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 INITIAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

The question presented is whether The Florida Bar ("The Bar") was precluded from bringing the charges that are the subject of this appeal by virtue of its agreement with Francisco Ramon Rodriguez ("Respondent") in 1998, an agreement which is memorialized in a Consent Judgment approved by this Court. This is a question of law and, under Florida law, the answer is yes. The Bar cannot collaterally attack the Consent Judgment approved by both a Referee and this Court.

In 1998, The Bar settled a disciplinary matter with Respondent by agreeing to the entry of a consent judgment relating to Respondent's conduct involved in the settlement of twenty clients' Benlate property damage claims (the "20 Benlate clients") against E.I. DuPont de Nemours ("DuPont") in August of 1996. That 1998 Consent Judgment included *negotiated* language which precluded The Bar from bringing *any* further Bar investigations into the Firm's representation of the 20 Benlate clients and which both parties understood to mean that any claims against Respondent related to the Firm's representation of the 20 Benlate clients were being resolved. Notwithstanding the comprehensive language in the 1998 Consent Judgment, The Bar in 2001 reopened an investigation relating to the settlement of the 20 Benlate clients' claims. Almost two years later, in December of 2002, probable cause was found. In May 2003, the complaint in these proceeding was filed alleging that Respondent

violated a number of Rules Regulating the Florida Bar as a result of the manner in which the 20 Benlate clients' claims were settled (The "Second Complaint").

Under Florida law, the Consent Judgment–which The Bar never moved to set aside-- precludes these claims. The Referee therefore erred in denying Respondent's Motion for Partial Summary Judgment and in subsequently finding Respondent guilty of violating certain Rules Regulating the Florida Bar.[1]

STATEMENT OF THE CASE AND THE FACTS

Respondent has practiced law in Florida for 22 years. R. at p. 38; Tr. Vol. VIII at 997.[2] In the 14 years before the events in question and in the 8 years since, Respondent has conducted himself in an exemplary fashion. R. at p. 38. During this

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[1] This appeal raises a narrow question of law which is not addressed in the Referee's final Order. The standard of review for a question of law is *de novo*. D'Angelo, M.D. v. Fitzmaurice, 863 So.2d 311 (Fla. 2003); Armstrong v. Harris, 773 So.2d 7, 11 (Fla. 2000), *cert. denied*, 522 U.S. 958 (2001). *Cf.* The Florida Bar in re Inglis, 471 So.2d 38 (Fla. 1985)(Referee's conclusion of law is not given the same deference as the Referee's findings of fact). Respondent filed his petition for review after being informed that The Bar intended to appeal the Referee's recommended sanction.

[2] "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. "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. "Tr. Vol. __ at ___" refers to the page in a transcript. For those transcripts for which there is no volume number, the date is provided.

22 year practice, Respondent has earned a reputation as a man of integrity, an ethical lawyer, a lawyer that works hard for his clients, a generous man, and an asset to the legal community. R. at p. 39. One of Respondent's clients (a businessman from Peru who flew to Miami to testify) described Mr. Rodriguez as follows:

> "I believe that Frank is a great attorney. I believe that this State should be proud of having him as an attorney. He is a person of full integrity. I am not a person that has anyone interest to tell something that is untrue. I am here truly because I consider Frank is a man of integrity, honesty, he's a gentleman, great father, good husband, good son, and a good friend, and better attorney."

Tr. May 22, 2004 at 145.

Similarly, Judge Martinez--United States Federal Judge for the Southern District of Florida-- described Respondent as "an extremely competent, ethical and aboveboard [sic] attorney" and testified that he thought Respondent's integrity was "of the highest caliber" and that he "would trust him about with matters that which concerned me and were personal to me." Tr. May 22, 2004 at 120. Likewise, one of Respondent's former partners testified:

> Frank endeavors both ethically and professionally to achieve that quantum, that sense of being the best. His work ethic leaves nothing to be desired... He treats everyone with kindness. There are times when I told Frank you are belaboring the point. And he would tell me, no, the client is entitled to the best we can give...If he has a concept with a client, it is to tell them the truth. At all times. At all times. Again, even when I insisted on glossing over some matters, Frank would say, no we have to proceed the right way, we have to do the right thing by the client.

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... He is what every attorney should achieve.

Tr. May 21, 2004 at 65-66, 70.

A. The Conduct that Gives Rise to the Bar Investigations against Respondent

In 1996, Respondent was a shareholder in the law firm of Friedman Rodriguez Ferraro & St. Louis (the "Firm").[3] R. at ¶ 1. The Firm represented 20 separate plaintiffs in their property damage claims against DuPont arising from their use of Benlate. R. at ¶ 2. Respondent's role in the representation of the 20 Benlate clients was to act as the first chair if any of the cases went to trial and to handle significant hearings. R. at ¶ 3. Respondent did not bring the 20 Benlate clients in as Firm clients and he did not have primary responsibility for communicating with the clients: Roland St. Louis was the person who brought the clients to the Firm and who had primary responsibility for communicating with the clients. R. at ¶ 3.

