS

TABLE OF CITATIONS.. iii

PRELIMINARY STATEMENT... vii

STATEMENT OF THE CASE AND FACTS.. 1

I. Statement of the Facts 1
Facts Giving Rise to Misconduct by Respondent 1
Facts Relating to the 1997-1998 Bar Discipline Case 2

II. Statement of the Case.. 3

SUMMARY OF ARGUMENT ON DIRECT APPEAL...................................... 5

I. THE REFEREE CORRECTLY FOUND THAT THE BAR'S PROSECUTION OF THIS MATTER WAS NOT A COLLATERAL ATTACK ON THE 1998 CONSENT JUDGMENT 5

II. THE REFEREE CORRECTLY FOUND THAT THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL DID NOT APPLY ....HERE 5

SUMMARY OF ARGUMENT ON CROSS APPEAL....................................... 6

I. THE REFEREE'S RECOMMENDATION OF A FOUR YEAR PERIOD OF PROBATION IS CONTRARY TO THE PROVISIONS OF R. .....REGULATING FLA.BAR 3-5.1(c) 6

II. THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS NOT SUPPORTED BY LEGAL PRECEDENT OR THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS FOR MISCONDUCT OF THE LEVEL OF EGREGIOUSNESS INVOLVED HERE.. 6

III. THE REFEREE'S FAILURE TO RECOMMEND FORFEITURE OF THE

ACKNOWLEDGED PROHIBITED FEE PERMITS RESPONDENT TO RETAIN THE FRUITS OF HIS MISCONDUCT 6

ARGUMENT REGARDING RESPONDENT'S DIRECT APPEAL.................... 7

I. THE REFEREE CORRECTLY FOUND THAT THE BAR'S PROSECUTION OF THIS MATTER WAS NOT A COLLATERAL ATTACK ON THE 1998 CONSENT JUDGMENT 7

II. THE REFEREE CORRECTLY FOUND THAT THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL DID NOT APPLY HERE 9

ARGUMENT REGARDING THE FLORIDA BAR'S CROSS APPEAL 15

I. THE REFEREE'S RECOMMENDATION OF A FOUR YEAR PERIOD OF PROBATION IS CONTRARY TO THE PROVISIONS OF R. .....REGULATING FLA. BAR 3-5.1(c) 15

II. THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS NOT SUPPORTED BY LEGAL PRECEDENT OR THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS FOR MISCONDUCT OF THE LEVEL OF EGREGIOUSNESS INVOLVED ....HERE 16

III. THE REFEREE'S FAILURE TO RECOMMEND FORFEITURE OF THE ACKNOWLEDGED PROHIBITED FEE AS PROVIDED BY R. REGULATING FLA. BAR 3-5.1(h) PERMITS RESPONDENT TO RETAIN THE FRUITS OF HIS MISCONDUCT 20

CONCLUSION... 23

CERTIFICATE OF SERVICE.. 24

CERTIFICATE OF TYPE, SIZE AND STYLE AND.. 25

TABLE OF CITATIONS

Cases

Arrieta-Gimenez v. Arrieta-Negron, 551 So 2d 1184 (Fla. 1989)............................ 10

DeClaire v. Yohanan, 453 So.2d 375 (Fla.1984) 11

Gordon v. Gordon, 59 So. 2d 40, (Fla. 1952).. 9

In re Brandt, 331 Or. 113, 10 P. 3d 906 (Or. 2000)... 18

In re Hager, 812 A.2d 904 (D.C. 2002) 18

The Florida Bar v. Anderson, 538 So 2d 852, 854 (Fla. 1989)............................... 18

The Florida Bar v. Budnitz, 690 So. 2d 1239 (Fla. 1997)...................................... 19

The Florida Bar v. Dancu,490 So.2d 40, 41-42 (Fla.1986)

.....................................15

The Florida Bar v. Forrester, 656 So.2d 1273 (Fla. 1995) 22

The Florida Bar v. Frederick, 756 So. 2d 79, 89 (Fla. 2000)

