IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

FRANCISCO RAMON RODRIGUEZ,

Respondent.

Case N0. SC03-909

(TFB File No. 2001-00,359(8B))

RESPONDENT'S REPLY BRIEF AND ANSWER BRIEF TO THE CROSS-PETITION

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

THE RULES REGULATING THE FLORIDA BAR

OTHER AUTHORITIES

INTRODUCTION

The Florida Bar's Answer Brief and Initial Brief on Cross Appeal ("Bar's Brief") asks this Court to (i) conclude that the 1998 Consent Judgment does not preclude The Bar's claims against Respondent because Respondent engaged in extrinsic fraud, (ii) suspend Respondent for two years, and (iii) order that Respond forfeit $1.6 million to the Clients' Security Trust Fund. The relief which The Bar requests is premised upon the repeated assertion (made at least ten times) that Respondent lied to The Florida Bar and engaged in fraudulent conduct. Bar's Brief at 12-14; 18-20. The Referee, however, ***rejected*** The Florida Bar's claims that Respondent lied to The Bar and that he engaged in deceitful conduct. ***The Referee found that Respondent did not lie to The Bar; that he did not create a misapprehension; and that he did not have an intent to deceive his clients or The Bar.*** R. at ¶¶ 34, 39, 43-45.[1] The Bar has not appealed these findings and there is competent substantial evidence in the record to support the Referee's findings that Respondent did not lie or engage in fraudulent conduct of any kind. R. at ¶¶ 34, 38-

[1] "R. at ¶ __" refers to the paragraph in the Referee's Order of Finding of Guilt and Referee's Findings and Recommendation Regarding Discipline dated June 8, 2004. "R. at p. __" refers to the page in the Referee's Order of Finding of Guilt and Referee's Findings and Recommendation Regarding Discipline dated June 8, 2004. "Tr. Vol. __ at ___" refers to the page in a transcript. For those transcripts for which there is no volume number, the date is provided.

45. Accordingly, this Court should summarily reject the Bar's arguments which are premised on the contention that Respondent lied and engaged in fraudulent conduct. *See* The Florida Bar v. Grosso, 760 So.2d 940 (Fla. 2000)(rejecting respondent's argument before the Florida Supreme Court that person was not his client where referee's findings of fact were not appealed and findings were supported by competent substantial evidence).

Likewise, this Court should reject The Bar's request that Respondent be required to forfeit $1.6 million to the Clients' Security Fund. Based upon the evidence, the Referee found that requiring Respondent to forfeit $1.6 million was an impermissible fine. R. at p. 46. The Rules Regulating the Florida Bar do not include fines among the list of permissible sanctions. *See* Rule 3-5.1. Additionally, after considering the evidence, the Referee found that requiring Respondent to forfeit $1.6 million would be punitive, and, under the circumstances, not appropriate. R. at pp. 46-47. Having made this factual determination, the Referee exercised the discretion given by Rule 3-5.1(h) and declined to sanction Respondent by requiring him to forfeit $1.6 million.

STATEMENT OF THE CASE AND THE FACTS

Completely absent from the Statement of Facts in the Bar's Brief asking for a two year suspension and the imposition of a fine is any discussion of the evidence the

Referee heard during the sanctions phase of the trial or the mitigating factors the Referee found applicable. The evidence is overwhelming.

Respondent is a lawyer that is passionate about the law, this profession, and representing his clients to the best of his ability. R. at p. 39. It is as a result of the work by him and his Firm that the 20 Benlate clients received settlement offers that were well beyond what the clients could have reasonably expected to have obtained if their respective cases has gone to trial. R. at pp. 42-43; Tr. Vol. VIII at 882-883; Tr. Vol. X at 1226, 1229. These 20 Benlate clients were not harmed by the engagement agreement: the money that was paid to the Firm pursuant to the engagement agreement was not money that would have otherwise been paid to the clients. R. at ¶ 16; *See also* R. at p. 46. Additionally, in 1996, there were no published decisions addressing whether it was permissible to enter into an engagement agreement to achieve a practice restriction. R. at p. 39. The Referee found that Respondent was inexperienced in handling multiple plaintiff mass tort cases[2] and unfamiliar with the issues that arise during settlement negotiations in these cases and that Respondent's mistake in judgment in 1996 was out of character. R. at pp. 38-40.

[2] Respondent also had no prior experience with contingency fee cases. R. at ¶ 2.

Respondent had a wide array of people come forward to testify for him: a sitting State Court Circuit Judge that has known Respondent for 20 years, a sitting United States District Court Judge, lawyers that had been opposing counsel, including the former U.S. Attorney for the Southern District of Florida who is now in private practice, a priest, current and former partners, clients, friends and family. R. at pp. 39-40. Respondent was consistently described by these witnesses as an honest man, a man of integrity, a generous man, an ethical lawyer, a lawyer that works hard for his clients, an asset to the legal community, and a man that is remorseful for the mistakes he made. R. at p. 39. The Referee also received numerous letters with similar descriptions of the Respondent. Id. *See also* Resp. Trial Ex. 136.

United States District Judge Jose Martinez testified that Respondent is extremely competent, ethical, above board, and a man of integrity of the highest caliber that he trusts. Tr. May 22, 2004 at 120. Dr. Jose Greer–who is a leader in the community, having founded the Camillus House clinic, Saint John Bosco clinic and numerous other clinics for the underprivileged, and who is involved in the Rand Corporation–described Respondent as a man of integrity who enjoys a reputation for being an extremely competent lawyer and a lawyer with integrity. Tr. May 21, 2004 at 20-21. Roberto Martinez–who is the former U.S. Attorney for the Southern District of Florida and who was opposing counsel to Respondent– described Respondent as

straight forward, a man of his word, a gentleman, and a man you can trust. Tr. May 21, 2004 at 60-62. Another member of the Florida Bar who has been opposing counsel to Respondent on a few matters testified:

> Frank I think is an excellent trial lawyer, achieved very good results for his clients. I found him to be straightforward and candid, a man of his word, never had any problems dealing with Frank. I think he's an excellent lawyer.

Tr. May 21, 2004 at 36.

Further, the testimony from his clients highlighted that Respondent is not motivated by greed and that if he were to be suspended from the practice of law it would be a loss to the profession and his clients. Of the three clients that testified at trial, each explained how Respondent did not let their inability to pay him interfere with his representation of them. R. at p. 41. One of the clients–who was sick with cancer and very weak from chemotherapy–explained why he felt compelled to come to Court to testify for Respondent:

> "I think that to try to just withdraw from the profession and a man of his quality, of his level of professionalism and honor, it would really be damaging to that profession because you would be denying other members of society, members such as myself, you would deny them of any possibility of a coming afloat after having felt downed, and then to then after be able to come up and look straight faced such as I did."

Tr. May 22, 2004 at 150.

Similarly, one of Respondent's former partners who practices in Miami testified

that he would consider it to be a loss to the profession if Frank Rodriguez were unable to practice law. Tr. May 22, 2004 at 133. He also testified:

> "I believe that Frank Rodriguez is an asset to the legal profession. *** Whatever happens I will tell you that I am convinced in my heart that Frank Rodriguez did not do for self-gratification or self enhancement or he is not a selfish person. He is not an unethical person. He's not a liar. He's not a thief. I consider Frank Rodriguez to be an ethical individual. I would not be sitting here. I consider being a member of the Florida Bar a very serious thing, and I'm very proud of that."

Tr. May 22, 2004 at 134, 135.

Consistent with the above testimony, one of Respondent's current partners testified that if Respondent were precluded from practicing law, "it will hurt his clients deeply. I mean it will have a very adverse affect on his clients, because they count on him. He is such an exceptional lawyer." Tr. May 22, 2004 at 161.

Another member of the Florida Bar who has known Mr. Rodriguez for over 30 years gave the following testimony:

> Q: What do you think it would do to Frank Rodriguez if he were not able to practice law?
>
> A: I think it would devastate him. Him and his family. And I think quite frankly it would be bad for the profession. I'm around lawyers all day long, and I see lawyers whom I believe shouldn't be practicing law. The Bar should be proud to have someone like Frank practicing; they really should.
>
> Q: Because he's a man of integrity?

> A: Because he's a man of integrity, because he's honest, and because this is what a lawyer should be. And Frank represents all those things. And I see many people out there who are not, and he is. I'm proud to be a member of the same Bar as him.

Tr. May 21, 2004 at 54.