Late in the night on August 7th or early in the morning of August 8th, the Firm entered into an agreement entitled Settlement Agreement with DuPont, pursuant to which DuPont made substantial individual settlement offers-- totaling approximately

[3] The Firm no longer exists.

$59 million-- to the Firm's 20 Benlate clients. Resp. Tr. Ex. 57.[4] The amounts DuPont offered to settle the 20 Benlate clients' claims were significantly more than the clients could have realistically hoped to have obtained if their respective cases had proceeded to trial.[5] Tr. Vol. VIII at 882-83; Tr. Vol. X at 1226, 1229.

The leverage which resulted in the Firm's obtaining these substantial settlement offers for the 20 Benlate clients resulted from an oral ruling by Judge Donner in the Davis Tree Farm case (one of the 20 Benlate clients) in late June 1996 sanctioning DuPont and striking DuPont's pleadings for discovery abuses and the destruction of evidence. *See* R. at ¶¶ 4, 7. Shortly after Judge Donner's oral ruling, DuPont approached the Firm in early July to try to settle the Davis Tree Farm case and all of the other Benlate cases the Firm was handling before Judge Donner issued a written sanctions order. R. at ¶ 5; Tr. Vol. VIII at 1019-20. The impending threat of Judge Donner's order created leverage that the Firm used to obtain outstanding settlement offers for all of its 20 Benlate clients, and by August 1, 1996, DuPont had made substantial oral offers to settle all of the Benlate cases other than the Davis Tree Farm

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[4] As set forth herein, the clients could accept or reject the settlement offers.

[5] Several of the clients' cases had significant legal and factual problems, such as statute of limitations problems (Tr. Vol. II at 161-63); prior releases given to DuPont for Benlate damage (Tr. Vol. II at 141-42); and no tax returns to support a lost profit damage calculation (Tr. Vol. I at 97).

case. R at ¶¶ 7- 8. However, in the absence of a settlement of the Davis Tree Farms case, DuPont was unwilling to settle the other cases. R. at ¶ 10; Tr. Vol. X at 1217.

In an effort to resolve the Davis Tree Farm case, the parties resorted to mediation with an experienced trial lawyer who–unlike Respondent-- had handled mass tort cases[6] and who was the court-appointed special master to Judge Donner. R. at ¶ 10; Tr. Vol. X at 1218. During a lunch break in the mediation on August 7th, Respondent learned that Judge Donner had issued the written order striking DuPont's pleadings. R at ¶ 12. DuPont agreed to continue the settlement discussions so long as an agreement was signed and Judge Donner vacated and sealed the sanctions order by the next morning. R. at ¶ 12. With a deadline for settling the 20 Benlate clients' claims now set and with the mediator's assistance, the parties were able to agree on a settlement figure for Davis Tree Farm case.

Having agreed on a number for the Davis Tree Farm case, Respondent believed that the settlement discussions were complete. R. at ¶ 13; Tr. Vol. X at 1224. The mediator, however, reported that there was one more issue–the Firm's entering into a written agreement that night that would preclude the Firm from bringing future

[6] Respondent was inexperienced in mass tort litigation, unfamiliar with the issues that arise in mass tort cases, and unfamiliar with handling contingency cases. R. at pp. 38-39; Tr. Vol. VIII at 1001.

Benlate cases against DuPont.[7] R. at ¶ 13; Tr. Vol. X at 1224. Respondent told the mediator to tell DuPont that they were not willing to enter into such an agreement and that DuPont could approach the Firm in the future after their representation of the clients was complete. R at ¶ 13; Tr. Vol. X at 1224-25. DuPont, however, was not willing to give up on this issue. R. at ¶ 13; Tr. Vol. X at 1225. The Firm continued to resist DuPont's demand until the mediator made it clear that if the Firm was not willing to sign an engagement agreement to satisfy DuPont's demand, the oral settlement offers to the Firm's clients (totaling approximately $59 million) would be withdrawn. R at ¶ 13; Tr. Vol. X at 1225-26. Being inexperienced in mass tort cases and knowing that a decision had to be made that night,[8] Respondent asked the mediator/special master whether agreements like this were done.[9] R. at ¶ 13; Tr. Vol.

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[7] DuPont had raised this issue early in the settlement discussions during the month of July, indicating that one of the conditions to a settlement would be that the Firm not be able to use the monies it would receive as fees from the settlements to fund future cases against DuPont. Tr. Vol. VIII at 1024. Whenever DuPont raised the issue, Respondent declined to discuss the issue and believed that ultimately the Firm had sufficient leverage to negotiate DuPont off the point. Tr. Vol. VIII at 1027, 1029.

[8] If an agreement was not reached that night and the order vacated the next morning, DuPont would no longer have any incentive to pay the kind of money it was offering to the 20 Benlate clients.

[9] When DuPont first raised the issue in early July of the Firm's not suing DuPont in the future, Respondent asked a lawyer known in the Firm for his research skills to research whether the Firm could ethically agree to DuPont's

X at 1230. The mediator/special master responded yes. R. at ¶ 13; *See also* Tr. Vol. X at 1230.

