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 SUPPLEMENTAL BRIEF

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INTRODUCTION

In compliance with this Court's May 17, 2006 Order, Francisco Ramon Rodriguez ("Respondent") files this supplemental brief to address the suitability of the disciplinary measures recommended by the Referee, including whether it would be appropriate to suspend Respondent and require him to disgorge fees to the Clients' Security Fund. Because the Referee's recommended sanctions have a reasonable basis in the existing case law and the Florida Standards for Imposing Discipline, under this Court's precedent, this Court should not second guess the Referee's recommended sanctions by ordering a suspension or disgorgement. Additionally, the Referee's recommended sanctions are fair and equitable.

This case ***does not*** involve a lawyer who acted with mal intent, who harmed clients, or who engaged in fraudulent or deceitful conduct. Instead, this case involves a lawyer who made a mistake in judgment 10 years ago by agreeing to enter into an indirect practice restriction, an area of law that was unclear at the time. Over the 24 years[1] in which Respondent has practiced law, he has earned an outstanding reputation as a lawyer. A sitting United States District Judge, a sitting Circuit Judge, a former U.S. Attorney for the Southern District of Florida, members of the Florida Bar (both colleagues and adversaries), and leaders in the community described

[1] At the time the Referee conducted the disciplinary phase of the trial, Respondent had been practicing law 22 years.

Respondent as extremely competent, ethical, above board, a man of integrity, a generous man, and an asset to the legal community. The evidence showed that Respondent is genuinely remorseful and that, in the eight years between the conduct at issue and the trial, Respondent had been rehabilitated. The evidence also revealed that Respondent has paid professionally, emotionally, medically, and financially over many years for a mistake that he acknowledges that he made. Given the totality of the evidence presented during the trial before the Referee, the findings of fact made by the Referee, and Florida law, neither a suspension nor disgorgement would be appropriate in this case.

STATEMENT OF FACTS THAT ARE RELEVANT TO THE ISSUES ADDRESSED IN THE SUPPLEMENTAL BRIEF[2]

As the Referee found, in August of 1996, the Friedman Rodriguez Ferraro & St. Louis firm (the "Firm") agreed not to bring future Benlate cases against DuPont so that the Firm's 20 Benlate clients could obtain what is undisputed were exceptional settlement offers. *See* R. at ¶ 14; R. at p. 42.[3] This practice restriction

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[2] Respondent's Initial Brief sets forth in detail at pages 4 to 10 the circumstances which ultimately resulted in Respondent's agreeing to the Firm's entering into the engagement agreement with DuPont.

[3] "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

was achieved through an engagement agreement. The practice restriction was not something Respondent wanted or requested. *See* R. at ¶ 14. Moreover, the Firm's 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.

While there are now published decisions addressing whether it is permissible to enter into an engagement agreement to achieve a practice restriction, in 1996 there were none.[4] R. at p. 39. Being inexperienced in mass tort cases and knowing that an immediate decision had to be made, Respondent asked the court appointed special master who was acting as a mediator–who was experienced in mass tort litigation-- whether agreements like this were done. R. at ¶ 13; Tr. Vol. X at 1230. The mediator/special master responded yes. R. at ¶ 13; *See also* Tr. Vol. X at 1230.

Although Respondent knew that the Engagement Agreement would not be

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transcripts for which there is no volume number, the date is provided.

[4] When DuPont first raised the issue in early July 1996 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 condition that the Firm not bring future Benlate cases against DuPont. R. at ¶ 6, n.2. 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.

disclosed to the Firm's Benlate clients,[5] the Referee found that Respondent did not intend to mislead or deceive the clients. R. at ¶ 34. Instead, his failure to take remedial actions and disclose the agreement was based on his mistaken belief that such agreements were common practice in mass tort litigation and that to disclose the agreement would have resulted in the forfeiture of the clients' hold back money. R. at ¶ 34.