..................................21

The Florida Bar v. Gentry, 447 So. 2d 1342 (Fla. 1984)

....9

The Florida Bar v. Hooper, 509 So 2d 289 (Fla. 1987) 12

The Florida Bar v. Langford, 126 So. 2d 538 (Fla. 1961)...................................... 19

The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997)...................................... 17

The Florida Bar v. McMillan, 600 So2d 457 (Fla. 1992) 12

The Florida Bar v. Moriber 314 So.2d 145 (Fla.1975) 22

The Florida Bar v. Oxner, 431 So. 2d 983 (Fla. 1983). 19

The Florida Bar v. Reed, 644 So 2d 1355 (Fla. 1994)... 18

The Florida Bar v. Robbins, 528 So.2d 900 (Fla. 1988) 22

The Florida Bar v. Spears, 786 So. 2d 516 (Fla. 2001) 14

The Florida Bar v. Stalnaker, 485 So 2d 815 (Fla. 1986)...................................... 12

The Florida Bar v. Thomas, 698 So.2d 530 (Fla. 1997) 23

United States v. Throckmorton, 98 U.S. 61, 65-66, 25 L.Ed. 93 (1878)................11

Rules

R. Regulating Fla.Bar 3-5.1(c) 7, 16

R. Regulating Fla. Bar 3-5.1(h) 21, 22

R. Regulating Fla. Bar 4-1.5, ... 23

R. Regulating Fla. 4-8.1(a)... 20

Other Authorities

Black's Law Dictionary, Revised Fourth Edition.. 11

Florida Standards for Imposing Lawyer Sanctions.. 19

Standard 4.32.. 19

Standard 4.62.. 20

Standard 7.2.. 20

PRELIMINARY STATEMENT

Appellant, Francisco Ramon Rodriguez, will be referred to as Respondent, or as Rodriguez throughout this brief. The Apellee/Cross Appellant, **The Florida Bar**, will be referred to as such, or as the Bar.

References to the Report of Referee shall be by the symbol **RR** followed by the appropriate page number.

References to the transcript of the final hearing before the Referee on December 8 – 12, 2003, January 15 – 16, 2004, and May 21 – 22, 2004, shall be by the symbol **TR** followed by the volume, followed by the appropriate page number (i.e., TR III 289).

References to Bar exhibits shall be by the symbol TFB Ex followed by the appropriate exhibit number, references to Respondent's exhibits shall be by the symbol R Ex followed by the appropriate exhibit number

References to specific pleadings will be made by title.

STATEMENT OF THE CASE AND FACTS

I. Statement of the Facts

Facts Giving Rise to Misconduct by Respondent

Respondent, while a partner in his previous firm of Friedman, Rodriguez, Ferraro and St. Louis, P.A. (FRFS) represented twenty plaintiffs in tort litigation against DuPont arising out of DuPont's faulty product, Benlate (RR 4). As the case was approaching trial and settlement negotiations were underway, respondent and his partner Roland Raymond St. Louis, entered into a secret side agreement with DuPont, unbeknownst to their clients (RR 14). The agreement, finalized on August 7, 1996, provided that 1.) Respondent and his partners would become consultants for DuPont in future Benlate litigation; 2.) they would be paid a fee of $6.445 million dollars within two days of execution of the agreement even though the clients' claims had not been finalized by that time (the $6.445 million dollar fee was the end result of negotiation between Respondent and his firm and DuPont, with Respondent having initiated the bidding with a $12 million demand and eventually agreeing to accept $6.445 million); 3.) the $6.445 million dollar fee was to be considered earned at the time of payment, even though there may be no future need for their consultant services; and 4.) the agreement would remain confidential, even as regards their clients (RR 14). Additionally, a significant portion of the clients' settlement funds would be impounded for a period of two years in order to secure a confidentiality provision of the settlement agreement (RR 17). The referee found that Respondent's firm

became an agent of DuPont at the time of signing the secret side agreement, August 7, 1996 (RR-15; TR Vol IV 479-480). Respondent realized approximately $1.6 million dollars as his share of the secret side agreement proceeds (RR 24, TFB Ex 1, p.82), in addition to his share of the firm's contingent fee in the $59 million dollar settlement of the clients' cases, and received a total of $4.7 million (RR21). The settlement agreement also contained a provision allowing Respondent's law firm to keep the interest earned on the client's trust funds during the two year impoundment period, and the firm kept approximately $393,933.21 of those funds (RR 24, TR II 186).