Additionally, the evidence showed that Respondent is remorseful for his mistake. Circuit Judge Robert Scola testified how Respondent came to him a few years ago and accepted responsibility for his actions. Specifically, Judge Scola testified:

> Q: And he came to chat with you a little bit about this problem with the Bar, did he not?
>
> A: Yes, he did. ...We had lunch together because he was very distraught about the whole situation. *** [H]e didn't really try and convince me that he was innocent or, but he seemed to me that he was genuinely remorseful. And I was really struck because particularly in the criminal division you see a lot of people you can sentence to some kid 90 days in jail, they could care less about it. Other people come in front of you and just the fact they are standing there is such a momentous occasion in their life, such a disappointment to themselves going through the process is a lot of punishment. To me and I really saw that Frank was negatively impacted by just this whole process, and you know, that was at least two or three years ago.
>
> Q: And you saw that remorse on his part?
>
> A: Absolutely.

Tr. May 21, 2004 at 9-10.

Respondent also expressed remorse to the Referee during the proceedings. R.

at pp. 41-42. Respondent acknowledged that he had made a mistake in agreeing to enter into the Engagement Agreement and in failing to disclose that agreement to the clients. R at pp. 41-42. The testimony of those close to Respondent also made it clear that Respondent has been hard on himself as a result of his conduct. R. at p. 42. Over the past eight years, Respondent has suffered emotionally, financially and physically. Id. The press relating to the 1996 settlement has hurt Respondent's practice and Respondent has been hospitalized several times (Tr. May 22, 2004 at 163).

Based upon the evidence, the Referee found in mitigation that Respondent had no prior disciplinary record. R. at p. 42. The Referee also found that Respondent was inexperienced in handling settlements of multiple plaintiff mass tort cases and he was unfamiliar with the issues that arise in these settlements. Id. The Referee further found that Respondent showed remorse for his conduct, Id., and that Respondent had suffered economically, emotionally and physically as a result of adverse publicity and the unusually long period of time during which Respondent has dealt with various proceedings arising out of the settlement with DuPont. R. at 42. In further mitigation, the Referee found that Respondent has an outstanding reputation in the community. Id. The Referee concluded that Respondent does not present a current risk to the public, R. at p. 42, and that in the eight years since the conduct in question

Respondent has shown rehabilitation. R. at pp. 38, 42.[3] Characterizing Respondent's conduct as involving a serious mistake in judgment, the Referee found that Respondent's conduct was out of character in what is an otherwise accomplished 22 year legal career. R. at pp. 38, 40. The Referee also found that suspending Respondent from the practice of law would hurt his clients and the public. R. at p. 43, n. 4.

Based on this record, the Referee rejected The Bar's request that Respondent be suspended for 2 years. Instead, and consistent with Florida law and this Court's order in an analogous case, the Referee recommended that Respondent be placed on probation for 4 years during which time he be required to perform 1000 hours of pro bono services under Father Patrick O'Neil's supervision, that he be given a public reprimand, and that he be required to pay The Bar's taxable costs. R. at p. 45.

Ignoring the record from the sanctions hearing, the Bar's Brief seeks to convince this Court that a two years suspension is warranted by setting forth some purported facts to try to show that Respondent "engaged in a pattern of intentional deceit and lying." Bar's Brief at 18. Not only is the Bar's assertion that Respondent engaged in a pattern of intentional deceit and lying incorrect, but also the Referee

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[3] The Referee also considered the undisputed fact that Respondent obtained excellent results for the clients. R. at p. 42.

–after hearing all of the evidence--rejected The Bar's claims against Respondent for lying to The Bar and engaging in fraudulent and deceitful conduct. R. at ¶¶ 34, 44. Moreover, The Bar's assertion that Respondent lied and is deceptive is premised on purported facts which lack any record citation or which are followed by a citation that does not support the asserted fact.[4] The disparity between The Bar's assertions and

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[4] The liberties that The Bar has taken with the record are not limited to those set forth in the chart. The Bar's Brief ignores the facts relating to the settlement discussions with DuPont and the ultimate execution of the engagement agreement, characterizing the settlement discussions and the timing of the engagement agreement in a glib fashion which is not consistent with the record. For example, The Bar asserts that the engagement agreement was entered into as the case was approaching trial and when settlement negotiations were underway, citing the Referee's Report at 14. Bar's Brief at 1. There is **nothing** on page 14 of the Referee's report that supports this statement. To begin with, the 20 Benlate clients were not joined as plaintiffs in one lawsuit. *See* Tr. Vol VIII at 1005-06; 1010. Moreover, the Report of the Referee reflects that the engagement agreement was entered into after the Firm had completed the negotiation of substantial settlement offers for its 20 Benlate clients. R. at ¶¶ 8, 10-13, 15.

The Bar further asserts that the Settlement Agreement contained a provision that allowed the Firm to keep the interest earned on the client's trust funds during the two year impoundment period, citing Referee's Report at 24. Once again, neither the Referee's Report nor the record support this statement. Instead, the facts–which are reflected in the Referee's Report at ¶ 35 and the record are that the Authorization to Settle gave the Firm the right to keep the interest on the settlement proceeds until such time as the initial distributions were made. Tr. Vol. X at 1330. The parties anticipated that this period of time would be short, a few days, however, the initial distribution to the clients was delayed. Id.

Respondent has provided the Court with a discussion of the facts relating to the settlement discussions with DuPont and the ultimate execution of the engagement agreement which is supported by record cites. Respondent's Initial Brief at pp. 4-10.

the proceedings below is highlighted by the following chart:

Statement in Bar's Brief	Citation in Bar's Brief	What citation states/The Record
Respondent lied to The Bar (Bar's Brief at 18)	No cite	The Referee found that Respondent did not lie to The Bar. R. at ¶¶ 39, 42- 45.
Respondent's conduct in this case involved a pattern of intentional deceit and lying (Bar's Brief at 18)	No cite	The Referee found that Respondent did not engage in any deceit and the Referee found that Respondent did not lie. R. at ¶¶ 34, 39, 42- 45. The Referee found that The Bar failed to prove a violation of Rules 4-8.1(a), 4-8.1(b) and 4-8.4(c). R. at ¶ 44.
Respondent has shown a disdain for the disciplinary process (Bar's Brief at p. 19)	No cite	The Referee found that Respondent cooperated fully with The Bar. R. at ¶ 44. The Referee further found that Respondent was genuinely remorseful and that he accepted responsibility for the suffering he has endured over the past eight years. R. at pp. 41-42.
Respondent knowingly deceived his clients (Bar's Brief at 20)	No cite	The Referee specifically found that Respondent did not have an intent to deceive the clients. R. at ¶ 34.
Respondent acceded to DuPont's demand only when "greed overcame his initial resistance." (Bar's Brief at 19)	No cite	The Referee found that Respondent agreed to DuPont's demand when the Court Appointed Special Master/Mediator made it clear that there would be no settlement for the clients unless the Firm agreed to enter into an engagement agreement that night. R. at ¶ 14.

Statement in Bar's Brief	Citation in Bar's Brief	What citation states/The Record
The Referee found against the Respondent both at trial and in ruling on the Motions for Summary Judgment on the issue of whether Respondent's conduct amounted to extrinsic fraud (Bar's Brief at 12)	No cite	The Referee issued a simple order denying the motion for summary judgment, stating there were issues of fact. Later, during the trial, the Referee stated that he believed the claims raised in the Second Complaint had to be identical to the facts/claims in the First Complaint for the Second Complaint to constitute an impermissible collateral attack. Tr. at VII at 822-24. The Referee never indicated that he denied the motions for summary judgment because of extrinsic fraud.
Respondent engaged in a cover-up that lasted for years (Bar's Brief at 18)	No cite	The Referee found that Respondent's mistaken belief that disclosure of the Engagement Agreement to anyone, including the clients, would have caused the forfeiture of his clients' hold back money, shows the lack of an intent to deceive. R. at ¶ 34. Additionally, the Referee found that there was no evidence that the Respondent went to the meeting in Inverness with a plan designed to avoid the disclosure of the Engagement Agreement. R. at ¶ 45.
Ms. Fowler did not suspect the existence of the engagement agreement (Bar's Brief at 14)	No cite	Ms. Fowler testified that before the Bar entered into the Consent Judgment she was told by the lawyer representing a Benlate client that there was some agreement between the Firm and DuPont but that he could not find it. Tr. Vol. III. at 367.