During a seven day trial on liability and a two day trial on sanctions, the Referee heard testimony from over 20 witnesses. The evidence without exception showed that Respondent is a devoted family man and a lawyer that is honest, passionate about representing his clients to the best of his ability–irrespective of their ability to pay-- and an asset to the legal community. 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. Dr. Jose Greer–who has known Respondent since high school and who is a leader in the community, having founded the Camillus House clinic, Saint John Bosco clinic and numerous other clinics for the underprivileged–

[5] The Referee found that DuPont insisted that the Firm not disclose the

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. Circuit Judge Robert Scola, who has known Respondent for over 20 years, described Respondent as a person of integrity who came to him, admitted he's made a mistake and showed remorse. R. at p. 40. 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. R. at p. 40. Members of the Florida Bar who knew Respondent from different perspectives-- as opposing counsel, as a former partner, as a current partner, and as a friend for over thirty years– testified that Respondent is an excellent lawyer, straightforward, honest and represents what a lawyer should be. R. at pp. 40-41. As one of his 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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> ***

Engagement Agreement to the Firm's clients. R. at ¶ 23.

... He is what every attorney should achieve.

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

The evidence also showed that Respondent is not a lawyer that is motivated by greed. Three clients came to testify for Respondent: Mr. Guillermo Gonzales--a businessman from Peru who felt so strongly about Respondent as a lawyer and a person that he flew to Miami to testify; Mr. Enrique Benet-- a person who felt compelled to testify for Respondent notwithstanding that he was sick with cancer and very weak from chemotherapy (and who unfortunately died a few months later); and Ms. Barbara Argudin--a person that has known Respondent his whole life. R. at p. 41. Each of the three clients that testified explained how Respondent did not let their inability to pay him interfere with his representation of them. R. at p. 41.

The evidence also showed that it would be a loss for the profession if Respondent were unable to practice law. R. at pp. 40-41. As Mr. Benet explained, Respondent allowed him to regain his dignity and it would be a mistake for the profession to preclude a person of Respondent's professionalism, honor and quality from practicing law and helping other members of society who had been wronged regain their dignity. Tr. May 22, 2004 at 150. Similarly, 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 excellent lawyer.

Tr. May 22, 2004 at 161. Likewise, Ms. Susie Ribero-Ayala–a member of the Florida Bar who has known Mr. Rodriguez for over 30 years–testified that she thought it would be a loss to the profession if Respondent were unable to practice law and that The Bar should be proud to have someone like Respondent practicing because he's a man of integrity, because he's honest, and because this is what a lawyer should be. Tr. May 21, 2004 at 54.

Additionally, the evidence showed that Respondent is remorseful for his mistake. Circuit Judge Robert Scola testified that Respondent was genuinely remorseful:

> A: ...[W]e 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.
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> 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 showed that Respondent has been hard on himself as a result of his conduct. R. at p. 42. Since 1996, Respondent has suffered professionally, emotionally, financially and physically. Id. The press relating to the 1996 settlement has hurt Respondent's practice; Respondent has been hospitalized several times; Respondent has incurred significant debt arising out of the civil lawsuits and The Bar proceedings; and Respondent's income is significantly less than his income before the settlement with DuPont. Tr. May 22, 2004 at 163, 173-180.

After considering all of the evidence and the credibility of the witnesses, the Referee found that Respondent did not act with a deceptive or fraudulent intent and that Respondent did not violate Rules 4-8.4 (c), 4-8.1(a) and 4-8.1(b). R. at ¶¶ 34, 44. In fact, the Referee found the exact opposite: 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. Based on this mistake, 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). *See* R. at pp 37-38.

Additionally, after listening to the testimony of judges, members of the Florida Bar, community leaders, present and former partners, clients, family members, and Respondent, and after reading the numerous letters that were submitted to the Court, and considering the significant passage of time since the settlement with DuPont, the Referee found that Respondent's mistake in judgment in 1996 was out of character and that Respondent does not pose a risk to the public. R. at pp. 39-40, 42.

Based upon the evidence, the Referee also 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.[6] 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.

In recommending a sanction, the Referee was guided by the Florida Standards for Imposing Discipline (which explicitly states that mitigating factors may justify a reduction in the sanction to be imposed), the case law, and the purposes which sanctions are to serve. The Referee recommended that Respondent be placed on probation for 4 years, be required to perform 1000 hours of pro bono work during that time, be given a public reprimand and be required to pay The Bar's taxable costs of $45,258.88. R. at 45.