Facts Relating to the 1997-1998 Bar Discipline Case

In 1997, as a result of a complaint brought by one of the firm's Benlate clients, a Mr. Beasley (TR III 278, RR 26), the Bar conducted an investigation into allegations that respondent and his firm had entered into an aggregate settlement of the twenty Benlate claims they were representing, that they had failed to communicate the terms of said settlement to the individual clients, and that the settlement represented a conflict of interest in that it pitted each client's financial interest in the settlement proceeds against every other client's interests (TR III 278, RR 25). The complaints made no reference to the secret side agreement, as it was not known to the clients or the Bar that such an agreement existed (TR III 290), Respondent having faithfully complied with the non-disclosure provision of the agreement. During the course of the investigative phase of

those complaints, Bar Counsel, Joan Fowler, and the Grievance Committee Investigating Member, Jeannette Haag, invited Respondent and counsel to meet with them in Ms. Haag's office, and to bring with them any relevant documents they felt the Bar should be aware of (TR III 309). The record reflects that Respondent and counsel brought with them a box of documents (TR III 283), which they have since contended included the secret side agreement, but that since neither Ms. Fowler nor Ms. Haag asked to see that document, Respondent did not disclose its existence, nor did he produce the document for inspection (TR III290). The Bar complaint was resolved in 1998 by a consent judgment resulting in an admonishment of respondent, based only on the allegations involving the aggregate settlement and failure to communicate. The secret side agreement was never disclosed to the Bar during the course of its investigation and prosecution of the 1997-1998 complaint, and in fact its existence never came to light until 2001 when it surfaced in the course of discovery during civil litigation against respondent and his partners, unrelated to Bar discipline matters.

II. Statement of the Case

The Honorable Fred Seraphin, County Court Judge in and for Dade County, Florida, was appointed as the referee in this matter on June 19, 2003. Prior to this matter being tried Respondent filed two Motions for Partial Summary Judgment. One such motion argued that the 1998 resolution of the Beasley complaint constituted res judicata and/or collateral estoppel, thus barring the prosecution of this matter. The other urged

that this action was an impermissible collateral attack on the consent judgment which constituted the 1998 resolution of the Beasley complaint. Both motions were heard and denied. The trial was bifurcated into the guilt phase and the discipline case, with trial beginning December 8, 2003 through December 12, 2003, then being recessed and resumed January 15 and 16, 2004, thus completing the guilt phase of trial. On April 26, 2004 the referee published courtesy copies of a draft Order of Finding Guilt. The discipline phase of the trial was held on May 21 and 22, 2004, and the referee filed his final Order of Finding Guilt, including his recommended discipline, on June 8, 2004. He recommended that Respondent be placed on probation for four years, that he perform 1000 hours of pro bono work under the supervision of a Catholic Priest and that he pay the Bar's costs. The referee did not recommend that Respondent forfeit the fee he received as a result of the secret side agreement with DuPont, even though he found said fee to have been prohibited (RR 25). Respondent thereafter filed a Notice of Review, raising the same issues raised in his Motions for Partial Summary Judgment, and Complainant filed a Notice of Cross Review as regards the recommended discipline.

