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 REPLY BRIEF ON CROSS APPEAL

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PRELIMINARY STATEMENT BY COUNSEL

Respondent's counsel has correctly pointed out that undersigned Bar Counsel mistakenly argued in The Florida Bar's Answer Brief and Initial Brief on Cross Appeal that Respondent lied. This arose out of the fact that undersigned Bar Counsel, who was not trial counsel, held the good faith but misguided belief that the Bar's evidence at trial established the fact that Respondent had lied. As Respondent's counsel has demonstrated, the Referee was not persuaded by the Bar's evidence on that issue, and consequently made no such finding. Undersigned counsel apologizes to the Court, Respondent and Respondent's Counsel for this mistaken representation and accepts full and sole responsibility for this error.

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SUMMARY OF ARGUMENT

I

The consent judgment approved by the Court in The Florida Bar vs. Mandelkorn, 874 So. 2d 1193 (Fla. 2004) does not provide *stare decisis* precedent in this case.

II

Allowing Respondent to retain and enjoy the prohibited fee realized in this case would amount to unjust enrichment and an improper signal to the public as well as the bar.

ARGUMENT

I

MANDELKORN DOES NOT PROVIDE A PRECEDENT REGARDING THE LEVEL OF SANCTION THAT SHOULD BE IMPOSED UPON RESPONDENT

Respondent advances this Court's approval of a public reprimand in The Florida Bar vs. Mandelkorn, 874 So. 2d 1193 (Fla. 2004) as a rationale to support the Referee's recommendation of a public reprimand in this case, but Respondent's reliance on that disposition is misplaced. Mandelkorn is not a published opinion, and is merely reported in Table form, since it was a negotiated disposition of a contested matter. It was never tested in the crucible of trial or appeal, and therefore has no *stare decisis* value. It is akin to a plea of convenience in criminal proceedings. Respondent's counsel introduced the Court's May 6, 2004 order in Mandelkorn only during closing argument at trial of this cause, it was never placed in evidence in this cause, and therefore is not a part of the record before the Court. None of the underlying facts of the Mandelkorn consent judgment were received in evidence, and it should not be a part of the Court's determination of this case for that reason. Further, a reading of Judge Middlebrooks' order published in Adams vs. BellSouth Telecommunications, Inc., 2001 WL 34032759 (S. D. Fla., 2001) likewise establishes that the sanctions imposed by the District Judge upon Mr. Mandelkorn in that proceeding were also a part of a consent judgment (Id at

*10), and that the facts forming the basis of Mandelkorn's misconduct were never litigated in the Federal Court proceeding.

Additionally, Mandelkorn had previously been sanctioned by the U. S. District Court for the same misconduct that was the subject of his Bar discipline consent judgment, to the extent that he was required to make a personal $10,000 contribution to the University of Miami School of Law, take a minimum of 20 hours of CLE in ethics, re-take and pass the ethics portion of the Bar Exam, perform 100 hours of pro bono service, agree to be supervised by a senior partner in all federal court litigation for a period of two years and publicly apologize to his former clients. Adams vs. Bell South Telecommunications, Inc., 2000 WL 33941851, *1, (S.D Fla. 2000). Further, his law firm, Ruden, McCloskey, agreed to make available a fund of $250,000 for distribution to the firm's former clients. Id, *2. It is important to note that these sanctions were a part of a consent judgment adopted by the District Judge in Adams vs. BellSouth Telecommunications, Inc., 2001 WL 34032759 (S. D. Fla., 2001). None of the reported orders contains a description of Mandelkorn's degree of proportional complicity in the misconduct involved, as compared with others that were also sanctioned, although it appears that attorney Norman Ganz was the primary instigator of the restriction on the right to practice. Mandelkorn did write two letters to BellSouth about the matter and, for that reason, in retrospect, The Florida Bar's decision to enter into the consent judgment in the Mandelkorn case was a mistake. The bar submits that such mistakes should not be

repeated.