Statement in Bar's Brief	Citation in Bar's Brief	What citation states/The Record
Respondent did not disclose the Engagement Agreement because neither Ms. Fowler or Ms. Haag asked to see that document (Bar's Brief at 3)	Tr. at 290	The transcript at 290 reflects that the engagement agreement was not disclosed to The Bar during the meeting in Inverness, but has no discussion of the reasons why the agreement was not disclosed. Based on evidence in the record, the Referee found that the engagement agreement was not relevant to the topics that were discussed during the meeting in Inverness, i.e. aggregate settlement, and it was not relevant to Mr. Beasley's complaint against Respondent. *See* R. at ¶¶ 41, 43- 44.
Respondent and his counsel were invited to bring to the meeting in Inverness any relevant documents *they felt the Bar should be aware of* (Bar's Brief at 3)	Tr. at 309	The transcript at 309 does not contain a discussion of this issue. Pages 307-308, Ms. Fowler (Bar counsel) testified that the letter the Bar sent to Respondent prior to the meeting in Inverness invited Respondent to bring any documents *he wished The Bar to review.*

REPLY ARGUMENT TO THE BAR'S ANSWER BRIEF

I. THE BAR DOES NOT ADDRESS RESPONDENT'S ARGUMENT THAT THE CLAIMS AGAINST HIM FOR VIOLATING RULE 4-5.6 AND RULE 4-1.8(a) WERE BARRED BY THE DOCTRINE OF RES JUDICATA AND/OR COLLATERAL ESTOPPEL

Respondent argued in his initial brief that the Referee's findings that Respondent

violated Rule 4-5.6(b) and Rule 4-1.8(a) are erroneous because these alleged rule violations are barred by the doctrine of res judicata and/or collateral estoppel. Respondent's Initial Brief at 24-29. Nowhere in the Bar's Brief is this argument addressed. The Bar's failure to address this argument is not surprising.

The Bar concedes that the 1998 Consent Judgment resolved known acts of misconduct. Bar's Brief at p. 8.[5] The evidence shows that prior to entering into the Consent Judgment The Bar knew that the firm had kept interest on a portion of the settlement monies because Mr. Beasley had raised this allegation in his complaint to The Bar. Resp. Trial Ex. 123; *See* Respondent's Initial Brief at 10-11, 28-29 and cites therein.[6] The evidence further shows that The Bar knew prior to entering into the Consent Judgment that the Firm had agreed not to sue DuPont in the future. *See* Respondent's Initial Brief at 11-13, 27. Indeed, three paragraphs in the First

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[5] Notably, The Bar's description of the known acts of misconduct on page 8 of its brief is not supported by a record cite, and, in fact, it is inaccurate and incomplete. *See* Respondent's Brief at 10-13. *See also* Resp. Trial Ex. 123 and Resp. Trial Ex. 96.

[6] The Bar concedes that Beasley's complaint against Respondent raised the issue of the Firm's keeping the interest on the settlement monies. Bar's Brief at 12-13. Additionally, the evidence clearly shows that before entering into the Consent Judgment The Bar saw the Authorization to Settle which contained the language whereby clients consented to the Firm's keeping a portion of the interest. Tr. Vol. III. at 321, 338-39.

Complaint[7] raised the issue of an alleged practice restriction under Rule 4-5.6. *See* Resp. Trial Ex. 96; Tr. Vol III at 349-350. That practice restriction--the Firm's agreeing not to sue DuPont in the future on Benlate matters–is the same practice restriction that is in the Engagement Agreement.[8]

Accordingly, the allegations that the firm kept interest on a portion of the settlement monies and that the firm entered into an illegal practice restriction were known to The Bar prior to The Bar's entering into the Consent Judgment and thus are barred by the doctrines of res judicata and/or collateral estoppel. As such, the Referee's findings that Respondent violated Rule 4-1.8(a) by keeping interest on the clients' settlement monies and Rule 4-5.6(b) by agreeing not to bring future cases

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[7] The Bar filed the First Complaint against Respondent in 1997 after The Bar found probable cause on Mr. Beasley's complaint.

[8] The Bar's serial rapist analogy has no application to the facts here. First, The Bar knew that the Firm had agreed not to sue DuPont in the future on Benlate related matters. *See* Resp. Trial Exs. 96, 133; Tr. Vol. III at 349-50, 370. What The Bar did not know was all of the details concerning that agreement. Thus, using The Bar's analogy, the Bar knew about the "crime" and chose to enter into a consent judgment resolving it prior to learning all the details of how the crime was committed. Second, the record reflects that The Bar was told prior to entering into the Consent Judgment that there was an agreement between the Firm and DuPont. Tr. Vol. III. at 367. Third, in this case, The Bar signed an agreement which is memorialized in a consent judgment where it agreed that any investigation relating to the Firm's 20 Benlate clients was concluded. Although this language may not be typical in consent judgments with The Bar, this language was explicitly agreed to by The Bar with the understanding that the words meant that *any* Bar investigation relating to the 20 Benlate clients was over. Tr. Vol. III at 381-82.

against DuPont are clearly erroneous.

II. THE 1998 CONSENT JUDGMENT RESOLVED ANY BAR INVESTIGATION RELATING TO THE FIRM'S 20 BENLATE CLIENTS

The 1998 Consent Judgment is unique. It contains negotiated language which provides: "This concludes any Bar Investigation into all of the firm's twenty (20) Benlate clients." Resp. Trial. Ex. 71; Resp. Trial Ex. 74. Completely ignoring this negotiated language, The Bar argues that the 1998 Consent Judgment only resolved known claims. Bar's Brief at 8. The Bar cites no factual support for this statement. There is none.

Ms. Fowler–the Bar counsel who negotiated the consent judgment and who agreed to this language-- testified that she understood this language to mean that *any* Bar investigation into the Firm's 20 Benlate clients was over. *See* Tr. Vol. III at 381-82. Ms. Fowler testified that she understood that this settlement, like others, are intended to bring finality to a situation and that this language was included because Respondent wanted finality. Tr. Vol. III at 381-82. Respondent believed that the Consent Judgment resolved all claims related to the 20 Benlate clients. *See* Tr. Vol. X at 1274. Thus, the parties to the Consent Judgment, including The Bar, understood and intended that the 1998 Consent Judgment would preclude any future claims against Respondent relating to the Firm's 20 Benlate clients unless the Consent Judgment were

set aside.

The Florida Bar v. Gentry, 447 So.2d 1342 (Fla. 1984), a case cited by The Bar, does not alter this conclusion. In Gentry, there is no discussion of the manner in which the prior disciplinary proceeding was resolved and there is absolutely no suggestion that it was resolved through the entry of a consent judgment containing language similar to the language in the 1998 Consent Judgment. Additionally, the issue the Court decided in Gentry was not whether the second suit constituted an impermissible attack on a consent judgment. Moreover, the conduct for which Gentry was subsequently prosecuted was conduct that the Court characterized as separate, additional, and continuing misconduct which occurred *after* the first investigation and *after* Gentry was on notice that his handling of the trust funds was improper. In contrast, in this case, all of Respondent's actions relating to the representation of the 20 Benlate clients took place prior to the 1998 Consent Judgment. Thus, Gentry does not address, let alone resolve, Respondent's argument that The Bar's claims relating to the manner in which the Firm settled the 20 Benlate clients' claims are an impermissible collateral attack on the 1998 Consent Judgment.

III. ARRIETA PROVIDES THE ANALYTICAL FRAMEWORK FOR RESOLVING WHETHER THE BAR'S CLAIMS AGAINST RESPONDENT CONSTITUTE AN IMPERMISSIBLE COLLATERAL ATTACK ON THE 1998 CONSENT JUDGMENT

The Bar concedes that this Court's decision in Arrieta-Gimenez v. Arrieta-Negron, 551 So. 2d 1184 (Fla. 1989) provides the analytical framework for resolving whether the Bar's claims against Respondent relating to the manner in which the Firm settled the 20 Benlate clients' claims is an impermissible collateral attack on the 1998 Consent Judgment. *See* Bar's Brief at 11-12. Where The Bar parts company with the Respondent is on the application of Arrietta to the facts in this case. Specifically, The Bar frames the decisive issue as whether Respondent engaged in extrinsic fraud, claiming that this issue has already been decided against Respondent. Bar's Brief at 12. The Bar's position is both procedurally and factually erroneous.