SUMMARY OF ARGUMENT ON DIRECT APPEAL

I. THE REFEREE CORRECTLY FOUND THAT THE BAR'S PROSECUTION OF THIS MATTER WAS NOT A COLLATERAL ATTACK ON THE 1998 CONSENT JUDGMENT

II. THE REFEREE CORRECTLY FOUND THAT THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL DID NOT APPLY HERE

SUMMARY OF ARGUMENT ON CROSS APPEAL

I. THE REFEREE'S RECOMMENDATION OF A FOUR YEAR PERIOD OF PROBATION IS CONTRARY TO THE PROVISIONS OF R. REGULATING FLA.BAR 3-5.1(c)

II. THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS NOT SUPPORTED BY LEGAL PRECEDENT OR THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS FOR MISCONDUCT OF THE LEVEL OF EGREGIOUSNESS INVOLVED HERE

III. THE REFEREE'S FAILURE TO RECOMMEND FORFEITURE OF THE ACKNOWLEDGED PROHIBITED FEE PERMITS RESPONDENT TO RETAIN THE FRUITS OF HIS MISCONDUCT

ARGUMENT REGARDING RESPONDENT'S DIRECT APPEAL

ISSUE I

I. THE REFEREE CORRECTLY FOUND THAT THE BAR'S PROSECUTION OF THIS MATTER WAS NOT A COLLATERAL ATTACK ON THE 1998 CONSENT JUDGMENT

Respondent argues that this matter is a collateral attack on the 1998 consent judgment, and therefore impermissible. In so arguing, Respondent mistakenly assumes that the Bar wants to set aside the 1998 consent judgment. The 1998 consent judgment was a negotiated resolution of known acts of misconduct consisting of the aggregate settlement of multiple clients' claims, without communication with nor consent of those clients, coupled with the coercive threat that if those clients did not accept the terms of the settlement unilaterally negotiated with Respondent's undisclosed principle, DuPont, Respondent and his firm would withdraw as counsel, leaving the clients unrepresented on the eve of trial.

This matter, conversely, litigates completely separate and distinct acts of misconduct, i.e., the *sub rosa* deal struck between Respondent and his firm with their clients' adversary, DuPont, in which Respondent and his firm benefited to the tune of more than $6.445 million, and the fact that they failed to disclose to their clients the fact that they were attempting thereby to serve two masters.

Respondent's argument can be analogous to a situation in the criminal arena where the state prosecutes a serial rapist for two or three crimes, only to learn later that there were additional rapes that had not become known at the time of the prior prosecution. Under Respondent's argument, the state would then be precluded from further prosecution of the additional, later discovered crimes.

The case of The Florida Bar v. Gentry, 447 So. 2d 1342 (Fla. 1984) dealt with a factual situation in which Gentry was charged with removing client funds from his trust account and placing them in a personal savings account, then pledging those funds as collateral for a personal loan. Gentry argued that the transaction in question had already been the subject of a previous disciplinary proceeding in which he was found guilty and given a private reprimand, and therefore the instant prosecution was barred. This Court held that, since the allegation of the Complaint by The Florida Bar was based on separate, additional and continuing misconduct, there was no identity of facts required to bar those proceedings. The Court stated

> Clearly, the subject matter of the prior disciplinary hearing and the allegations in count one of the complaint do not possess an "identity of facts" required for the application of the res judicata doctrine. *See* Gordon v. Gordon, 59 So. 2d 40, (Fla. 1952); *cert. denied*, 344 U.S. 878, 73 S.Ct. 165, 97 L.Ed. 680 (1952). (Id at 1343)

ISSUE II

II. THE REFEREE CORRECTLY FOUND THAT THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL DID NOT APPLY HERE

Respondent takes confidence in this Court's holding in Arrieta-Gimenez v. Arrieta-Negron, 551 So 2d 1184 (Fla. 1989), but his confidence is misplaced. The Arrieta opinion was a response to a certified question pertaining to Florida law by the United States Court of Appeals in and for the First Circuit, in which the Federal Appellate Court framed the issue as

> Would the Florida courts give res judicata effect to a consent judgment approving a property settlement, if it could be shown more than one year later that one party had fraudulently misrepresented to the other or concealed from the other party information that was material to the settlement? [Arrieta-Gimenez v. Arrieta-Negron, 551 So 2d 1184, 1185 (Fla. 1989)]

This Court responded to the certified question in the affirmative, but differentiated between whether the fraud in question was intrinsic fraud or extrinsic fraud, finding that the conduct in Arrieta amounted to intrinsic fraud and thus the earlier consent judgment in Arrieta was given *res judicata* effect. In its analysis of the nature of the fraudulent conduct involved, this Court looked to its earlier opinion in the case of DeClaire v. Yohanan, 453 So.2d 375 (Fla.1984). The DeClaire opinion establishes that extrinsic fraud involves conduct which is collateral to the issues tried in a case and looked for guidance to the definition of extrinsic fraud as provided in United States v.

