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 REPLY BRIEF

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INTRODUCTION

The Bar does not address the arguments Respondent made in his Supplemental Brief. The Bar also ignores the extensive factual findings made by the Referee, arguing that a two year suspension is appropriate in this case based upon the unsupported proposition that sanctions agreed to by Respondent's former partners in ***different*** proceedings before ***different*** referees with ***different*** records establish the baseline for sanctions that should be imposed on Respondent. None of the cases cited by The Bar stand for this proposition. Under well established Florida law, the issue is whether the discipline recommended by the Referee has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Discipline based on the record and factual findings made by the Referee in this case. As set forth in Respondent's Answer Brief and his Supplemental Brief, the answer is yes. The Referee's recommended discipline consisting of a public reprimand, 1000 hours of pro bono work, probation, and payment of the Bar's costs should be approved and adopted by the Court.

SUMMARY OF REPLY ARGUMENT

The Bar argues that this Court should determine the sanctions to impose on Respondent by using as a baseline the sanctions that Respondent's former partners agreed to in plea agreements with The Bar. This is a novel approach and none of the cases cited by The Bar support this Court's adopting that approach. Additionally, the adoption of such an approach would be fundamentally unfair and contravene Respondent's due process rights.

However, even if this Court were to adopt such an approach, a two year suspension is not appropriate given the findings of fact by the Referee in this case. The Bar does not dispute that the Referee's recommended discipline has a reasonable basis in the existing case law and the Standards for Imposing Lawyer Discipline. Additionally, The Bar has failed to cite any authority to support its assertion that a two year suspension is appropriate in this case. The fact that one of Respondent's former partners agreed to a 90 day suspension as part of a plea agreement with The Bar is not a basis for this Court to disregard its well established precedent limiting the circumstances under which the Court will "second guess" a referee's recommended discipline.

Likewise, the fact that Ferraro and Friedman paid money to settle civil lawsuits that the Firm's former Benlate clients brought against them (far from "voluntary restitution" as characterized by The Bar) is not a basis for requiring Respondent to disgorge money to the Clients' Security Fund. Just like Ferraro and Friedman, Respondent settled the civil lawsuits.

Additionally, The Bar's assertion that disgorgement is necessary to create a sufficient deterrent effect is not a sound basis for overruling Florida law that prohibits the imposition of a fine in Bar disciplinary cases. Further, this is a unique

case that is unlikely to be repeated and thus deterrence should not be the overriding goal. The sanctions should also be fair to society and fair to Respondent. As set forth below and in Respondent's Reply Brief and Answer Brief to Cross Petition at pp. 37-45 and Respondent's Supplemental Brief at pp. 19-25, requiring Respondent to disgorge money to the Clients' Security Fund would be inappropriate.

REPLY ARGUMENT

I. The Appropriateness of the Referee's Recommended Sanctions should be judged based on the record in this case and the existing case law.

The Florida Bar made the decision to prosecute lawyers in the Firm in a serial manner by filing separate complaints against the lawyers in the Firm and then proceeding separately against the lawyers before different Referees.[1] As a result of that decision by The Bar, Respondent had a trial before a different Referee who considered different evidence and his record is separate and independent from the other cases that The Bar has prosecuted against the other members of the Firm.

As set forth in Respondent's Supplemental Brief at pp. 4-8, the Referee heard numerous witnesses and made extensive findings of fact. These findings of fact include that Respondent did not act with any fraudulent or deceptive intent, but instead made a single mistake in judgment in 1996 in an area of law where there was no published decision at that time addressing the issue. The Referee found numerous mitigating factors, none of which The Bar disputes. Consistent with

[1] The Bar mentions only four of these lawyers in its Supplemental Answer Brief. The fifth lawyer was Jorge Guerra. The Florida Bar v. Guerra, TFB File No. 2002-00,076(8B), discussed *infra*.

Florida law and the Standards for Imposing Lawyer Discipline, the Referee recommended that Respondent (i) receive a public reprimand, (ii) be put on probation;[2] (iii) perform 1000 hours of pro bono legal work and (iv) pay The Bar's costs. *See* Respondent's Supplemental Brief at 11-18. Notably absent from The Bar's Supplemental Answer Brief is any argument that the Referee's recommended discipline does not have a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Discipline.[3]

Instead, The Bar argues that a two year suspension is appropriate in this case when viewed in the context of the plea agreements two of Respondent's former partners made with The Bar in different proceedings before different Referees with different records. Contrary to The Bar's argument, none of the cases The Bar cites supports The Bar's position that the appropriateness of Respondent's sanction should be determined in the context of the sanctions that two of his former partners agreed to as part of plea agreements with The Bar.[4] Rather, the cases stand for the

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[2] Although the Referee recommended that Respondent be put on probation for four years, the Referee's failure to limit the probation to three years is understandable. There is an inconsistency between the Rules Regulating the Florida Bar–Rule 3-5.1(c) and the Standards for Imposing Lawyer Sanctions –Standard 2.7. If Rule 3-5.1(c) trumps Standard 2.7, then this Court may modify the term of the probation to three years. *See e.g.*, The Florida Bar v. Wells, 602 So.2d 1236 (Fla. 1992)(modifying terms of probation from two years to three years).