II

RESPONDENT SHOULD NOT BE ALLOWED TO BE UNJUSTLY ENRICHED BY RETAINING THE PROHIBITED FEE

Respondent argues that the provisions of R. Regulating Fla. Bar 3-5.1(h), which was adopted in 1990 as a part of The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar - Advertising Issues, 571 So 2d 451 (Fla. 1990) should be limited to forfeiture of prohibited fees that have been realized as a result of advertising rule violations, without reference to any rationale supporting such a limitation, other than the fact that the amendment was a part of the advertising rule amendment package. Why should the forfeiture of prohibited fees be limited to such a narrow sector, when the principle embraced by the rule amendment should apply to any form of ill-gotten fee, regardless of its source? There is nothing in the language of the rule itself that so limits its application, but respondent argues that such a limitation should be implicitly read into the rule because of the method of its adoption.

As has been noted above, the U.S. District Judge in Adams (*supra*) found no difficulty in endorsing the concept of disgorgement embodied in the consent judgment agreed to by Mandelkorn and Ruden, McCloskey, which involved disgorgement of prohibited fees amounting to $260,000, albeit the vehicle employed was different than

contemplated by rule 3-5.1(h).

The District of Columbia court addressed the moral implications of retention of prohibited fees in In Re Hager, 812 A 2d 904 (D.C. 2002). That court acknowledged with approval an issue raised by *amicus curiae*

> *Amicus curiae* Public Citizen argues, while supporting a one-year suspension, that suspension by itself is insufficient "to maintain the integrity of the profession [,] ... protect the public and the courts, [and] ... deter other attorneys from engaging in similar misconduct." (Citation omitted). It asks what message would be sent if this court disciplined respondent but allowed him to profit from his unethical behavior. Public Citizen therefore urges that respondent be required to disgorge his fee. Id 922.

This is exactly the dilemma facing this Court if it permits Respondent to retain the acknowledged prohibited fee as Respondent urges. The message sent to the public and to Respondent's brethren at the bar would be that the price of retention of a prohibited fee in excess of one million dollars is a public reprimand.

The District of Columbia court went on to correct the erroneous determination by the District's Board on Professional Responsibility (Board), to the effect that disgorgement of the prohibited fee was not a permissible sanction.

> We think the Board did not take a broad enough view of the full range of possible disciplinary actions under our rules. Public Citizen argues that disgorgement should be imposed as a "reasonable condition" of reinstatement under D.C. Bar R. XI, § 3(b). **We are inclined to agree.** This court has previously relied upon Section 3(b)'s open-endedness to impose special reinstatement conditions that are well-matched to particular misconduct. Id, 922. (Emphasis added).

That court then engaged in a discussion of the moral implications of allowing the

retention of the prohibited fee in the context of unjust enrichment.

> Even if restitution as such may not be ordered here, the objective of restitution, preventing unjust enrichment, (Citation omitted), underlies disgorgement as well. (Citation omitted) Unjust enrichment is no more acceptable simply because a potential defendant and not the clients themselves paid respondent. Furthermore, "[i]t is the general rule ... that where an attorney violates his or her ethical duties to the client, the attorney is not entitled to a fee for his or her services (Citation omitted) It is not a great extension to say that an attorney is not entitled to retain a fee from an opposing party if that payment was the product of multiple ethics violations. Id, 923.

The District of Columbia court was confronted with the quandary of, while it approved of disgorgement of the prohibited fee, it did not have available the vehicle that Florida has, *i.e.*, R. Regulating Fla. Bar 3-5.1(h), which provides for forfeiture of the fee. Instead, the District court was forced to rely upon disgorgement as a condition of reinstatement. This Court faces no such dilemma if it is willing to extend the application of rule 3-5.1(h) to all prohibited fees, rather than limit its application as Respondent urges. Alternatively, if the Court feels it inappropriate to recognize such an extension, it should adopt the solution adopted by the District of Columbia, i.e., require Respondent to disgorge the fee as a condition precedent to reinstatement following the two year suspension suggested by the Bar.

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 to the Client Security Fund and payment of costs incurred by The Florida Bar in the amount of $45,258.88.

Respectfully submitted

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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 January, 2005.

_____

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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 Initial/Answer/Reply Brief of Style of Case 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.

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Donald M. Spangler, Bar Counsel