IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC Case No. SC03-909

v.

TFB File No. 2001-00359(8B)

FRANCISCO RAMON RODRIGUEZ

Respondent.
_____/

SUPPLEMENTAL ANSWER BRIEF

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PRELIMINARY STATEMENT

The Complainant, The Florida Bar, submits this Answer Brief in compliance with the Court's order of May 17, 2006.

Complainant will be referred to as The Florida Bar, or as The Bar. Raymond Roland Rodriguez, Respondent, will be referred to as Respondent, or as Mr. Rodriguez throughout this brief.

References to the related case involving Roland Raymond St. Louis, Case No. SC04-49, will refer to Respondent St. Louis or Mr. St. Louis.

References to the related case involving Paul D. Friedman, Case No. SC02-2430, will refer to Respondent Friedman or Mr. Friedman.

References to the related case involving Diane Deighton Ferraro, Case No. SC02-1549, will refer to Respondent Ferraro or Ms. Ferraro.

References to the Report of Referee[1] in this matter shall be by the symbol RR(Rodriguez) followed by the appropriate page number. References to the Reports of Referee in the related cases shall be by the symbol RR(St. Louis), RR(Friedman) or RR(Ferraro) followed by the appropriate page number.

References to the transcript of the final hearing shall be by the symbol TR, followed by the volume and page number (e.g. TR III, 145).

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[1] The referee styled his report "Order of Finding of Guilt" instead of Report of Referee.

References to specific pleadings will be made by title.

STATEMENT OF THE CASE

This case is pending subject to review of the Referee's Order of Finding Guilt dated June 8, 2004 in which he recommends that Respondent should receive a public reprimand, should be placed on probation for a period of four years, that he provide 1000 hours of *pro bono* work during that period of probation and that he pay the Bar's costs in the amount of $45,258.88. The Referee did not recommend that Respondent's share of the prohibited fee be disgorged. The Court's order of May 17, 2006 directed the filing of this supplemental brief to specifically discuss the appropriateness and length of a suspension; the appropriateness of disgorgement of the fee into the Client's Security Fund pursuant to rule 3-5.1(h); and the amount of a potential disgorgement. A similar order was entered on the same date in the related case of The Florida Bar v. Friedman, Case No. SC02-2430, and a similar supplemental brief is being submitted in that case.

STATEMENT OF THE FACTS

This and the related St. Louis, Friedman and Ferraro cases arise out of the representation of twenty clients having claims against DuPont, stemming from the clients' use of the DuPont product Benlate, by the law firm then known as Friedman, Rodriguez, Ferraro and St. Louis, P. A. (hereafter FRF&S) in which all four respondents were shareholders. On August 7, 1996, during settlement negotiations with DuPont's defense counsel, Respondents St. Louis and Rodriguez agreed to execute an agreement (hereafter the "Secret Side Agreement") whereby in return for a payment of $6,445,000.00 by DuPont to FRF&S they would refrain from further Benlate litigation against DuPont and serve as counsel and/or consultants for DuPont in future matters. The agreement was drafted by Respondent St. Louis and executed by him on behalf of the firm. All four respondents were aware of the discussion of an arrangement such as this before the fact as a result of attending firm meetings at which the topic was discussed, although Respondents Ferraro and Friedman were not actively engaged in the Benlate cases and did not learn that an agreement had been struck and the document executed by Respondent St. Louis until after the fact. All four respondents shared in the distribution of the $6,445,000.00 fee in varying amounts, presumably in proportion to their ownership interest in the firm or their contribution to the litigation of the Benlate cases.

The case of The Florida Bar v. Ferraro, SC02-1549, was resolved through negotiations which culminated in an agreement whereby Respondent Ferraro agreed to accept a public reprimand, make restitution to the clients in the amount of $425,000 and pay the Bar's costs in the amount of $3169.36. Respondent Ferraro paid the agreed restitution amount and the Bar's costs prior to the submission of the consent judgment to the referee. In his Report of Referee the referee recommended acceptance of the consent judgment, and it was accepted by the Court by order entered February 20, 2003.

The case of The Florida Bar v. Friedman, SC02-2430, resulted in a negotiated consent judgment in which Respondent Friedman agreed to accept a suspension of 90 days, pay restitution to the firm's clients in the amount of $910,000.00 and pay the Bar's costs in the amount of $7162.36. The restitution and costs were paid prior to submission of the consent judgment to the Court, but the suspension has not been served as a result of the Court's stay order entered on April 23, 2004.

This case was tried and resulted in a Report of Referee (styled Order of Finding Guilt) recommending that Respondent Rodriguez receive a public reprimand, serve four years of probation, provide 1000 hours of *pro bono* service and pay the Bar's costs in the amount of $45,258.88. This case is presently pending before the Court on the Respondent's Petition for Review and the Bar's Cross Petition for Review.