The Referee declined to recommend that Respondent forfeit $1.6 million to the Clients' Security Fund for two separate and independent reasons. First, the Referee declined to recommend that Respondent forfeit money to the Clients' Security Fund based upon the absence of any authority that permits a court in a

[6] Additionally, based upon 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

disciplinary matter to impose a fine on Respondent by requiring disgorgement to the Clients' Security Fund. R. at p. 46. The Referee also declined to recommend that Respondent be required to forfeit money to the Clients' Security Fund in light of the evidence that was presented, including evidence regarding Respondent's financial condition. R. at pp. 46- 47.

SUMMARY OF THE ARGUMENT

The Referee's recommendations were made after he considered the totality of the evidence presented, made findings of fact (which have not been challenged), and then applied those findings of fact to the existing case law. The Referee's recommended sanctions have a reasonable basis in and are consistent with existing case law and the Florida Standards for Imposing Discipline and, under this Court's precedent, should not be second guessed by the Court. Moreover, given the facts in this case-- the absence of any mal intent, the absence of harm to the client, the absence of any published opinion at the time addressing whether an indirect practice restriction could be obtained through an engagement agreement, the numerous mitigating factors that exist, the significant passage of time since the conduct in question, interim rehabilitation, and the fact that but for this conduct Respondent has conducted himself in a exemplary fashion-- the Referee's

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facts.

recommended sanctions are suitable and appropriate and should be approved by the Court.

ARGUMENT

I. Since the Referee's Recommended Sanctions Have a Reasonable Basis in Existing Case Law and Are Consistent with the Standards for Imposing Lawyer Discipline, There is No Basis to "Second-Guess" the Recommendation.

Although this Court has a broader scope of review of a Referee's recommended discipline than a Referee's findings of fact, this Court has recognized that it will not generally second-guess a referee's recommended discipline so long as the Referee's recommendation has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997); The Florida Bar v. Morse, 784 So.2d 414 (Fla. 2001). Applying this precedent, a suspension would be inappropriate because the Referee's recommended discipline has a reasonable basis in existing case law and the Standards for Imposing Lawyer Discipline.

The most analogous Florida disciplinary case involving a practice restriction that was entered into as part of a settlement agreement is The Florida Bar v. Mandelkorn, 874 So.2d 1193 (Table)(2004). In that case, this Court approved a public reprimand as the appropriate sanction for a lawyer that was involved in

agreeing to a practice restriction via a consulting agreement as part of a settlement. Although the underlying facts are not set forth in this Court's order approving a public reprimand, the underlying facts are set forth in Adams v. BellSouth Communications, Inc., 2001 WL 34032759, *3 (S.D. Fla. 2001).

In BellSouth, the Plaintiffs' lawyers suggested a practice restriction as part of an aggregate settlement of numerous claims against BellSouth. 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 told the Plaintiffs' lawyers to 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 lawyers involved had violated the following Rules: 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, recommending 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).

The Referee's recommended sanctions in this case are consistent with Mandelkorn, particularly given that Respondent's conduct–unlike Mandelkorn's conduct–did not result in money being taken from the clients. Specifically, 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. Thus, the money that was paid to the Firm pursuant to the engagement agreement in this case was not money that would have otherwise gone to the clients. In fact, 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. Respondent–whose actions benefitted the clients–should not be suspended where Mandelkorn, who engaged in similar conduct but who in the

process took money from clients, was not.

In addition to the public reprimand in Mandelkorn, the Referee's recommended sanctions are consistent with The Florida Bar v. King, 174 So.2d 398 (Fla. 1965). In King, Mr. King committed perjury and did nothing to prevent two others witnesses from committing perjury. King, 174 So.2d at 402. Although this Court found Mr. King's conduct reprehensible, the Court approved the Referee's recommendation that Mr. King be given a public reprimand based on the following facts: the event in question was over eight years ago and both before and after that time Mr. King had conducted himself in an exemplary fashion; his actions were out of character; he had suffered professionally and personally (degradation and humiliation, the loss of reelection to the senate) and financially (loss $10,000) and emotionally (torment of being under criminal prosecution); since the episode he had conducted himself in an exemplary manner as a man and a lawyer and given his clients 'gold plated' service; and Mr. King had support from the judiciary, the Bar in the area and other prominent citizens who appeared on his behalf. King, 174 So.2d 404.