Throckmorton, 98 U.S. 61, 65-66, 25 L.Ed. 93 (1878), in which the United States Supreme Court said:

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side--these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. (Citations omitted.) (Emphasis added)

The DeClaire opinion goes on to provide

> [T]his Court has defined extrinsic fraud as the prevention of an unsuccessful party [from] presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from court; falsely promising a compromise; ignorance of the adversary about the existence of the suit or the acts of the plaintiff; . . . (Id at 377)

Extrinsic fraud is also defined as some intentional act or conduct by which the prevailing party has prevented the unsuccessful party from having a fair submission of the controversy. (Citation omitted) Black's Law Dictionary, Revised Fourth Edition.

In the final analysis, then, we must lay down the conduct of the Respondent beside the concepts of law defining extrinsic fraud and make a determination of whether, given the facts at bar, Respondent's failure to disclose and produce the secret side agreement in

the course of the Bar's 1997-1998 investigation and prosecution amounted to extrinsic fraud. In doing so we must be mindful of the fact that the trier of fact, the referee, has already examined Respondent's conduct in the context of the Motion for Partial Summary Judgment and in the trial of this case and has found against Respondent's contentions on this issue. The Court has repeatedly announced that, unless clearly erroneous, where there is substantial competent evidence to support the referee's findings of fact, it will not disturb those findings. The Florida Bar v. McMillan, 600 So2d 457 (Fla. 1992); The Florida Bar v. Stalnaker, 485 So 2d 815 (Fla. 1986); The Florida Bar v. Hooper, 509 So 2d 289 (Fla. 1987).

The facts drawn from the record below show that in 1997 Joan Fowler was employed as Bar Counsel in the Orlando branch office of The Florida Bar, and that when she began her employment a part of her caseload included the Beasley complaint against Respondent (TR III 278, RR 26). The substance of the complaint brought by Beasley was that Respondent and his partners had entered into an aggregate settlement of the 20 Benlate claims they represented, that they did not communicate with individual clients pertaining to their share of the settlement proceeds, that Respondent and his firm threatened to withdraw on the eve of trial if the clients did not accept the settlement offers (TR III 278, RR 25) and that the firm was keeping interest earned on the clients' settlement proceeds (RR 25). Ms. Fowler testified that she referred the complaint to the grievance committee and an Investigating Member, Jeannette Haag, was assigned (TR III

278, RR 25). Respondent was informed that the case was referred to the grievance committee and that he could submit any materials he felt he wanted the committee to consider (TR III 279). Following a request by Respondent and his partner to meet with Ms. Fowler and Ms. Haag, on June 9, 1997, Ms. Haag wrote to Respondent and invited him and his partner to meet with her and Ms. Fowler in her office and to bring with them any documents Respondent wanted them to review (TR III 309). Respondent and his partner met with Ms. Fowler and Ms. Haag and brought with them a box of documents. During the course of the meeting the box was retained by Respondent and his partner and various documents of Respondent's selection were withdrawn from the box and shown to Ms. Fowler and Ms. Haag (TR III 283). Ms. Fowler and Ms. Haag were permitted to examine at least one confidential document but were not permitted to obtain or copy the document (TR III 286). The secret side agreement, if contained in the box as Respondent maintains, was never displayed to Ms. Fowler and Ms. Haag (TR III 290, TFB Ex 11). Following a probable cause determination by the grievance committee Ms. Fowler filed a formal Complaint against Respondent (TR III 348, R Ex 96) as well as a Request for Production of Documents that might have led to disclosure of the secret side agreement. As a result of negotiations which ultimately led to the Consent Judgment, however, it was agreed that Respondent did not have to comply with the Request for Production (TR III 356), the Consent Judgment was consummated and the secret side agreement never came to light, simply because Joan Fowler and Jeannette Haag did not

suspect its existence and were not intuitive enough to guess that the box produced by Respondent and his partner may have contained such a document.