A. The Consent Judgment must stand and it Precludes The Bar's Pursuit of Claims against Respondent

Extrinsic fraud is a fraud that deprives a party of an opportunity to present a case in court. *See* Arietta- Gimenez v. Arrieta-Negron, 551 So. 2d 1184, 1186 (Fla. 1989). It is well settled that a party raises extrinsic fraud when it is seeking to set aside or modify a prior judgment. *See* DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984). In this case, however, The Bar has repeatedly taken the position that it is not seeking to set aside the Consent Judgment. *See e.g.* The Florida Bar's Answer to Respondent's

Motion for Partial Summary Judgment dated October 13, 2003. This position is repeated in the Bar's Brief. Bar's Brief at 8. If The Bar is not seeking to attack the Consent Judgment, then the issue of extrinsic fraud is a red herring[9] and the Consent Judgment stands.

The Consent Judgment contains negotiated language that states that "This concludes any Bar investigation into the firm's twenty (20) Benlate clients." The Bar does not argue that this language--which the parties understood and intended would preclude any future claims against Respondent relating to the Respondent's conduct in settling the 20 Benlate clients' claims-- does not preclude future claims. According to the testimony of the parties involved in negotiating the language, it does. Accordingly, and as set forth in Respondent's Initial Brief at 18-20, The Bar's pursuit of claims against Respondent relating to his conduct in settling the 20 Benlate clients' claims is an impermissible collateral attack on the Consent Judgment.

B. The Referee found that Respondent did not engage in fraudulent conduct of any kind

The Bar's Brief is the first time that The Bar has asserted that Respondent's

[9] Thus, it appears that The Bar has raised the issue of extrinsic fraud in an effort to distinguish Arrieta, which, as set forth in the text, is not distinguishable.

conduct was extrinsic fraud.[10] Accordingly, the Bar's assertion that the Referee determined that Respondent engaged in extrinsic fraud in connection with Respondent's motion for summary judgment and at trial (Bar's Brief at p. 12) is pure fiction. The Referee denied Respondent's motion for summary judgment, stating as the sole reason that there were several disputed issues of material fact. November 14, 2004 Order on Respondent's Motion for Partial Summary Judgment October 10, 2003.

Moreover, following the trial and after hearing all the evidence [11]and judging the credibility of the witnesses[12], the Referee concluded that Respondent had not engaged

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[10] In the proceedings before the Referee, The Bar argued that Respondent deceived The Bar. However, The Bar consistently took the position that it was not seeking to set aside the Consent judgment and thus never argued that Respondent's conduct was extrinsic fraud. By failing to raise the issue of whether Respondent's Conduct was extrinsic fraud before the Referee, The Bar has waived this argument. *See* Jackson v. State, 788 So.2d 373, 374-75 (Fla. 4th DCA 2001)(to preserve an issue for appeal, the precise legal argument must have been presented below), rev. denied, 807 So.2d 654 (2002).

[11] The purported facts which are set forth in the Bar's Brief at 12-14 are a select portion of the evidence that the Referee heard at trial. This evidence was presented because The Bar had alleged that Respondent violated Rules 4-8.1(a), 4-8.1(b) and 4-8.4(c) by failing to disclose the engagement agreement to The Bar during the 1997 Bar investigation. The Referee concluded that The Bar failed to prove a violation of Rule 4-8.1(a), Rule 4-8.1(b) and Rule 4-8.4(c). R. at ¶ 44.

[12] An integral part of the Referee's conclusion that Respondent did not lie to The Bar or engage in fraudulent conduct was the Referee's conclusion that The Bar's witness was not credible and Respondent's witnesses were. R at ¶¶ 42, 45.

in fraudulent conduct of any kind. The Referee found that Ms. Fowler (whose testimony The Bar references on pages 12-14) was not credible. R. at ¶¶ 42, 45. The Referee further found that Respondent fully cooperated in the investigation; that Respondent had a reasonable basis for believing that the engagement agreement was not relevant; and that Respondent did not engage in fraudulent or deceitful conduct. R. at ¶¶ 34, 41, 43-44.

Notwithstanding the Referee's findings, the Bar's Brief asserts that Respondent's conduct amounts to extrinsic fraud. This assertion in the face of the findings by the Referee which are supported by the record and which The Bar has not appealed is disingenuous. The Referee found that Respondent did not engage in fraudulent conduct *of any kind*. Based on this record, Respondent's purported conduct set forth in the Bar's Brief cannot amount to extrinsic fraud. Thus, this Court should reject The Bar's argument that its claims against Respondent are appropriate because Respondent engaged in extrinsic fraud.

The Bar's citation to The Florida Bar v. Spears, 786 So.2d 516 (Fla. 2002) does

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This Court has recognized that the referee is in the unique position to judge the credibility of the witnesses. *See* The Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997)(recognizing that the Referee is in a unique position to judge the credibility of witnesses). The Bar does not challenge this finding.

not change this conclusion. Spears does not discuss the issue of extrinsic fraud.[13] Instead, it appears that the sole reason Spears is cited is an effort to indirectly attack the Referee's findings that Respondent did not engage in fraudulent or deceitful conduct without having to meet the burden of showing that the findings are clearly erroneous or not supported by any evidence in the record. This Court should reject the Bar's back-door effort at relitigating the Referee's findings as these findings are not only supported by evidence in the record and the Referee's determination that Ms.

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[13] Contrary to The Bar's assertion, in Spears this Court did not infer a duty of disclosure under similar circumstances to those in this case. This Court explicitly stated that it was declining to reach the issue of whether Spears intentionally misled The Bar by failing to make restitution. The Florida Bar v. Spears, 786 So.2d at 518, n.4. Moreover, the facts in Spears are not analogous to the facts in this case. Spears engaged in the misconduct that was the subject of the Carey matter (misappropriating client funds) while he was providing The Bar with letters and checks indicating that he had made restitution with regard to misappropriating client funds. Spears, 786 So.2d at 520, n.5. This conduct is akin to a person who commits a robbery while he is on probation for robbery and was indicative that Spears was a repetitive offender. In contrast, Respondent's conduct relating to the engagement agreement occurred prior to the Bar investigation and, in the eight years since the settlement with DuPont, he has conducted himself in an exemplary fashion. R. at p. 38. Additionally, based upon the evidence, the Referee found that Respondent did not mislead The Bar. R. at ¶¶ 39, 43-44. The Referee further found that given the scope of the issues during the investigation Respondent did not have an obligation to disclose the engagement agreement to The Bar. R. at ¶ 44. Specifically, the referee found that Respondent reasonably believed that the primary focus of the investigation was the aggregate settlement claim and the engagement agreement was not relevant to that claim. Id.; *See also* R. at ¶¶ 39, 41. The Bar has not appealed this finding and there is substantial competent evidence in the record to support it.

Fowler was not credible, but also unchallenged by The Bar on appeal. *See* R. at ¶¶ 42, 45

C. Respondent's Conduct could not be deemed extrinsic fraud

Assuming solely for the sake of argument that the Referee had found that Respondent committed a fraud on The Bar by concealing the engagement agreement, that type of fraud would be intrinsic, not extrinsic, fraud. The Bar's reliance on selective quotes from DeClaire v. Yohanan, 453 So.2d 375, 377 (Fla. 1984) for a contrary conclusion is misplaced.

In DeClaire, this Court summarized the circumstances amounting to extrinsic fraud as follows: "extrinsic fraud occurs when a defendant has somehow been prevented from participating in a cause." DeClaire v. Yohanan, 453 So.2d 375, 377 (Fla. 1984). Respondent's purported fraudulent concealment did not deprive The Bar from participating in its 1997 Lawsuit against Respondent and Respondent's purported fraud is not extrinsic fraud.

Once again, Arrietta-Gimenez v. Arrieta-Negron, 551 So. 2d at 1185 (Fla. 1989) is on point and supports this conclusion. In Arrietta, the step-brother concealed from his step-sister the extent of the father's property in Puerto Rico. Arrietta- Gimenez v. Arrieta-Negron, 859 F.2d 1033, 1035 (1st Cir. 1988). Without knowledge of this property, the sister entered into a settlement agreement which on its face stated that she

was settling her claims to the father's estate. Arrietta-Gimenez v. Arrieta-Negron, 672 F. Supp. 46, 47 (D. Puerto Rico 1987). The settlement agreement was memorialized in a consent judgment which was approved by a court. Arrietta- Gimenez , 859 F.2d at 1035. Twenty-three years after the settlement, the sister sued her half-brother for fraud based upon either his having misrepresented the father's property or his having concealed the true extent of the father's property. Id.