All of these mitigating factors were found by the Referee in this case and are supported by the evidence. The Referee found that in the eight years since the settlement with DuPont and in the 14 years before the settlement, Respondent had

conducted himself in an exemplary fashion; Respondent's actions were out of character; Respondent has shown interim rehabilitation; Respondent has suffered professionally, personally, financially and emotionally; Respondent's clients depend on him and would be harmed if he were suspended[7]; and Respondent had members of the judiciary, the Bar, and other prominent citizens testify and submit letters on his behalf. R. at pp. 38-43. Therefore, the Referee's recommended discipline in this case has a reasonable basis in King, particularly given that unlike Mr. King, Respondent did not engage in conduct that involves fraud or deceit and, in this case, the Referee's recommended sanctions are more severe than those imposed in King.

Likewise, the Referee's recommended sanctions have a reasonable basis in the Standards for Imposing Lawyer Discipline. The Standards set forth guidelines for recommending a sanction in the absence of aggravating or mitigating circumstances. However, a suggested sanction is subject to being reduced if mitigating factors are present. Fla. Stds. Imposing Law. Sancs. 9.31. As set forth above and in Respondent's Answer Brief, there was overwhelming evidence regarding the presence of numerous mitigating factors in this case. Consistent with

[7] 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

the Standards, the Referee recommended a sanction less than a suspension based upon the existence of these numerous mitigating factors and the fact that the clients benefitted from Respondent's action.[8] R. at pp. 42-43.

Moreover, the Referee's recommended discipline is consistent with existing case law which recognizes that the sanctions imposed in a disciplinary case should be fair to society, fair to the attorney, and 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. *See* 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, 45-46. Further, this case does not involve a fact situation that is likely to be repeated. In 1996,

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at 50, 67; Tr. May 22, 2004 at 143-44, 147, 152.

[8] Thus, Standard 4.32 does not really fit the facts in this case because it 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.

there were no published decisions addressing whether a indirect practice restriction resulting from an engagement agreement was permissible. Now, there are reported decisions addressing this issue, as well as Fla. Ethics Opinion 04-2.

Weighing each of the stated purposes of disciplinary sanctions in the context of the facts in this case, the Referee recommended that Respondent not be suspended but that instead he be placed on probation and required to perform 1000 hours of pro bono legal services under the supervision of Father Patrick O'Neil, the founder of St. Thomas College of Law who has supervised other lawyers at the request of a number of judges. This is a constructive sanction that will require a significant time commitment from Respondent while allowing Respondent to serve the community.

Based upon the foregoing cases, the Referee's recommended discipline in this case clearly has a reasonable basis in existing Florida disciplinary case law and the Standards for Imposing Lawyer Discipline. Accordingly, a suspension would be inappropriate because it would necessarily require this Court to "second guess" the Referee's recommended discipline even though his recommendation is consistent with existing law.

II. Given That the Factual Findings by the Referee Have Not Been Challenged and Are Supported by Evidence, a Suspension Would Be Inappropriate.

Additionally, given that the factual findings by the Referee are supported by the evidence and have not been challenged, a suspension would be inappropriate. More specifically, the Referee's recommended discipline is predicated upon the totality of evidence in this case and the extensive factual findings he made. After listening to numerous witnesses over 9 days, the Referee found that Respondent is not a current risk to the public (R. at p. 42), that his actions were out of character (R. at p. 42), that suspending Respondent from the practice of law would hurt his clients and the public (R. at p. 43, n. 4), and that suspending Respondent would not be fair to him as he has been extremely hard on himself already and has suffered physically, emotionally and financially and has rehabilitated himself (*See* R. at pp. 42-43, 45-46). The Bar has not challenged these findings of fact and these findings are supported by the evidence. Against this factual record, a suspension would be inappropriate as it would require this Court to set aside the Referee's factual findings. Specifically, in ordering a suspension, the Court would have to conclude that a suspension was in the public interest, necessary to punish Respondent, or necessary to protect clients. The Referee, however, has made fact findings to the contrary and this Court has recognized that absent proof that the Referee's findings are clearly erroneous or lacking in evidentiary support it should not set aside the Referee's findings of fact. The Florida Bar v. Morse, 784 So.2d 414 (Fla. 2001).

See also The Florida Bar v. Committee, 916 So.2d 741, 746 (Fla. 2005), *cert. denied* 126 S. Ct. 1890 (2006)("Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.").