Required to make a decision on the spot, the decision was made that the Firm should agree to enter into an engagement agreement with DuPont so that the Firm's 20 Benlate clients could obtain the benefits of the substantial settlement offers that DuPont had orally agreed to make.[10] Tr. Vol. X at 1228-30. Thereafter, the amount of the engagement agreement was negotiated with the mediator/special master's

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condition that the Firm not bring future Benlate cases against DuPont. R. at ¶ 6. After doing some research, the lawyer reported back to Respondent that the law was unclear, but that it appeared that what DuPont was requesting could be achieved by DuPont's engaging the Firm after the Firm finished the representation of its 20 Benlate clients. R. at ¶ 6. Respondent did not ask for any further research because he believed that the threat of the impending order gave him sufficient leverage to be able to negotiate DuPont off the point and agreeing to such a restriction was not something that the Firm wanted to do. R. at ¶ 6. The Firm had spent considerable resources learning Benlate litigation and believed that it had a prosperous future in that litigation. R. at ¶ 14; Tr. Vol. X at 1227-28.

[10] Respondent viewed himself in a Catch 22. Tr. Vol. X at 1228-30. As a matter of self-interest, the Firm did not want to agree to not sue DuPont in the future because it was not in the Firm's long term financial interest. Tr. Vol. X at 1227. On the other hand, he was being told by the mediator that if he did not agree to let DuPont engage the Firm that night, DuPont was going to walk and the clients would never get the benefit of the substantial settlement offers that had been negotiated. Tr. Vol. X at 1228-29. Believing that the right thing to do was to put the 20 Benlate clients' interests first, Respondent agreed to DuPont's demand. Tr. Vol. X at 1230. Respondent acknowledges that this was the wrong decision. Tr. May 22, 2004 at 193; Tr. Vol. XI at 1394-95.

assistance. Tr. Vol. X at 1231-32.[11] Mr. St. Louis then drafted the engagement agreement with the DuPont lawyers[12] and the Settlement Agreement and engagement agreement were signed. R. at ¶ 17; Tr. Vol. VIII at 907; Tr. Vol. X at 1233-34. Under the engagement agreement, the Firm received $6.4 million. Resp. Tr. Ex. 58.

By the Firm's agreeing to enter into the engagement agreement, the 20 Benlate clients received substantial sums on their claims. And, the record reflects that the money that was paid to the Firm pursuant to the Engagement Agreement was money that DuPont was not willing to pay to the Firm's clients. R. at ¶ 16. Simply put, the Firm did not take money from its clients.

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[11] While the amount paid to the Firm under the Engagement Agreement is substantial–$6.4 million–the evidence at trial showed that the Firm would have made more money in the future by continuing to sue DuPont on Benlate related matters. Tr. Vol. VIII. at 934-35.

[12] The engagement agreement (Resp. Tr. Ex. 58) was created because DuPont wanted something that would be enforceable in allowing it to insist that the Firm not take other Benlate cases against it. Tr. Vol. VIII. at 907. The intent was that the engagement agreement would "kick in" when the last event necessary for the clients was complete. Tr. Vol. VIII. at 908. The belief was that if the agreement was structured with the correct sequencing, it would be permissible. Tr. Vol. VIII. at 924.

Mr. Rodriguez did not communicate the settlement offers to the clients. Tr. Vol. X at 1240. Instead, Mr. St. Louis–who had brought in the clients to the Firm-communicated the settlement offers to the clients. Tr. Vol. X at 1240. Because each client had the right to accept or reject the amount that DuPont was offering to settle each client's case (and because DuPont had a number of cases pending nationwide), DuPont insisted on confidentiality. R. at ¶ 22; Tr. Vol. X at 1253. Specifically, DuPont insisted that the clients be told only the amount that he/she was being offered to settle his/her case (and not what any other clients were being offered) and that the engagement agreement be kept from the clients. R. at ¶¶ 22, 23. The clients were not told about the engagement agreement.[13]

B. The 1997 Bar Proceedings–The First Complaint

In the beginning of 1997, The Bar conducted an investigation of Respondent, arising out of a complaint by Mr. Beasley, one of the Firm's 20 Benlate clients. Resp. Trial Ex.123. Mr. Beasley's complaint concerned the settlement with DuPont and

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[13] Although the Referee found Mr. Rodriguez derivatively responsible for his partner's actions (and thus a violation of Rule 4-5.1(c)), the Referee found that Respondent did not have an intent to deceive the Firm's clients. R. at ¶ 34. Respondent believed that if the clients were told about the engagement agreement, the clients settlement monies would be at risk because one of the terms of the Settlement Agreement was that 10% of the clients' monies were held in escrow to ensure the confidentiality that DuPont insisted upon. *See* R. at ¶ 34; Tr. Vol. X at 1253, 1317.

included allegations that he was forced to accept the settlement and that the Firm was keeping interest earned from the settlement monies that were to go to the clients.[14] R. at ¶ 38. The Bar investigated Mr. Beasley's complaint and Respondent cooperated fully in the investigation. R. at ¶ 44.