In analyzing whether the sister's suit against her step-brother was barred by the consent judgment, this Court analyzed whether the brother's fraud was intrinsic or extrinsic fraud. Arrieta-Gimenez v. Arrieta-Negron, 551 So. 2d at 1185 (Fla. 1989). This Court held that the step-brother's fraud did not amount to extrinsic fraud because the step-sister had full access to discovery, she had the right to reject the settlement until she had fully explored the extent of the step-father's property, and she could have discovered the brother's fraud if she had rejected the settlement and explored the extent of her father's estate. Arrietta- Gimenez, 551 So.2d at 1186. Thus, the brother's fraud did not deprive the sister of her opportunity to present her case in court. Id. at 1186.

Like the sister in Arrietta, The Bar filed suit against Respondent in 1997. In the First Complaint, The Bar raised the issue of the practice restriction under Rule 4-5.6. Tr. Vol. III at 349-50. The Bar had discovery which it could have pursued had it

chosen to do so.[14] Rather than pursue discovery and explore the circumstances surrounding the practice restriction, even after being told by a lawyer representing a Benlate client that there was an agreement between the Firm and DuPont, The Bar decided to make an offer to settle with Respondent. Resp. Tr. Ex. 70. Thus, just like the brother's conduct in Arrietta, Respondent's purported fraud did not deprive The Bar of the opportunity to present its case to the court. Accordingly, even if Respondent had engaged in the purported fraudulent conduct The Bar claims, such conduct would be intrinsic, not extrinsic fraud. Therefore, the 1998 Consent Judgment is not subject to attack.

The 1998 Consent Judgment is unique. It includes language which the parties who negotiated the Consent Judgment understood and intended to mean that the Consent Judgment would resolve not only the Bar investigation that began with Mr. Beasley's complaint, but any investigation related to the Firm's 20 Benlate clients. The parties also understood that the language was included to bring finality to the process. That language is "This concludes any Bar investigation into the firm's twenty (20)

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[14] The Bar's Brief implies that Respondent deceived The Bar into not pursuing discovery. Bar's Brief at 14. Such is not the case and the record cited in The Bar's Brief does not suggest any deceit by Respondent. Additionally, The Bar's decision to put discovery on hold was a voluntary decision by The Bar. Tr. Vol. III at 356 (agreement of everybody that the request for production does not have to be responded to).

Benlate clients." In negotiating the inclusion of this language in the Consent Judgment, both parties understood and intended that The Bar would be precluded from bringing future claims against Respondent relating to the settlement of the 20 Benlate clients' claims. As in Arrietta, ensuring the finality of the Consent Judgment requires the Court to give preclusive effect to this language.

SUMMARY OF THE RESPONSE ARGUMENTS TO THE BAR'S CROSS-PETITION

The Bar's assertion that Respondent should be suspended for two years is predicated on the false premise that Respondent lied to The Bar and intentionally deceived the Firm's clients. After considering all of the evidence and the credibility of the witnesses, the Referee found that Respondent did not lie to The Bar and he did not intentionally deceive his clients. R. at ¶¶ 34, 39, 44, 45. Thus, the issue is not–as The Bar contends-- whether a lawyer that lies and is deceptive should be suspended. Instead, the issue before this Court is whether the Referee's recommendation of a public reprimand, probation, 1000 hours of pro bono service and paying the Bar's costs is a sanction that is supported by existing case law for violations of the Rules Regulating the Florida Bar which do not involve mal intent, a dishonest motive, or client harm and where there are numerous mitigating factors. The answer is yes.

Additionally, the Referee's decision to deny The Bar's request that Respondent be required to forfeit money to the Clients' Security Fund should be affirmed because it has a reasonable basis in this Court's existing case law. It is also well grounded based upon the facts in the case and the permissive language in Rule 3-5.1(h).

RESPONSE ARGUMENTS TO THE BAR'S CROSS-PETITION ARGUMENTS

I. THE REFEREE'S RECOMMENDED SANCTIONS ARE CONSISTENT WITH FLORIDA LAW

The Bar contends that a public reprimand, probation and 1000 hours of pro bono legal services are not appropriate sanctions supported by Florida case law because Respondent lied and engaged in fraudulent conduct. Bar's Brief at 18-20. The Bar's contentions are premised upon findings of fact that the Referee **did not make and that are contrary to the findings he did make** and ignore a Florida Supreme Court Order approving a public reprimand in a factually analogous case. Based upon the findings of fact by the Referee, including the numerous mitigating factors which he found applicable, the sanctions recommended by the Referee are appropriate in this case and consistent with Florida case law and, thus, should be affirmed.

A. The Referee's Findings Relating to Discipline

The Referee found that Respondent is an excellent lawyer and an honest man who made a mistake in 1996 when he acceded to DuPont's demand that The Firm agree not to sue DuPont on future Benlate related matters and thereafter failing to ensure the clients were told about the engagement agreement. R. at p. 38. Respondent recognizes that he made a mistake (R. at pp. 41-42) and The Bar concedes that in 1996, when the Firm was confronted with either agreeing to enter into the engagement agreement or forfeiting substantial settlement offers for its clients, there were no reported decisions addressing whether it was permissible to enter into an engagement agreement to achieve a practice restriction. Bar's Brief at 18. Respondent has suffered professionally (Tr. May 22, 2004 at 174, 177) and he and his family have suffered emotionally and financially for almost eight years as a result of his mistake. R. at p. 39. In fact, Respondent has been so hard on himself that he has suffered physically. Tr. May 22, 2004 at 176.

After listening to the testimony of judges, members of the Florida Bar, community leaders, present and former partners, clients, family members and Respondent, after reading the numerous letters that were submitted and after considering Respondent's conduct during the significant passage of time since the settlement with DuPont, the Referee found numerous mitigating factors. Specifically, the Referee found the absence of a prior disciplinary record, inexperience in handling

settlements of multiple plaintiff mass tort cases, remorse, interim rehabilitation, harm as a result of the unusually long period of time during which Respondent has dealt with various proceedings and publicity arising out of the settlement with DuPont, and his character and an outstanding reputation in the community.[15] R. at p. 42. The Referee concluded that Respondent was not a current risk to the public and that his actions were out of character. R. at p. 42. These mitigating factors significantly outweigh the sole aggravating factor the Referee found applicable: multiple offenses stemming from one event, namely the engagement agreement and his failure to disclose the agreement to the clients. R. at p. 43.[16]

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[15] Additionally, based upon The Florida Bar v. Quinon, 773 So.2d 58 (Fla 2000), the Referee also considered the fact that it is undisputed that Respondent obtained excellent results for the Firm's clients. R. at p. 42. The 1998 Consent Judgment provides in several places that the settlements obtained for the clients were substantial and that the clients were not harmed. R. at pp. 42-43; Resp. Trial Ex. 71. Respondent provided the Referee with the Conditional Guilty Plea and the Order from the Florida Supreme Court in Quinon which sets forth the pertinent facts.

[16] The Referee's findings regarding the presence or absence of mitigating or aggravating factors is a factual determination and presumed correct unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Morse, 784 So.2d 414 (Fla. 2001). These factual findings are supported by substantial competent evidence. In fact, no where in the Bar's Brief does the Bar contend that these findings lack evidentiary support. Accordingly, the Referee's findings regarding the mitigation and aggravating factors should be approved.

Consistent with this Court's approval of a public reprimand in The Florida Bar v. Mandelkorn, 874 So.2d 1193 (Table)(2004)[17] and with the Court's decision in The Florida Bar v. King, 174 So.2d 398 (Fla. 1965), the Referee recommended that Respondent (i) receive a public reprimanded, (ii) be put on probation for 4 years during which time he must perform 1000 hours of pro bono legal work and (iii) pay The Bar's costs.

Acknowledging that a Referee's recommended sanction should not be second guessed so long as it has a reasonable basis in existing case law,[18] the Bar proceeds to ignore the Referee's findings and The Florida Bar v. Mandelkorn and argue that Respondent's conduct warrants a two year suspension based upon alleged conduct for which Respondent was exonerated.[19] Specifically, The Bar premises its request

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[17] During closing argument, Respondent provided the Referee with a copy of this Court's Order in Mandelkorn (Tr. May 22, 2004 at 218). A copy of that order is attached hereto as Exhibit 1.