III. The Referee's Denial of the Bar's Request that Respondent Forfeit $1.6 Million is Consistent with Florida Case Law and Requiring Respondent to Disgorge Monies to the Clients' Security Fund Would be Inappropriate in this Case.[9]

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 a punitive measure and not appropriate. R. at pp. 46-47. The Referee's recommendation is consistent with Florida law and thus it would be inappropriate to require Respondent to disgorge money to the Clients' Security Fund.

A. The purposes and contemplated use of the Clients' Security Fund do not include requiring disgorgement from Respondent based on the facts in this case.

[9] Respondent has discussed in his Reply Brief and Answer Brief to the Cross-Petition the history of Rule 3-5.1(h) and the constitutional issues that are raised by the broad reading The Bar gives to this Rule. *See* Reply Brief at n. 25.

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 7.25.

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).

Based on the facts in this case, 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). 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 a situation in which the lawyers wrongfully took money from their clients. Additionally, the Referee correctly concluded that

this is not a case where restitution fits. R. at p. 46. Further, no money has been paid out of the Clients' Security Fund to the 20 Benlate Clients. R. at p. 46. Moreover, Respondent has settled the civil lawsuit that 19 of the 20 Benlate clients filed against him. R. at p. 46. Thus, the purposes and contemplated use of the Clients' Security Fund have no application to the facts in this case.

B. The Referee's conclusion that disgorgement to the Clients' Security Fund as a disciplinary sanction in this case is a fine which is not authorized by the Rules is consistent with existing Florida law.

The Referee correctly concluded that since the forfeiture The Bar requested was not restitution and it was not going to be used to repay money paid out of the Clients' Security Fund to the Benlate clients, it was a fine. The Referee also correctly recognized that there is no authority authorizing the imposition of 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). In fact, 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. The Florida Bar v. Frederick,

756 So. 2d 79, 89 (Fla. 2000).[10]

In sum, the Referee's decision to decline to recommend that Respondent disgorge money to the Clients' Security Fund is consistent with existing case law. As set forth in Section I above, 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, sanctioning Respondent by requiring him to disgorge $1.6 million to the Clients' Security Fund would be inappropriate.

C. The Referee decision to decline to recommend that Respondent pay $1.6 million to the Clients' Security Fund is based on a factual finding which The Bar has not challenged and which is supported by evidence in the record.

The Referee's decision not to recommend that Respondent disgorge money to the Clients' Security Fund is not only based on the law, it is also predicated upon the Referee's findings of fact. After hearing all of the evidence[11] and after

[10] 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.

[11] 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,

considering Respondent's financial condition, the Referee found that requiring Respondent to pay $1.6 million to the Clients' Security Fund would be punitive in nature. R at 46-47. The Bar has not challenged this factual finding.

As set forth above, this factual determination has a presumption of correctness and 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. *See* 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)[12]; 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 177-180).

Having found that sanctioning Respondent by requiring him to forfeit $1.6

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and that there was no evidence money had been paid out of the Clients' Security Fund to the 20 Benlate clients.

[12] Two of Respondents' former partners, Diane Ferraro and Paul Friedman, also settled with the Benlate clients who sued them. While the Bar characterized those settlements as "restitution" it never characterized those payments as "disgorgement," and no monies were paid to the Clients' Security Fund.

million was punitive in nature, the Referee correctly exercised his discretion[13] in denying The Bar's request that Respondent forfeit $1.6 million. If this Court were to set aside this finding and order Respondent to disgorge money to the Clients' Security Fund, this Court would run afoul of its own precedent recognizing the limited circumstances under which a Referee's fact findings should be set aside. Accordingly, disgorgement would be inappropriate in this case.

IV. The Equities Do Not Warrant the Creation of an Exception to this Court's Decisions.

Respondent is an ethical lawyer and a good man that made a mistake 10 years ago in an area where there was no published decision addressing the issue; a mistake that is completely out of character; a mistake for which he has accepted responsibility and is remorseful; a mistake that benefitted the Firm's clients; a mistake for which he has paid emotionally, professionally, financially and physically.

These facts do not warrant this Court ignoring precedent by either

[13] 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.

suspending Respondent or imposing a fine on him.

Dated: May 31, 2006

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 May 31, 2006, 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.

_____
Michael Nachwalter