1. Probable Cause is Found and the First Complaint is Filed

The grievance committee found probable cause and The Bar filed the first Bar proceeding against Respondent relating to the settlement of the 20 Benlate clients' claims ("First Complaint").[15] *See* Respondent's Motion for Partial Summary Judgment, filed October 10, 2003. In the First Complaint, the Bar alleged that as part of the settlement with DuPont the Firm had agreed not to bring any future Benlate

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[14] The Authorization to Settle, Bar Tr. Ex. 10, which the clients signed, contained a provision which authorized the Firm to keep the interest on the $59 million between the time the Firm received the $59 million and the time the clients received their first settlement distributions. At the time the clients were asked to sign the authorization, the Firm believed that the $59 million would be held only a short period of time before the initial distribution. R. at ¶ 35; Tr. Vol. X at 1330. However, the conduct of one of the clients resulted in the Firm holding the money for approximately 5 weeks–much longer than expected. Ms. Fowler, who was The Bar counsel assigned to the Beasley complaint, admitted at trial that Mr. Beasley's grievance against Respondent raised the issue of the Firm's keeping the interest on the settlement proceeds, *See* Tr. Vol. III at 347, and that she knew in 1997 during the first investigation that the Firm was going to keep the interest earned on the settlement proceeds. Tr. Vol. III at 321.

[15] The Bar's lawsuit against Respondent was subsequently consolidated with The Bar's suit against Roland St. Louis.

related cases against DuPont. See Resp. Tr. Ex. 96 at ¶10, 12, 16. Specifically, in the First Complaint, the Bar alleged:

> 10. The August 7, 1996 agreement required the firm to cease handling any further Benlate claims, and required it to turn over to DuPont's attorneys all materials that the firm collected related to any DuPont confidentiality order.
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> ...
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> 12. By letter dated August 14, 1996, Mr. St. Louis advised Mr. Beasley that settlement negotiations with DuPont were over, that no suits would be filed, and that the firm would not be pursing any more Benlate cases. The $300,000 offer was the only offer Mr. Beasley was going to get and Mr. Louis [sic] must receive the executed authorization and release by August 22, 1996 or their attorney-client relationship and the settlement offer would terminate.
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> ...
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> 16. Had Mr. Beasley chosen to pursue further litigation against DuPont, he would have been placed in a difficult situation as a result of the firm's August 7, 1996 settlement agreement with DuPont. The agreement required the firm to cease further representation in Benlate claims and to turn over certain materials to DuPont. Mr. Beasley would have been without legal representation and materials necessary to pursue his claims.

Resp. Trial Ex. 96.

While the thrust of the First Complaint was that the Settlement Agreement was an aggregate settlement and that the Firm had failed to properly communicate with its clients, there is no dispute that the allegations in the First Complaint raised the issue

of a practice restriction under Rule 4-5.6. Even Ms. Fowler–who was The Bar's counsel in the first Bar proceeding-- admitted that paragraphs 10, 12 and 16 in the 1997 Complaint address the issue of practice restrictions under Rule 4-5.6. Tr. Vol. III at 349-50. Ms. Fowler further testified that paragraph 17 of the 1997 Complaint addressed the authorization to settle, which on its face says that the interest on the clients' money is going to the Firm. Tr. Vol. III at 350-51.

2. The Settlement with The Bar

After thoroughly reading a copy of Patrick Lee's deposition (which offered strong evidence that the settlements for the 20 clients were individually negotiated and thus not an aggregate settlement),[16] Ms. Fowler offered to settle the First Complaint by recommending approval of a consent judgment for a finding of minor misconduct. Resp. Trial Ex. 70.

The Consent Judgment (Resp. Tr. Ex. 71) was a negotiated document. The first draft of the of the proposed conditional guilty plea–drafted by The Bar–contained a paragraph stating that the settlement agreement required the Firm to cease

[16] Patrick Lee was the outside counsel to DuPont who participated in the settlement discussions. In connection with a civil lawsuit filed by one of the 20 Benlate clients, Patrick Lee's deposition was taken. Believing that his deposition was proof that the settlement of the 20 Benlate clients' claims was not an aggregate settlement, Respondent took the necessary steps (the deposition was subject to a protective order) to be able to provide The Bar with an unredacted copy of the Patrick Lee deposition.

handling future Benlate claims. Resp. Trial Ex. 113. Ms. Fowler agreed that this was a preclusion from future employment under Rule 4-5.6. Tr. Vol. III. at 370. Respondent's counsel, along with Roland St. Louis's lawyer, made revisions to the proposed conditional guilty plea and sent it back to Ms. Fowler for her review and comment. Tr. Vol. III. at 374-75; Resp. Trial Ex. 112.

One of the sentences which was added by counsel during the negotiation was the statement "This concludes any Bar investigation into the firm's twenty (20) Benlate clients." Resp. Tr. Ex. 111. Ms. Fowler understood this language to mean that the Bar's investigation into the Firm's 20 Benlate clients was over and done. Tr. Vol. III. at 381-82. She understood that this, like other settlements, are intended to bring finality to the situation. Tr. Vol. III. at 381-382. Respondent would not have entered into the settlement agreement with The Bar if the Consent Judgment did not resolve all claims related to the 20 Benlate clients. Tr. at 1274. Ms. Fowler knew that there were no do-overs in the practice of law and that the agreement would mean what it says unless The Bar moved to set aside the agreement under the rules. See Tr. Vol. III. at 382.