[18] The Bar's Brief suggests that if a recommended sanction is consistent with the case law, but the application of existing case law to a set of facts demonstrates that the recommended discipline is inappropriate, this Court may reject the Referee's recommendation, citing The Florida Bar v. Lecznar, 690 So.2d 1284. Bar's Brief at 17. Lecznar does not support this proposition. In Lecznar, the sanction imposed was in conflict with prior case law. Lecznar, 690 at 1288.

[19] In its Recommendation of Discipline which it filed with the Referee, The Bar also requested a lengthy suspension. Notwithstanding its pleading, during closing argument The Bar suggested that th Referee consider disbarment as an appropriate sanction. Tr. May 22, 2004 at 204. The Bar also failed to reveal to the Court that the sanction The Bar was requesting was significantly more severe than the sanction

for a two year suspension on the assertion that Respondent lied, (Bar's Brief at 18-19); that Respondent engaged in a pattern of intentional deceit and lying (Bar's Brief at 18); that Respondent showed a disdain for the disciplinary process (Bar's Brief at 19); that Respondent acceded to DuPont's demand based on greed (Bar's Brief at 19); and that Respondent knowingly deceived his clients and The Bar (Bar's Brief at 20). None of these assertions are followed by a record cite, and for good reason. There are none. As pointed out above, these bold assertions are contrary to the Referee's findings and the record. As a result, The Bar has failed to offer a factual basis supported by the Referee's findings for suspending Respondent for two years.

B. The Bar Does not Cite any authority that Justifies a Suspension, let alone a two year suspension

None of the cases cited in the Bar's Brief support suspending Respondent for two years. The Florida Bar v. Budnitz, 690 So. 2d 1239 (Fla. 1997); The Florida Bar v. Langford, 126 So.2d 538 (Fla. 1961); and The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983) are all cases in which a Respondent was disciplined for lying. Similarly, in In re Hager, 812 A.2d 904 (D.C. 2002), another case cited by The Bar, the misconduct for which respondent was sanctioned by a one year suspension included

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recently approved by The Florida Supreme Court in Florida Bar v. Mandelkorn, a decision which The Bar admitted is was aware of. Tr. May 22, 2004 at 246.

engaging in conduct involving fraud, dishonesty and deceit.[20] Likewise, in In re Brandt, 10 P. 3d 906 (Or. 2000), the lawyers' misconduct for which they were suspended for 12 and 13 months respectively included misrepresentations to the client and The Oregon Bar.[21] In fact, the only portion of the In re Brandt decision which addresses what sanction would be imposed if the only conduct involved were agreeing to the practice restriction is consistent with the Referee's recommendation in this case. Specifically, in a concurring and dissenting opinion, Justice Kulongoski's stated that the appropriate sanction for conduct involving a practice restriction is a reprimand in light of the fact that the issue of whether an indirect practice restriction is prohibited had not been litigated. Id. at 927-28.

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[20] In re Hager is further distinguishable from this case because the it was the lawyer's desire for attorney's fees that resulted in the opposing party insisting that the clients not be told about the terms of the settlement. In re Hager, 812 A.2d 904, 910 (D.C. 2002). Ultimately, the court attributed all of the misconduct to respondent's according a higher priority to the collection of his fees than to serving his clients. In re Hager, 812 A.2d at 921. In contrast, in this case, the Referee found that Respondent agreed to DuPont's demand that the Firm enter into an engagement agreement only after the mediator told him that if he did not there would be no settlement offers for his clients. R. at ¶ 14. Additionally, the fee paid to the Firm pursuant to the engagement agreement was not money that would have otherwise gone to the client (R. at ¶ 16) and thus the engagement fee was not at the clients' expense.

[21] Further, in that case, the Oregon Supreme Court found many aggravating factors and only one mitigating factor. The exact opposite is true in this case. The Referee found only one aggravating factor, multiple rule violations and numerous mitigating factors. R. at pp. 42-43.

Likewise, none of the Florida Standards for Imposing Lawyer Sanctions which are cited in The Bar's Brief justify a suspension in this case. To begin with, The Bar's argument with respect to Standard 4.62 is premised upon the assertion that Respondent intentionally deceived his clients, an assertion that is contrary to the findings by the Referee. Additionally, the Bar's argument with respect to Standard 4.32 requires injury or potential injury to the client. The record reflects that the engagement agreement actually benefitted the clients. *See* Tr. Vol. X at 1226, 1229; R. at pp. 42-43. Further, even though Respondent's role did not include communicating the terms of the settlement to the clients (R. at ¶ 3), the sole evidence in the record reflects that the amount of the settlement offers were so substantial that the engagement agreement did not impact the advice that the clients were given with respect to whether to accept the settlement offers. *See* Tr. at 1216; Resp. Trial Ex. 71. Finally, the Standards set forth guidelines for recommending a sanction in the absence of aggravating or mitigating circumstances. As set forth herein and in the Referee's Report, the mitigating factors were numerous and justified imposing a public reprimand, probation, 1000 hours of pro bono service, and not suspension.

C. The Recommended Sanction is Consistent with The Florida Bar v. Mandelkorn

Not only are the cases and the arguments made in the Bar's Brief inapplicable to this case, but also The Bar chose to completely ignore this Court's approval of a

public reprimand in The Florida Bar v. Mandelkorn, 874 So.2d 1193 (Table)(2004), a factually analogous, although arguably more egregious, case. More specifically, in connection with negotiating a settlement of numerous claims against BellSouth, the Plaintiffs' lawyers suggested a practice restriction as part of an aggregate settlement. Adams v. BellSouth Communications, Inc., 2001 WL 34032759, *3 (S.D. Fla. 2001). BellSouth's lawyers seized on the concept and aggressively negotiated for its inclusion in an aggregate settlement. Id. Thereafter, BellSouth's counsel negotiated a settlement, insisting that the restriction was a necessary condition to the settlement. Id. at *4. When the Plaintiffs' lawyers asked to be compensated for the condition, BellSouth's lawyers said take it out of the gross amount of the clients' settlement. Adams v. BellSouth Communications, Inc., 2001 WL 34032759 at *4. The Court noted that because the lawyers were taking the consulting fee from the monies BellSouth had offered to the clients, the consulting arrangement pitted Plaintiffs' counsel in a direct conflict to their clients. Id. at *8. Based upon the evidence before him, the Magistrate Judge found that the following Rules had been violated by the lawyers involved: Rule 4-5.6, Rule 4-1.7, Rule 4-1.4, Rule 4-8.4(a), Rule 4-8.4(b) and Rule 4-5.5. Id. at *2.

One of the Plaintiffs' lawyers that was involved in the settlement in BellSouth was Barry Mandelkorn. The Bar filed disciplinary cases against him. These cases

were resolved through a conditional guilty plea and consent judgment, ordering a public reprimand. On May 6, 2004, the Florida Supreme Court issued an Order approving the conditional guilty plea and consent judgment and reprimanding Mr. Mandelkorn. The Florida Bar v. Mandelkorn, 874 So.2d 1193 (Table)(May 2004).

In contrast to the Mandelkorn situation, the money paid to the Firm pursuant to the engagement agreement in this case was not money that would have otherwise gone to the clients and there is no evidence to the contrary. The Referee found that the only evidence presented was that DuPont considered the money paid to the Firm and the money paid to the clients two separate pots of money. R. at ¶ 16. Moreover, the only evidence is that the engagement agreement resulted in the Firm's 20 Benlate clients getting significantly more money than they would have been able to get if the cases had not settled. *See* Tr. Vol. VIII at 882-83; Vol. X at 1226, 1229.

Based upon the Florida Supreme Court's approval of a public reprimand for Mr. Mandelkorn, and in light of the facts in the respective cases and the Referee's findings of fact, the Referee's recommended sanctions in this case – a public reprimand, probation and 1000 hours of pro bono legal work – certainly has a reasonable basis in existing Florida disciplinary case law.

D. A suspension would not serve any legitimate purpose

This Court has long recognized that "the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently deter other attorneys from similar misconduct." The Florida Bar v. Brown, 790 So.2d 1081, 1089 (Fla. 2001). In this case, the Referee found that suspending Respondent would harm clients and the public and thus not be fair to society. R. at p. 43, n.4. The Referee further found that suspending Respondent would not be fair to him as he has been extremely hard on himself already, he has suffered physically, emotionally and financially, and he has rehabilitated himself. *See* R. at pp. 42-43.