In The Florida Bar v. Spears, 786 So. 2d 516 (Fla. 2001) the Court inferred a duty of disclosure under similar circumstances. Referring to misconduct on the part of Spears involved in what is referred to as "the Carey matter" which had occurred prior to a disciplinary consent judgment having been entered in an earlier case, but which was unknown to the Bar at the time of the earlier consent judgment, the Court stated

> We can only conclude that Spears was in the best position to have brought the Carey matter to the Bar's attention, and that the exclusion of the Carey matter from the consent judgment case is solely attributable to Spears' failure to conduct himself in a most upstanding manner at a time when he was under investigation for multiple and serious violations of the Rules of Professional Conduct. (Id at 520)

There can be no doubt that Respondent and his partner were in the best position to have brought the secret side agreement matter to the Bar's attention, and that the exclusion of the secret side agreement matter from the 1998 consent judgment is solely attributable to Respondent's failure to conduct himself in a most upstanding manner at a time when he was under investigation for multiple and serious violations of the Rules of Professional Conduct.

As the Court stated in Spears,

> (T)he very nature of the lawyer-client relationship requires that clients "place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships." Florida Bar v. Dancu, 490 So.2d 40, 41-42 (Fla.

> 1986). Spears had already violated this trust by committing the misconduct detailed in the consent judgment, and we view the Carey matter to be an additional, egregious example of cumulative misconduct for which greater discipline must be imposed. (Id at 521)

When Respondent entered into the secret side agreement with DuPont he violated the trust placed in him by his clients just as surely as did Spears.

ARGUMENT REGARDING THE FLORIDA BAR'S CROSS APPEAL

ISSUE 1

I. THE REFEREE'S RECOMMENDATION OF A FOUR YEAR PERIOD OF PROBATION IS CONTRARY TO THE PROVISIONS OF R. REGULATING FLA.BAR 3-5.1(c)

The referee has recommended a probationary period for which there is no basis in the Rules Regulating The Florida Bar. In his report, titled "Order of Finding of Guilt," the referee recommends, in pertinent part, "i. (H)e be placed on probation for a **four year period of time** and that during that time he be required to perform 1000 hours of pro bono work **under the strict supervision of Father Patrick O'Neill**;" (RR 47)(Emphasis added)

R. Regulating Fla. Bar 3-5.1(c) states, in pertinent part,

> **(c) Probation**. The respondent may be placed on probation for a stated period of time of not less than 6 months **nor more than 3 years** or for an indefinite period determined by conditions stated in the order. (Emphasis added.)

Contrary to those provisions, the referee recommends a probation for a stated period of four years, not three, nor does he recommend probation for an indefinite period determined by conditions of the order. The rule goes on to provide

> The judgment shall state the conditions of the probation, which may include but are not limited to the following:
>
> . . .
>
> (2) supervision of all or part of the respondent's work by a member of The Florida Bar;
>
> (3) the making of reports to a designated agency;

There is no provision in the referee's recommendation for supervision of respondent's proposed pro bono work by a member of the Bar, as opposed to Father O'Neill, nor for any monitoring or reporting system during the period of probation.

ISSUE II

II. THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS NOT SUPPORTED BY LEGAL PRECEDENT OR THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS FOR MISCONDUCT OF THE LEVEL OF EGREGIOUSNESS INVOLVED HERE

The Court has advised, in The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997), that "we will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw." (Id, at 1288). Nevertheless, where, as in Lecznar, the existing case law demonstrates that the referee's recommendation of discipline is inappropriate, the Court may and has departed from such recommendations. A referee's recommendation for discipline is persuasive. However, it is ultimately the

Court's task to determine the appropriate sanction. The Florida Bar v. Reed, 644 So 2d 1355 (Fla. 1994); The Florida Bar v. Anderson, 538 So 2d 852, 854 (Fla. 1989).