The case of The Florida Bar v. St. Louis, SC04-49, was also tried and resulted in a Report of Referee recommending that Respondent St. Louis receive a 60 day suspension, serve 3 years of probation with *pro bono* service in the amount of 100 hours per year, disgorge the sum of $2,277,663.00 of the prohibited fee into the Client Security Fund over a ten year payment plan and pay the Bar's costs in the amount of $72,218.37. It also is pending before the Court on the Bar's Petition for Review and Respondent's Cross Petition.

SUMMARY OF ARGUMENT

A suspension for a period of two years is appropriate in this case, when viewed in the light of the proportionality of the misconduct and varying degree of egregiousness thereof of the four respondents involved in these related cases. Respondent Rodriguez's conduct was more egregious than that of Respondents Ferraro and Friedman, but less than that of Respondent St. Louis.

Respondent should not be permitted to retain his $1,558,401.00 (TR X 1298) share of the prohibited fee, and to permit him to do so dilutes the deterrent effect Bar discipline is intended to have upon other members of the Bar. Additionally, to permit him to do so would be manifestly unfair in these circumstances where Respondents Friedman and Ferraro have already voluntarily paid restitution in an amount proportionate to their share of the prohibited fee involved, and the Referee in the St. Louis case has recommended that his share of the fee be disgorged.

The record reflects that Respondent Rodriguez realized 24.18% of the $6,445,000 prohibited fee, and therefore should be required to disgorge the after-tax amount of his share, $935,040.00, to the Client Security Fund.

ARGUMENT

ISSUE I

WHEN CONSIDERED IN THE CONTEXT OF THE RELATIVE DEGREES OF CULPABILITY OF THE RELATED RESPONDENTS, A TWO YEAR SUSPENSION IS AN APPROPRIATE SANCTION IN THIS CASE.

The Florida Bar urges the Court to apply a concept of proportionality when considering the degree of sanction to be applied to this respondent, in comparison with that which is appropriate to the respondents in the related cases involving Ms. Ferraro, Mr. Friedman and Mr. St. Louis, and suggests that the degree of culpability of each should be measured and that measurement should be the determinant of the appropriate sanction.

This writer is unable to find a specific pronouncement by the Court that it accepts the concept of proportionality, but in the case of The Florida Bar v. Tauler, 775 So. 2d 944 (Fla. 2000) it appears that the Court has accepted the concept. The majority in Tauler compared the misconduct of Tauler (misappropriation of trust account funds), with the level of egregiousness found to have existed in the cases of The Florida Bar v. Travis, 756 So. 32d 689 (Fla. 2000) and The Florida Bar v. Korones, 752 So. 2d 586 (Fla. 2000), and after considering the mitigating factors present in Tauler, and the lack thereof in Travis and Korones, stated “While we do not countenance Tauler's actions,

proportionality requires that Tauler be held less culpable..." (Id at p. 949)(Emphasis added). One such factor taken into consideration was the protracted time period over which Travis (two years) and Korones (three years) misappropriated funds, compared with the relatively brief period involved in Tauler (five months). The Court also appears to recognize and adopt the Tauler referee's finding of "…*diminished culpability* due to the circumstances surrounding Tauler's misconduct." (Id at p. 947)(Emphasis added).

Likewise, in a group of Bar discipline cases, only one of which resulted in a published opinion, the Court has accepted proportioned disciplines according to the degree of culpability. The Florida Bar v. Cueto, 834 So. 2d 152 (Fla. 2002) is but one of several discipline matters arising out of a kick-back scheme between Miami-Dade County adjustors and personal injury attorneys. While Cueto was disbarred, others who participated to varying lesser degrees received varying lessened sanctions. This Court approved consent judgments of 18 month suspensions in five cases[2], a two year suspension in one[3], three year suspensions in two cases[4] and disciplinary resignations in two more[5].

At least one other jurisdiction, Mississippi, appears to be comfortable with the concept of proportionality the Bar is urging. In The Mississippi Bar v. Walls, 797 So. 2d

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[2] Cabello, SC01-604; Tacher, SC01-592; Gonzalez, SC01-1200; Izquierdo SC00-242; and Klemick SC00-2214.
[3] Appel, SC00-2516.
[4] Joseph Rodriguez, SC01-605 and Vazquez, SC00-1899 & SC01-462.

217 (Miss. 2001), despite the fact that the respondent had been suspended for one year by the United States Court of Appeals for the Fifth Circuit, the Mississippi court imposed only a public reprimand, commenting that

> This Court applies a *proportionality* requirement to Bar discipline cases. (Citation omitted). Suspensions from the practice of law have been reserved for instances where some form of dishonesty has significantly harmed the client, or constituted a fraud on a court, or both. (Id at p. 221)(Emphasis added).

The Board of Governors of The Florida Bar appears to have accepted proportionality in Bar discipline cases as evidenced by the Florida Standards for Imposing Lawyer Sanctions adopted by the Board. One need look no farther than any of the sub-parts of section C of the Standards to recognize that the recommended level of sanction becomes increasingly severe as the degree of culpability of the respondent increases. For example, Fla. Stds. Imposing Law. Sancs. 4.4, suggests that admonishment is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client (Id at 4.44), whereas suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client (Id at 4.42(a)) and disbarment is appropriate when a lawyer abandons the practice and causes serious or potentially serious injury to a client (Id at 4.41(a)). Referees customarily rely upon these standards in

[5] Batista, SC00-1660 and Fernandez, SC00-289.

recommending discipline, as does the Court.