This Court has recognized that where the passage of time and the testimony of witnesses make it clear that the lawyer's conduct was out of character and that the lawyer has evidenced a sense of ethics and integrity but for the incident in question, a public reprimand is appropriate instead of disbarment. The Florida Bar v. King, 174 So.2d 398 (Fla. 1965).[22] This Court's rationale in King is applicable here, particularly given that unlike King Respondent did not engage in any fraudulent or deceitful conduct. But for the settlement with DuPont, Respondent has evidenced a sense of ethics and integrity. R. at pp. 38, 45. Such testimony was offered by many prominent and credible members of the community, including a sitting United States District

[22] King was involved in a bribery scheme to try to win public office, in knowingly permitting perjured testimony to be given, and in testifying falsely before the Grand Jury. King, 174 So.2d at 398, 402.

Judge and a sitting State Court Judge. Tr. May 21, 2004 at 5-16; Tr. May 22, 2004 at 118-121; R. at p. 40. Additionally, clients and members of the Florida Bar testified how Respondent works tirelessly for his clients, not allowing an inability to pay for his services interfere with his dedication to the clients or his quality of work. Tr. May 21, 2004 at 51, 67; Tr. May 22, 2004 at 143-44, 147, 152. Furthermore, the Referee found that Respondent has shown interim rehabilitation, that he does not pose a current risk to the public and that suspending Respondent would serve no purpose. R. at pp. 42, 46. In conformity with Mandelkorn and King, this Court should affirm the Referee's recommendation. A public reprimand, along with probation and 1000 hours of pro bono legal work is consistent with Florida case law.

II. THE REFEREE'S DENIAL OF THE BAR'S REQUEST THAT RESPONDENT FORFEIT $1.6 MILLION IS CONSISTENT WITH FLORIDA CASE LAW[23]

Consistent with the opinions of this Court which recognize that a fine is not a permissible sanction under the Rules Regulating the Florida Bar and after exercising his discretion under Rule 3-5.1(h), the Referee declined to recommend that

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[23] In its Amended Cross-Petition, The Bar characterizes the issue as the Referee's failing to recommend that Respondent make "***restitution"*** to the Clients' Security Fund. However, the Referee correctly concluded that this is not a case where restitution fits. The fee the Firm received pursuant to the Engagement Agreement was not money that would have otherwise gone to the clients. R. at ¶ 16. Additionally, no money has been paid out of the Clients' Security Fund to the 20 Benlate Clients. R. at p. 46.

Respondent be required to pay $1.6 million to the Clients' Security Fund. R. at pp. 46-47. The Referee declined to recommend the forfeiture of $1.6 million for two separate and independent reasons: (1) the Referee concluded that since the payment was not restitution and it was not being made to repay money that had been paid out of the Clients' Security Fund, it was a fine; and (2) the Referee concluded that under the circumstances in the case, including Respondent's financial condition, recommending a payment of $1.6 million to the Clients' Security Fund would be punitive and not appropriate. R. at pp. 46-47. Because the Referee's recommendation is consistent with Florida law, it should be affirmed.

A. Rule 3-5.1(h) does not require the forfeiture of every fee that violates the Rules Regulating the Florida Bar

Neither the language nor the history of Rule 3-5.1(h) require the forfeiture of every fee that violates the Rules Regulating the Florida Bar. Under Florida law, forfeiture is a harsh remedy that is not favored in law or equity. Department of Law Enforcement v. Real Property, 588 So.2d 957, 961 (Fla. 1991). Accordingly, forfeiture statutes must be strictly construed. Id.

Rule 3-5.1(h) states: "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 fees or any part thereof. ...a fee otherwise prohibited by the

Rules regulating the Florida Bar *may be* ordered forfeited to The Florida Bar Clients' Security Fund. ..." May is permissive. Thus, there is nothing in Rule 3-5.1(h) that required the Referee to order Respondent to pay $1.6 million to the Clients' Security Fund. Indeed, forfeiture of fees is not listed as a sanction in the Standards for Imposing Lawyer Sanctions under Standard 2. Instead, it is only listed as a sanction under Standard 13 –Standards for Imposing Lawyer Sanctions in Advertising and Solicitation Rule Violations.[24] Accordingly, Rule 3-5.1(h) was not intended to apply to all fees obtained in violation of the Rules Regulating the Florida Bar.

B. Fines are Not a Permissible Sanction

There is no authority to impose a fine as a term of attorney discipline. *See* Rule 3-5.1 (fines are not among the list of sanctions); *see also* The Florida Bar v. Greene, 589 So.2d 281 (Fla. 1991)(Bar conceded that there was no authority to impose a fine); The Florida Bar v. Frederick, 756 So. 2d 79, 89 (Fla. 2000). Consistent with this position, even after the adoption of Rule 3-5.1(h), this Court recognized that the Rules Regulating the Florida Bar do not include fines among the list of permissible sanctions.

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[24] This is consistent with the history of Rule 3-5.1(h), which reflects that Rule 3-5.1(h) was adopted as part of the amendments to the Rules Regulating the Florida Bar pertaining to advertising issues. *See* The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar–Advertising Issues, 571 So.2d 451, 455 (Fla. 1990)("The Bar submits that the proposed rules were developed to address problems found and reported by its Commission on Advertising and Solicitation.").

The Florida Bar v. Frederick, 756 So. 2d 79, 89 (Fla. 2000). The fact that Frederick did not involve a prohibited fee or Rule 3-5.1(h) does not alter this conclusion. At the time the Court analyzed the Rules Regulating the Florida Bar for permissible sanctions, Rule 3-5.1(h) had been adopted and was part of Rules Regulating the Florida Bar. Thus, notwithstanding Rule 3-5.1(h), The Rules Regulating the Florida Bar do not include fines among the list of permissible sanctions.

The Referee's determination that requiring the payment of the money to the Clients' Security Fund was an impermissible fine because it was not restitution or repayment to the Clients' Security Fund is analytically correct. The Clients' Security Fund exists to compensate clients who have been harmed by their lawyer's conduct. Rule 7-1.1. This Fund is funded with a portion of the annual membership fees paid by members of the Florida Bar. Rule 7-3.2. The Rules Regulating the Clients' Security Fund contemplate that in those instances in which a client has been paid from the Fund, the client and The Bar will enter into an assignment/subrogation agreement so that The Bar will be entitled to be reimbursed for amounts paid out of the fund to the client. *See* Rule 7-2.5. Consistent with this regulatory scheme, this Court has recognized that the Court cannot require a payment from an attorney that is not for restitution or the payment of costs if no payment has been made by the Fund. The Florida Bar v. Rogowski, 399 So.2d 1390 (Fla. 1981). Although Rogowski was

decided before Rule 3-5.1(h) was adopted, it was cited favorably by this Court in The Florida Bar v. Frederick, 756 So. 2d 79, 89 (Fla. 2000), after the adoption of Rule 3-5.1(h).[25]

In this case, the Referee found that the money the Firm received pursuant to the Engagement Agreement was not money that would have otherwise gone to the clients. R. at ¶ 16. Thus, this is not an instance in which a lawyer misappropriated, embezzled or wrongfully took money from a client. Accordingly, this is not an instance involving conduct for which the clients could seek payment from the Clients' Security Fund. *See* Rule 7-1.4(f).

C. The cases cited by The Bar do not support the conclusion that fines are a permissible sanction

The Bar cites a handful of cases in which this Court required a lawyer to repay monies to a client where the Court determined the fee was excessive. *See* Bar's Brief

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[25] Interpreting Rule 3-5.1(h) in this manner is also consistent with the constitutional limitations that would otherwise apply if Rule 3-5.1(h) were construed as giving the Court the power to order forfeiture for any fee that was obtained in violation of the Rules regulating the Florida Bar. More specifically, this Court has recognized that property rights are among the basic rights that are protected by the Florida Constitution and that due process requires that a final determination of forfeiture be made by a jury unless the right to the jury has been waived. Department of Law Enforcement v. Real Property 588 So.2d at 964, 968 (Fla. 1991). Moreover, given that the property that The Bar is requesting Respondent forfeit is cash –which to the extent he has any–is joint property owned by his wife, The Bar has not afforded his wife any due process to which she would be entitled.

at 22-23. There has been no determination that the fee was excessive. More importantly, these cases do not support the proposition that the Court has the authority to impose a fine because each of the cases involves restitution. The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975)(respondent was ordered to reimburse the client); The Florida Bar v. Forrester, 656 So.2d 1273 (Fla. 1995)(respondent ordered to repay estate fees he took from the estate and to which he was not entitled); The Florida Bar v. Robbins, 528 So.2d 900 (Fla. 1988)(requiring restitution to former client); The Florida Bar v. Thomas, 698 So.2d 530 (Fla. 1997)(required to make restitution to client).[26]

D. The Referee properly exercised his discretion in declining to recommend that Respondent pay $1.6 million to the Clients' Security Fund after concluding that such a sanction would be punitive

As set forth above in II.A., Rule 3-5.1(h) provides the Referee with the ability to use his/her discretion in deciding whether to sanction a lawyer by requiring that a fee be forfeited. Assuming that such a sanction is permissible under the Rules–which

[26] Thus, these cases are inapplicable to the facts in this case. In this case, the concept of restitution does not apply. Respondent did not take any money from the 20 Benlate clients or any money that would have otherwise gone to the 20 Benlate clients.