There are is no Florida discipline case law concerning secret side agreements. It appears that this may be an emerging problem spinning off from mass tort litigation. Two other jurisdictions, however, the District of Columbia Bar and the Oregon Bar, have recently imposed one-year suspensions for this type of misconduct. In In re Hager, 812 A.2d 904 (D.C. 2002), the respondent received only $125,000 in exchange for the secret deal, did not keep the interest on his client's trust funds, did not engage in a cover-up that lasted for years, and did not lie to the Bar as this Respondent has done. The District of Columbia Bar imposed a one year suspension, but obviously, this case involves misconduct that is far more serious than that involved in Hager.

In the case of In re Brandt, 331 Or. 113, 10 P. 3d 906 (Or. 2000), the respondent received only $10,000 plus $175 per hour in return for the secret deal. He did lie to the Bar in response to a written Bar inquiry, but did not keep the interest on his client's trust funds, and did not engage in a cover-up that lasted for years. This case also involves misconduct that is far more serious than that involved in the Brandt case.

Respondent's conduct in this case involved a pattern of intentional deceit and lying. Although most cases of lying have resulted in lesser disciplines, in one instance the Supreme Court of Florida has disbarred an attorney for the single act of lying to a grievance committee in violation of Rule 4-8.1(a). The Florida Bar v. Budnitz, 690 So.

2d 1239 (Fla. 1997). Respondent has also shown a disdain for the disciplinary process.

In another case, an 18 month suspension was imposed for lying to a Grievance Committee and asking a friend to back him up in that statement. The Florida Bar v. Langford, 126 So. 2d 538 (Fla. 1961). Other cases of lying have imposed lesser terms of suspension or public reprimand. See, e.g. The Florida Bar v. Oxner, 431 So. 2d 983 (Fla. 1983).

The Florida Standards for Imposing Lawyer Sanctions adopted by the Board of Governors of The Florida Bar provide additional guidance as to the level of sanctions the Court should consider.

With respect to conflicts of interest and restrictions on the right to practice, Standard 4.32 provides that suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. The record clearly demonstrates that Respondent not only knew the secret side agreement represented a conflict of interest, he initially opposed it on that basis, and acceded only when greed overcame his initial reticence. He clearly did not fully disclose, or disclose at all, the possible effect of the conflict to his clients.

Standard 4.62 suggests that suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. Again, Respondent knowingly deceived his clients as well as The Florida Bar with respect to the existence of

the secret side agreement.

With respect to his share of the prohibited $6.445 million fee Respondent realized, and which the referee's recommended discipline would allow him to retain, Standard 7.2 provides that 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.

Clearly a public reprimand is inappropriate as a sanction indicated by the type of misconduct in which the Respondent has engaged. The Florida Bar is seeking only the absolute minimum that will protect the public and the legal system adequately, and the requested discipline of a two year suspension is that minimum.