The Referee accepted the Consent Judgment. Resp. Tr. Ex. 74. Paragraph VII. of the Referee's June 19, 1998 order states "This concludes any Bar Investigation into all of the firm's twenty (20) Benlate clients." Resp. Trial. Ex. 74. On July 2, 1998 this

Court approved the Referee's report. Resp. Trial Ex. 75. The Bar has never moved to set aside the 1998 Consent Judgment.

C. The 2001 Investigation--The Second Complaint

Notwithstanding the terms of the Consent Judgment, in early 2001 The Bar reopened an investigation in Gainesville into Respondent's conduct in settling the 20 Benlate clients' claims against DuPont. It took The Bar well over a year to conduct this investigation and a complaint was not filed against the Respondent until May 2003, over two years after the investigation began.

The focus of the 2003 Complaint was a renewed inquiry into Respondent's conduct related to the settlement of the 20 Benlate clients' claims, and in particular the engagement agreement (which The Bar claimed to know nothing about).[17] However, the 2003 complaint also contained allegations directly related to the Settlement Agreement. Specifically, in paragraph 22, The Bar alleges that Respondent violated

[17] In fact, before The Bar settled, Bar counsel was aware that the lawyers who were representing some of the 20 Benlate clients' in lawsuits against the Firm believed that there was an agreement between the Firm and DuPont. Ms. Fowler testified that after she read the Patrick Lee deposition (which has a series of questions regarding whether DuPont paid any money to the Firm or whether DuPont retained the Firm and which DuPont's lawyer refused to answer) she called the lawyer for the Benlate client and inquired about whether he was aware of DuPont's paying money to the Firm to forego future Benlate litigation. Tr. Vol. III at 366-67. That lawyer told her that there was some agreement between the Firm and DuPont but that he could not find it. Tr. Vol. III. at 367.

Rule 4-8.1(b)[18] by including in the settlement closing documents a paragraph that authorized the Firm to keep interest on the clients' money.[19] The Bar also alleged that Respondent had made misrepresentations to The Bar during the 1997 investigation.

Following a seven day trial on liability and a two day trial on sanctions, the Referee found that Respondent had not made any misrepresentations to The Bar during the 1997 investigation and concluded that Respondent did not violate Rules 4-8.4(c), 4-8.1(a) and 4-8.1(b). R. at ¶¶ 34, 44. However, the Referee found that Respondent violated certain 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)) when he acceded to DuPont's demand and agreed to enter into an engagement agreement with DuPont. *See* R. at pp 37-38. The Referee noted that the Firm's 20 Benlate clients were not harmed as a result of his conduct; that Respondent's actions were out of character; that Respondent is remorseful and has suffered emotionally, financially and physically over the past 8 years as a result of his conduct; that

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[18] This paragraph was later amended to allege a violation under Rule 4-1.8(a), not 4-1.8(b)

[19] Paragraphs 10-12 of the complaint also contain allegations relating to the Firm's receipt of $245,000 pursuant to the terms of the Settlement Agreement. In response to Respondent's motion for partial summary judgment which argued that these claims were barred by res judicata and/or collateral estoppel, The Bar agreed to dismiss these allegations. *See supra* n. 22.

Respondent is not a risk to the public; and that suspending Respondent from the practice of law would fail to serve any purpose. R. at pp 39, 42, 46.

Based upon all of the evidence he heard, the Referee came up with a constructive sanction that is consistent with (albeit more severe than) a sanction imposed in an analogous but arguably more egregious case. *See* The Florida Bar v. Mandelkorn, 874 So.2d 1193 (Table)(May 2004). The Referee recommended that Mr. Rodriguez perform a significant amount of supervised *pro bono* work–**1000 hours**–during a four year probationary period in addition to receiving a public reprimand and being required to pay The Bar's costs.

SUMMARY OF THE ARGUMENT

The 1998 Consent Judgment between The Bar and Respondent is unique. That consent judgment includes negotiated language which settled all disciplinary proceedings against Respondent relating to the Firm's 20 Benlate clients. By denying Respondent's Motion for Summary Judgment and subsequently finding that Respondent violated certain Rules Regulating the Florida Bar, the Referee impermissibly allowed The Bar to collaterally attack the 1998 Consent Judgment. Florida law requires that the 1998 Consent Judgment be given preclusive effect and the Referee's findings that Respondent violated 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) should be

reversed.

Additionally, Florida law requires that the Referee's finding that Respondent violated Rule 4-5.6(b) and Rule 4-1.8(a) be reversed because these claims are barred by the doctrine of res judicata and/or collateral estoppel.