Respondent does not--after hearing all of the evidence[27] and after considering Respondent's financial condition, the Referee found that requiring Respondent to pay $1.6 million to the Clients' Security Fund would be punitive and was not appropriate. This is a factual determination which has a presumption of correctness and which should not be set aside absent proof that there is no evidence in the record to support the finding or it is clearly contrary to the evidence. The Florida Bar v. Morse, 784 So.2d 414 (Fla. 2001). There is ample evidence in the record to support this finding. The evidence revealed that Respondent did not take this money from his clients (R. at ¶ 16); that Respondent has settled with the 19 Benlate clients that sued him (R. at p. 46); and that Respondent's financial condition is worse than before the Firm took on the representation of the 20 Benlate clients, in no small part because of the adverse economic impact that the lawsuits and Bar proceedings have had on him and his practice (Tr. May 22 at 195-196; 198-199).[28] Having found that sanctioning

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[27] This evidence included that the money was not taken from the clients, that the Respondent has settled with all 19 of the 20 Benlate Clients that sued him, and that there was no evidence money had been paid out of the Clients' Security Fund to the 20 Benlate clients

[28] Although The Bar has not argued that the Referee erred by considering the Respondent's financial condition, in its reply we anticipate that The Bar will cite The Florida Bar v. Lechtner, 666 So.2d 892 (Fla. 1996) and argue that Respondent's financial condition is irrelevant. The rule pertaining to the assessment of costs discussed in Lechtner is vastly different than Rule 3-5.1(h) as the rule pertaining to costs sets forth parameters that the courts are to follow in determining whether to

Respondent by requiring him to forfeit $1.6 million was punitive and not appropriate, the Referee correctly exercised his discretion in denying The Bar's request that Respondent forfeit $1.6 million. Accordingly, based on this additional ground, the Referee's recommendation that Respondent not be required to pay $1.6 million to the Clients' Security Fund should be affirmed.

E. The equities do not warrant this Court's ignoring its own decisions

The overriding theme of the Bar's argument is that the equities "cry out" for Respondent being required to forfeit money to the Clients' Security Fund. The Bar's argument is factually and legally flawed. As set forth previously, there was no lying or deception. Additionally, The Bar's argument ignores the economic reality that Respondent and his Firm lost money by agreeing to enter into the Engagement Agreement. At trial, evidence was offered of just one case which would have resulted in a fee for the Firm in excess of the money paid to the Firm under the Engagement Agreement which the Firm gave up to secure the significant settlement offers for the 20 Benlate clients. *See* Tr. Vol. VIII at 934-35. Finally, the money did not come from the clients. Indeed, the clients actually benefitted from Respondents' conduct. In contrast, as a result of the civil proceedings, Bar proceedings, and press related to the settlement of the 20 Benlate clients' claims, Respondent is worse off both

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assess costs. No such parameters exist for Rule 3-5.1(h).

economically and professionally than he was in 1996 before the settlement with DuPont. Tr. May 22, 2004 at 177-180. These facts do not cry out for the imposition of an impermissible fine on Respondent.

Moreover, it is well recognized that the Referee's recommendation regarding discipline should not be second guessed if it has a reasonable basis in existing case law. The Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997). Here, there is law–discussed above-- which this Court would have to ignore --to sanction Respondent by requiring him to pay $1.6 million to the Clients' Security Fund. Accordingly, this is not a case in which the Referee's recommendation that Respondent not be required to pay $1.6 million to the Clients' Security Fund should be set aside.

III. THERE IS AN INCONSISTENCY BETWEEN THE RULES REGULATING THE FLORIDA BAR AND THE STANDARDS FOR IMPOSING LAWYER SANCTIONS WITH RESPECT TO THE DURATION OF PROBATION

The Standards for Imposing Lawyer Sanctions explain probation as a sanction that allows a lawyer to practice law under specified conditions. Standard 2.7. In contrast to suspension, which explicitly states that a suspension shall not be ordered for more than 3 years, Standard 2.7 contains no discussion of any time limits

applicable to probation.[29] The Referee recommended that Respondent be placed on probation for 4 years and that he perform 1000 hours of pro bono legal services under Father Patrick O'Neil's direction. Father Pat founded Saint Thomas Law School. Tr. May 21, 2004 at 22. He holds three masters degrees, two doctorates and has attended both medical school and law school. Id. He is extremely active in the community and a even a Federal Judge has assigned people to him for supervision. Tr. May 21, 2004 at 31.

The Bar argues that the Referee's recommendation of a four year probation which is not under the supervision of a member of the Florida Bar and which fails to include a reporting system is contrary to Rule 3-5.1(c). There is nothing in Rule 3-5.1(c) which requires that a lawyer who is on probation be supervised by a member of the Florida Bar [30]or that the probation include regular reporting. Rule 3-5.1(c) states that the conditions of probation shall be stated in the judgment and that those

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[29] Given that the Referee was directed by The Bar to The Standards for Imposing Lawyer Sanctions during closing argument, the Referee's failure to limit the probation to three years is understandable. After the Referee's Report was received, The Bar chose not to give the Referee an opportunity to correct his Order if it thought it was incorrect.

[30] In fact, this Court has approved a probation following reinstatement that does not include supervision by a member of the Florida Bar. The Florida Bar v. Dunagan, 775 So.2d 959 (Fla. 2000).

conditions *may* include the conditions that are listed in the Rule. "May" is a permissive term.[31]

As to the term of the probation, assuming that Rule 3-5.1(c) trumps Standard 2.7, then this Court has the power to modify the term of the probation to three years. *See e.g.*, The Florida Bar v. Wells, 602 So.2d 1236 (Fla. 1992)(modifying terms of probation from two years to three years). This Court may also impose any conditions on the probation which it believes are appropriate.

CONCLUSION

The 1998 Consent Judgment cannot be collaterally attacked. Yet this will be the result if the Referee's findings that Respondent violated certain Rules Regulating the Florida Bar are permitted to stand. It is beyond dispute that the Bar was well aware prior to entering into the Consent Judgment that the Firm had kept interest on the clients' settlement monies and that the Firm had agreed not to sue DuPont in the future. Accordingly, the Consent Judgment clearly barred the claims against Respondent for violating Rule 4-1.8(a) and Rule 4-5.6(b). Additionally, the terms of the 1998 Consent Judgment are unique and were negotiated and agreed to by The Bar. Under the terms of that Consent Judgment, The Bar agreed that *any* investigation

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[31] Moreover, contrary to The Bar's argument, the recommendation includes a reporting system: Respondent's pro bono work will be done under the direction of Father Pat.

relating to Respondent's conduct involving the twenty Benlate clients was being resolved. The record reflects that the language was negotiated and specifically included in the Consent Judgment to bring finality to any dipute between The Bar and Respondent relating to Respondent's conduct involving the 20 Benlate clients. Upholding the finality of this judgment requires the Court to reverse the Referee's findings that Respondent violated the following Rules Regulating the Florida Bar: Rules 4-1.4(a) and (b), 4-1.5(a), 4-1.7(a), 4-1.7(b), 4-1.8(a), 4-1.9(a), 4-1.16(a), 4-5.6(b), 4-8.4(a), and 4-5.1(c).

If notwithstanding the language in the Consent Judgment the Court affirms the Referee's findings regarding guilt, then consistent with other decisions of this Court, this Court should affirm the Referee's recommendations regarding sanctions, modifying the term of the probation to three years if the Court concludes that such modification is necessary.

Dated: December 6, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail on December 6, 2004, to:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

_____
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