Likewise, both referees and the Court rely upon the application of the mitigating and aggravating factors set forth in Section C of the standards in determining whether a recommended sanction should be enhanced or lessened, according to the proportionality of those factors applicable in each circumstance, thus tacitly accepting the applicability of proportionality in determining sanctions.

As discussed in the Bar's Answer and Initial Brief on Cross Appeal in the case at bar, there is no Florida discipline case law concerning secret side agreements. Two other jurisdictions, however, the District of Columbia Bar and the Oregon Bar, have recently imposed one-year suspensions for this type of misconduct. In In re Hager, 812 A.2d 904 (D.C. 2002), the respondent received only $125,000 in exchange for the secret deal, but did not keep the interest on his client's trust funds and did not engage in a cover-up that lasted for years. The District of Columbia Bar imposed a one year suspension, but obviously, this case involves misconduct that is far more serious than that involved in Hager.

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

misconduct that is far more serious than that involved in the Brandt case.

Apart from those arguments, the Court should adopt the concept of proportionality and assess the degree of culpability of this respondent, compare it with that of the related three respondents and apply a proportional sanction here. If, as the Bar contends, the public reprimand the Court has already approved is appropriate in Ferraro, and a 90 day suspension sought by the Bar is appropriate in Friedman, then the sanction applied to Respondent Rodriguez should be something greater than 90 days but less than the disbarment sought in the St. Louis case.

Accepting the one year suspensions applied in the Hager and Brandt cases, supra, as appropriate for those cases involving less egregious misconduct, the sanction to be applied in this case should also be greater than one year. A two year suspension would be consistent with Fla. Stds. Imposing Law. Sancs. 4.32, "Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client."

ISSUE II

TO ALLOW THE RESPONDENT TO RETAIN A PROHIBITED FEE FRUSTRATES THE DETERRENT EFFECT GOAL OF LAWYER DISCIPLINE.

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

In his Supplemental Brief, Respondent cites the case of The Florida Bar v. Brown, 790 So. 2d 1081 (Fla. 2001) as standing for the proposition that disciplinary sanctions should be fair to society, fair to the attorney and sufficiently deter other attorneys from similar misconduct, then goes on to argue that a suspension of Respondent would not be fair to society or [himself] but chooses to ignore the desired deterrent effect of sanctions. The Court has also recognized the need for a deterrent effect in The Florida Bar v. Cueto, 834 So. 2d 152, 156 (Fla. 2002), where the opinion quotes an earlier decision, "Discipline must be fair to the public and to the respondent and '*must be severe enough to deter others who might be prone or tempted to become involved in like violations.*' " *Id.* (quoting The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983)). As discussed above, one can only wonder and speculate about the nature of the message Respondent would have the Court send, i.e., the wages of a $1.6 million dollar sin are no more than a public reprimand.

This Court has historically required disgorgement of excessive fees, as can be found in The Florida Bar v. Forrester, 656 So.2d 1273 (Fla. 1995), The Florida Bar v. Moriber 314 So.2d 145 (Fla.1975), The Florida Bar v. Robbins, 528 So.2d 900 (Fla. 1988) and The Florida Bar v. Thomas, 698 So.2d 530 (Fla. 1997), all of which are discussed in the Bar's Answer and Initial Brief on Cross Appeal. This prohibited fee must be disgorged.

The only available receptacle for the disgorged fee is the Client Security Fund, since the prohibited fee was not subtracted from settlement funds that should have gone to Respondent's clients. Thus, while Respondent argues that the language of R. Regulating Fla. Bar 3-5.1(h) does not mandate payment to the Fund, neither does that language prohibit said payment, and there being no practical alternative, the Fund should serve as the proper receptacle.

ISSUE III

THE RECORD SUPPORTS DISGORGEMENT OF THE PROHIBITED FEE IN THE AMOUNT OF $$935,040.00.

Respondent testified at trial that he received 24.18% of the prohibited fee of $6,445,000 (TR X, 1298). The respondent's share of that sum was $1,558,401.00. The Bar has previously agreed in the St. Louis case that it would be appropriate to reduce the amount to an after-tax figure, a reduction of 40%, or a net amount of $935,040.00. On the other hand, Respondent has benefited by having the use of those funds over a period of many years, a fact which should be taken into consideration in arriving at an appropriate figure.

CONCLUSION

The Court should enter an order suspending Respondent Rodriguez for a period of two years, requiring that he disgorge the prohibited fee into the Client Security Fund in the amount of $935,040.00 and pay the Bar's costs in the amount of $45,258.88.

Respectfully submitted

_____

Donald M. Spangler
and
James A. G. Davey, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Answer Brief 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 June, 2006.

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

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

_____

Donald M. Spangler, Bar Counsel