ARGUMENT

I. The Bar's Claims in this Lawsuit relating to the Firm's 20 Benlate Clients are an impermissible collateral attack on the 1998 Consent Judgment

It has long been settled that a consent judgment is a final judgment that cannot be collaterally attacked. *See* Arrieta-Gimenez v. Arrieta-Negron, 551 So. 2d 1184 (Fla. 1989). A collateral attack on a judgment is defined as "any proceeding which is not instituted for the express purpose of annulling, correcting or modifying it." Skipper v. Schumacher, 169 So. 58, 66 (1936), *appeal dismissed, cert. denied*, 299 U.S. 507 (1936). The Bar's pursuit of claims against Respondent in this proceeding pertaining to the manner in which the Firm's 20 Benlate clients' claims were settled easily fits within this definition of a collateral attack because it annuls the language in the Consent Judgement, the clear meaning of which is that *any* Bar investigation relating to the Respondent's conduct in representing the Firm's 20 Benlate clients were being resolved.

Specifically, the 1998 Consent Judgment sets forth the terms of an agreement that was reached between The Bar and Respondent to resolve any claims the Bar might have relating to the manner in which the Firm's 20 Benlate clients' claims against DuPont were settled. The Consent Judgment and the Report of the Referee Accepting Consent Judgment state: "This concludes any Bar Investigation into all of the firm's twenty (20) Benlate clients." Resp. Trial. Ex. 71; Resp. Trial Ex. 74. (Attached as Composite Exhibit 1).

This was negotiated language and a material term of the settlement. Respondent testified that he would not have settled with The Bar absent this language. *See* Tr. Vol. X at 1274. Ms. Fowler (Florida Bar counsel) testified that she knew that this language was added to the Consent Judgment because Mr. Rodriguez wanted finality and she agreed to the language understanding that it meant any Bar investigation into the Firm's 20 Benlate clients was over. Tr. Vol. III at 381-82. Ms. Fowler knew that there were no do-overs in the practice of law and that the agreement would mean what it says unless The Bar moved to set aside the judgment under the rules. *See* Tr. Vol. III at 382.

The Florida Rule of Procedure that sets forth the circumstances under which a consent judgment can be set aside is Fla. R. Civ. P. 1.540(b).[20] Arrieta-Gimenez v. Arrieta-Negron, 551 So. 2d 1184 (Fla. 1989). The Bar did not seek to set aside the Consent Judgment under Rule 1.540(b). Notwithstanding the law and the facts, the Referee denied Respondent's motion for partial summary judgment and his motion for a directed verdict on this issue, believing that the claims raised in the Second Complaint needed to be *identical* to the facts/claims raised in the First Complaint for the Second Complaint to qualify as an impermissible collateral attack. Tr. VII at 822-24. The Referee's view on this point was legally erroneous and inconsistent with this Court's decision in Arrieta-Gimenez v. Arrieta-Negron in light of the facts in that case.

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[20] Rule 1.540 (b) provides in pertinent part:

> the court may relieve a party... from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or hearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken....

In Arrieta, the plaintiff had entered into a settlement agreement with her siblings and half siblings which on its face stated that plaintiff was settling her claims to her father's estate by agreeing to take the property specified in the settlement agreement. Arrieta Gimenez v. Arrieta Negron, 672 F. Supp 46, 47 (D. P.R. 1987), *question certified by* 859 F.2d 1033 (1st Cir. 1988), *certified question answered by* 551 So.2d 1184 (Fla. 1989), *answer to certified question conformed to* 896 F.2d 16 (1st Cir. 1990). That settlement agreement was reduced to a consent judgment in Dade County. Arrieta-Gimenez v. Arrieta-Negron, 859 F.2d 1033, 1035-36 (1st Cir. 1988). Twenty-three years later the plaintiff filed suit against her half brother for fraud after discovering that--contrary to what her half-brother had told her in 1960-- her father owned substantial property in Puerto Rico. Id. The trial court granted the defendant's motion for summary judgment finding that the suit was barred by the applicable statute of limitations. Arrieta Gimenez v. Arrieta Negron, 672 F. Supp 46 (D. P.R. 1987). The trial court did not address whether the consent judgment was a bar to the present suit.

On appeal, the First Circuit addressed this issue by analyzing Florida cases to determine whether Florida courts would permit an attack on a judgment more than one year after judgment. Arrieta Gimenez v. Arrieta Negron, 859 F.2d 1040-41 (1st Cir. 1988). The First Circuit concluded that the answer to whether the Florida courts

would permit an attack on a judgment more than one year after judgment depended on whether the Florida courts would treat a consent judgment memorializing a settlement the same as a judgment in litigated cases Id. Because Florida law was unclear, the First Circuit certified to this Court the issue of whether Florida courts would "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?" 859 F.2d at 1042.

This Court interpreted this question as one requiring the Court to decide the preclusive effect a consent judgment has on any further action regarding that judgment. Arrieta-Gimenez v. Arrieta-Negron, 551 So. 2d at 1185 (Fla. 1989). In answering the question, the Court analyzed the circumstances under which a judgment may be challenged under Rule 1.540(b) and concluded that Rule 1.540(b) defines the circumstances under which the consent judgment may be challenged. Id. at 1186. This Court held that a consent judgment is entitled to the same preclusive effect as any other judgment entered by a court of competent jurisdiction and may only be attacked in cases alleging fraud on the court. Id. at 1186. Based upon this Court's holding, the First Circuit then affirmed the order dismissing the lawsuit. Arrieta-Gimenez v. Arrieta-Negron, 896 F.2d 16 (1st Cir. 1990).