ISSUE III

III. THE REFEREE'S FAILURE TO RECOMMEND FORFEITURE OF THE ACKNOWLEDGED PROHIBITED FEE AS PROVIDED BY R. REGULATING

FLA. BAR 3-5.1(h) PERMITS RESPONDENT TO

RETAIN THE FRUITS OF HIS MISCONDUCT

The referee found that the $6.445 million fee was a prohibited fee (RR 25), yet declined to accede to the Bar's suggestion that Respondent's portion of said fee be forfeited to the Client Security Fund of The Florida Bar. The referee opined that to do so would be punitive (RR 47), in the nature of a fine (RR 46). In reaching this conclusion the referee applied the rationale of the case of The Florida Bar v. Frederick, 756 So. 2d 79, 89 (Fla. 2000). This was error, as the Frederick case did not involve a prohibited fee or Rule 3-5.1(h) at all. The case at bar is a case of first impression regarding a prohibited fee under Rule 3-5.1(h). In Frederick the Bar was seeking to recoup money previously expended by the Client Security Fund. The Florida Bar is not seeking to recoup money paid out by the Client Security Fund in this case, but to enforce Rule 3-5.1(h) – an entirely different matter. The end result of the referee's recommendation is to impose only a public reprimand and allow the Respondent to have profited by his acknowledged misdeeds to the extent of $1.6 million. One can only wonder how many members of The Florida Bar, confronted with such an option, would accept the reprimand and take the fee.

Rule 3-5.1(h) provides

> **(h) Forfeiture of Fees**. An order of the Supreme Court of Florida or a report of minor misconduct adjudicating a respondent guilty of entering into, charging, or collecting a fee prohibited by the Rules Regulating The

> Florida Bar may order the respondent to forfeit the fee or any part thereof. In the case of a clearly excessive fee, the excessive amount of the fee may be ordered returned to the client, and a fee otherwise prohibited by the Rules Regulating The Florida Bar may be ordered forfeited to The Florida Bar Clients' Security Fund and disbursed in accordance with its rules and regulations. (Emphasis added).

This Court has historically required members of the Bar to disgorge fees in cases where it has been determined that the fee was excessive. In The Florida Bar v. Forrester, 656 So.2d 1273 (Fla. 1995) the Court ordered that Respondent was suspended for a period of ninety days and thereafter for an indefinite period until she paid the cost of the disciplinary proceedings and to the estate of Sarainne L. Andrews the sum of $20,810.00 plus interest, for violation of rule 4-1.5(a); In The Florida Bar v. Moriber 314 So.2d 145 (Fla.1975) the Court suspended Respondent and ordered that the suspension continue until he paid his client $7,983.14 less a reasonable fee of $2,500.00 and costs incurred by the respondent in processing collection of the client's funds; In The Florida Bar v. Robbins, 528 So.2d 900 (Fla. 1988) the Court provided that if the respondent applied for reinstatement after the three-year suspension, it would be necessary for him to prove that he had made restitution to his former clients as part of the required showing of rehabilitation to reenter the practice of law; and in The Florida Bar v. Thomas, 698 So.2d 530 (Fla. 1997), Thomas was ordered to make restitution to his client in the amount of $1,900.

While the referee found that Respondents' clients were not deprived of any funds as a result of the prohibited fee, and that restitution was therefore not indicated (RR 46) the equities of this situation cry out for a resolution that does not allow Respondent to feed on the ill-gotten fruits of his misconduct. Rule 4-1.5, R. Regulating Fla. Bar provides that an attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee. Clearly, the inference should be drawn that a remedy, other than allowing the Respondent to retain the prohibited fee, is contemplated by the prohibition, and Rule 3-5.1(h) provides that remedy.

CONCLUSION

The Court should affirm the referee's findings regarding guilt but should impose sanctions against Respondent amounting to a suspension from the practice of law in the State of Florida for a period of two years, forfeiture of the prohibited fee in the amount of $1.6 million and payment of costs incurred by The Florida Bar in the amount of $45,258.88.

Respectfully submitted

____

Donald M. Spangler, Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 184457

and

James A. G. Davey, Jr., Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 141717

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief and Initial Brief on Cross Appeal regarding Supreme Court Case No. SC03-909 and TFB File No. 2001-00,359(8B) has been forwarded by regular U.S. mail to Michael Nachwalter, Respondent's counsel, at his record Bar address of 1100 Miami Center, 201 South Biscayne Boulevard, Miami, Florida 331-4327, on this ________ day of October, 2004.

____

Donald M. Spangler, Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 184457

James A. G. Davey, Jr., Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5845
Florida Bar No. 141717

Copy provided to:
John Anthony Boggs, Staff Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE AND
ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Brief of is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's Order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

____

Donald M. Spangler, Bar Counsel

H:\FORMS\BRIEFS\BRIEF1.WPD