While the facts in Arrieta are more egregious than the facts in this proceeding (because the half-brother lied to his sister), they are analogous. Just like the plaintiff in Arrieta, The Florida Bar claims that at the time it entered into the settlement which was memorialized in a Consent Judgment it was unaware of all the facts relating to the manner in which the Firm had accomplished the settlement for the Firm's 20 Benlate clients. And like the plaintiff in Arrieta, The Florida Bar agreed to the entry of a consent judgment that contained explicit language pursuant to which The Florida Bar agreed that *any* investigation of the Firm's handling of the 20 Benlate clients was over.[21]

Applying this Court's reasoning in Arrieta to the facts in this case, an action predicated on the settlement of the Firm's 20 Benlate clients' claims was required to have been brought within one year from the entry of the judgment pursuant to Rule 1.540(b) or to have alleged fraud on the court. Neither condition is met here. Moreover, The Bar never sought to set aside the Consent Judgment. Consequently, the Consent Judgment stands today as a judgment approved by this Court. The terms of the Consent Judgment preclude the Bar from bringing a proceeding that relates to

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[21] In Arrieta, the Consent Judgment provided that the agreement "irrevocably terminate and settle any and all differences and claims...excepting such as are afforded by this Agreement." Arrieta Gimenez v. Arrieta Negron, 672 F. Supp. 46, 47 (D. Puerto Rico 1987).

Respondent's conduct in settling the 20 Benlate clients' claims. Thus, The Bar's filing of the Second Complaint was an impermissible collateral attack on the 1998 Consent Judgment. Accordingly, the Referee's denial of Respondent's Motion for Partial Summary Judgment and his conclusion that Respondent violated 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) are erroneous.

II. The Referee's Findings that Respondent Violated Rule 4-5.6(b) and Rule 4-1.8(a) are erroneous because these alleged rules violations are barred by the doctrine of res judicata and/or collateral estoppel

Separate and apart from the Referee's erring by entering a finding of guilt because the Second Complaint is an impermissible collateral attack on the 1998 Consent Judgment, the Referee erred in finding that Respondent violated Rules 4-5.6 and 4-1.8(a) because these claims are barred by the application of res judicata and/or collateral estoppel.

As this Court ruled in Arrieta, res judicata applies to a consent judgment. Under Florida law, the doctrine of res judicata bars the relitigation of claims that were or could have been raised in an earlier proceeding where there is an identity of parties. ICC Chemical Corp. v. Freeman, 640 So. 2d 92, 93 (Fla. 3d DCA 1994). The doctrine of res judicata applies to Bar proceedings. The Florida Bar v. Collier, 526

So. 2d 916 (Fla. 1988)(res judicata applied in Florida Bar proceeding).[22] The four factors necessary for res judicata to apply are: (1) identity of the thing sued for; (2) identity of parties; (3) identity of the quality of the person against whom the claim is made; and (4) identity of the cause of action. ICC Chemical Corp. v. Freeman, 640 So.2d 92 (Fla. 3d DCA 1994). All four elements exist in this case.

There is a complete identity of parties between The First Complaint which resulted in the 1998 Consent Judgment and the Second Complaint. The Florida Bar brought both lawsuits in the exact same capacity against Respondent. Additionally, in this lawsuit, as well as the First Complaint, The Bar sought the imposition of sanctions against Respondent. Further, there is an identity of causes of action between The Bar's claims that Respondent violated Rules 4-1.8(a) and Rule 4-5.6(b).

The test for identity of causes of action is identity of facts necessary for the maintenance of the actions. ICC Chemical Corp. v. Freeman, 640 So.2d 92 (Fla. 3d DCA 1994). Although this sounds extremely narrow, it is not.[23] Identity of facts

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[22] In the proceedings below, The Bar conceded that res judicata applies to Bar proceedings. In response to one of Respondent's Motions for Partial Summary Judgment on the basis that the claim was barred by the 1998 Consent Judgment, The Bar withdrew the claim. *See* The Florida Bar's Response to Respondent's Motion for Partial Summary Judgment, served October 9, 2004.

[23] As this Court recognized many years ago:

'When the second suit is between the same parties as the first, and on

necessary for the maintenance of the actions is properly construed to mean that the evidence used to prove the claims in the second suit would be essentially the same as the evidence used to prove the claims in the first suit. *See* Gordon v. Gordon, 59 So.2d 40, 44-45 (Fla. 1952), *cert. denied*, 344 U.S. 878 (1952). The application of the doctrine does not require that the claims raised in the second suit be the same as the claims raised in the first suit. *See e.g.*, ICC Chemical Corp. v. Freeman, 640 So.2d 92 (Fla. 3d DCA 1994)(finding fraudulent misrepresentation claim barred by res judicata because the issue of whether a facsimile was fraudulent was related to the defense of bad faith and coercion which had been raised in the first lawsuit).

> the same cause of action, the judgment in the former is conclusive in the later not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings or as incident to or essentially connected with the subject-matter of the litigation, whether the same, as a matter of fact. were or were not considered....This rules applies to every question falling within the purview of the original action, both in respect to matters of claim and defense, which could have been presented by the exercise of due diligence.'

Hay v. Salisbury, 109 So. 617, 621 (1926)(citations omitted). Thus, the conclusiveness of a prior judgment extends to "all matters which could have properly been determined in the prior action, whether they were considered or not." 32 Fla. Jur. 2d Judgments and Decrees § 136 (2003). *See also* Kimbrell v. Paige, 448 So.2d 1009 (Fla. 1984)(res judicata extends to claims and defenses which could have been litigated and determined in the action).

A. Respondent's violation of Rule 4-5.6(b) by The Firm's Agreeing Not to Bring Future Benlate cases against DuPont was raised and settled in the First Complaint

In the First Complaint, The Bar raised the issue of the Firm's agreeing not to sue DuPont in the future. *See* Resp. Trial Exs. 96; 113. In fact, Ms. Fowler admitted that paragraphs 10,12 and 16 in the 1997 Complaint against Respondent address the issue of an alleged practice restrictions under Rule 4-5.6. Tr. Vol. III at 349-50. Ms. Fowler further testified that at the time she entered into the Consent Judgment she was aware that the Firm had agreed not to sue DuPont in the future. Tr. Vol. III at 370.

The practice restriction raised in the First Complaint is the same as the practice restriction which is the subject of this proceeding. Although both the settlement agreement and the engagement agreement speak of this practice restriction, it is the same practice restriction in both documents. That practice restriction was raised in the First Complaint and the Bar's claim that Respondent violated Rule 4-5.6(b) by agreeing not to bring future cases against DuPont was settled in the First Complaint via a Consent Judgment. Accordingly, The Florida Bar's claim in this proceeding that Respondent violated Rule 4-5.6 by agreeing not to bring future Benlate cases against DuPont is barred by the doctrine of res judicata and/or collateral estoppel.

B. The Referee's finding that Respondent violated Rule 4-1.8(a) was raised in the 1997 investigation and settled by the Consent Judgment

The Referee found that Respondent violated Rule 4-1.8(a) based upon the language in the Authorization to Settle which permitted the Firm to retain interest on the settlement monies that were to go to the clients. *See* R. at ¶ 35; Fla. Bar. Ex. 10. This very issue was raised by Mr. Beasley in the 1997 bar grievance that he filed against Mr. Rodriguez. Tr. Vol. III at 347. Ms. Fowler testified that she was aware of this issue during the first Bar proceedings. Tr. Vol. III at 321. Further, although The Bar did not explicitly allege a violation of Rule 4-1.8(a) in the 1997 complaint, Ms. Fowler testified that paragraph 17 of the 1997 Complaint addressed the Authorization to Settle, which is the document pursuant to which the Firm kept the interest on the settlement proceeds. Tr. Vol. III at 350-51. The Bar settled the First Complaint with Respondent through a consent judgment. At a very minimum, if the language in the consent judgment that states that "This concludes any Bar investigation into all of the firm's twenty (20) Benlate clients" means anything, it means that the allegations that Mr. Beasley had made and the allegations in the First Lawsuit were over/done/resolved.

Moreover, the evidence clearly established that The Bar had all the facts it needed to pursue a claim against Respondent for a violation of Rule 4-1.8(a) during

the First Complaint. In fact, the evidence that was used in this proceeding and which the Referee relied on in finding that Respondent violated Rul 4-1.8(a) is the same evidence that The Bar certainly knew of and could have used had the 1997 lawsuit gone to trial to attempt to prove a violation of Rule 4-1.8(a). Because the very same issue that is raised in this proceeding was raised during the 1997 investigation and resolved through the entry of the Consent Judgment in 1998, The Florida Bar's claim that Respondent violated Rule 4-1.8(a) is barred by the doctrine of res judicata and/or collateral estoppel.[24]

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[24] The Referee's finding that Respondent violated Rule 4-1.8(a) is also erroneous in light of the related rule against splitting causes of action. "The rule against splitting causes of action makes it incumbent upon plaintiffs to raise all available claims involving the same circumstances in one action." Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 570 So.2d 892, 901 (Fla. 1990). This rule is predicated upon three basic policy considerations: "(1) finality in court cases promotes stability in the law; (2) multiple lawsuits arising out of a single incident are costly to litigants and an inefficient use of judicial resources; and (3) multiple lawsuits cause substantial delay in the final resolution of disputes." Id.

As set forth herein, Mr. Beasley raised in his complaint against Respondent the issue of the Firm's keeping interest on a portion of the settlement proceeds. The Bar admits that it was aware of this issue prior to the time it entered into the 1998 Consent Judgment. Tr. Vol. III at 321.

CONCLUSION

The Florida Bar is bound by the agreement it made with the Respondent which is memorialized in the 1998 Consent Judgment. The Referee's findings that Respondent violated certain 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)) are predicated on claims that are precluded by the 1998 Consent Judgment. Accordingly, the Referee's findings that Respondent violated these Rules should be reversed.

Dated: September 14, 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 September 14, 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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