[3] Further, The Bar does not dispute that under this Court's precedent the Court should not second guess a Referee's recommended discipline if it has a reasonable basis in existing Florida law.

[4] The Bar's assertion that in The Florida Bar v. Cueto, 834 So.2d 152 (Fla. 2002) this Court accepted proportional discipline according to degree of culpability is not supported by that opinion. In The Florida Bar v. Cueto, this Court justified the sanction it imposed on Cueto based on his record alone and Florida law. This Court does not mention the related cases The Bar cites in footnotes 2-4, let alone

proposition that the sanction imposed on a lawyer should be based on the facts in his/her case and whether the recommended sanction is consistent with existing law in light of the factual findings. *See e.g.*, The Florida Bar v. Tauler, 775 So.2d 944, 946-47 (Fla. 2000)(recognizing that a Referee has a favored vantage point for accessing key considerations, such as a respondent's degree of culpability, and therefore that the Court will not second guess a referee's recommended sanction so long as that discipline has a reasonable basis in existing case law); The Florida Bar v. Korones 752 So.2d 586, 591 (Fla. 2000)("In determining the discipline to be imposed in a case involving the misappropriation of funds, we must look to the circumstances surrounding the misappropriation.").[5] Thus, the cases cited by The Bar confirm that the relevant question is whether the Referee's recommended sanctions have a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Discipline, not whether the recommended discipline makes sense in the context of an agreed upon sanction as part of a settlement arising out of a different proceeding before a different referee.

Not only is the novel approach urged by The Bar not supported by the cases it cites, but also this Court's adoption of that novel approach, *i.e.* determining the appropriateness of the Referee's recommended discipline by looking at the agreed

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justify the sanction it imposed on Cueto based upon the records and sanctions imposed in those cases.

[5] The cases also recognize that a pattern of misconduct should be sanctioned more severely than an isolated incidence of misconduct. The Florida Bar v. Travis, 765 So.2d 689 (Fla. 2000)(noting that case involved a pattern of misconduct); The Florida Bar v. Tauler, 775 So.2d 944, 948 (Fla. 2000)("Tauler's isolated instances of misconduct are distinguishable from the continuous and substantial misappropriations in Travis and Korones").

upon facts and agreed upon sanctions from ***different*** records and from ***different*** proceedings which are not existing case law and which discuss facts relevant to ***someone other than Respondent***, would be a de facto violation of Respondent's due process rights. *See e.g.,* Chrysler v. Department of Professional Regulation, 627 So.2d 31 (Fla. 1st DCA 1993)(consideration of evidence outside the record violated due process). It would also be manifestly unfair to permit The Bar to use against Respondent the plea agreements (including agreed facts[6] and sanctions) his former partners and The Bar made for their own reasons and in which Respondent had no say or right to participate. This would be tantamount to application of the doctrine of estoppel against someone who was not a party or privy to a proceeding or the doctrine of law of the case to a different case. Such a result is contrary to Florida law. Florida Dep't. of Transportation v. Juliano, 801 So.2d 101 (Fla. 2001)(discussing when the application of both doctrines is appropriate).

II. A Two Year Suspension is Not Appropriate Based upon The Plea Agreements The Bar has Made with Other Members of the Firm[7]

Even if this Court were to look at the sanctions that members of the Firm have agreed to as part of settlements[8] with The Bar, the Referee's recommended discipline is reasonable given the findings of fact he made in this case.

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[6] One of the flaws with The Bar's approach is that some of the so called "agreed facts" in Ferraro's and Friedman's record are "facts" which Respondents' former partners claim to have no first hand knowledge about.

[7] As set forth above, Respondent submits that this Court should not adopt the novel approach advanced by The Bar. By making the arguments in this Section, Respondent does not intend to waive any of his arguments.

[8] The Bar's discussion of The Florida Bar v. Roland St. Louis, SC04-49 in the Statement of Facts fails to mention that the Referee in that case found that Mr. St. Louis had made two misrepresentations to The Bar and that he lied to a State Court

Although The Bar discusses its settlement with two members of the Firm, it omits any reference to the settlement it made with Mr. Guerra, one of the lawyers in the Firm who worked on the Benlate cases and who participated in the settlement discussions. Although Mr. Guerra was not a senior partner at the time, he was present August 7th-August 8th during all of the same discussions regarding the engagement agreement as Respondent. Tr. Vol. VIII at 921-22. The Grievance Committee Recommendation of Diversion states that Mr. Guerra violated Rules 4-1.4(a), 4-1.4(b), 4-1.7(b), 4-1.8(a), 4-1.16(a)(1), 4-5.6(b), 4-8.3(a), 4-8.4(a), and 4-8.4(c). There were no findings of fact regarding the presence of mitigating factors. The Bar agreed to divert Mr. Guerra's case to the Practice and Professional Enhancement Programs. Mr. Guerra was required to attend Ethics School. Mr. Guerra was not asked to nor required to pay any money to the Clients' Security Fund or the Firm's former Benlate clients.

If one were to compare–which Respondent submits is not appropriate–one could conclude that The Referee's recommended discipline is reasonable in the context of Mr. Guerra's diversion and requirement that he attend Ethics School. This is particularly so given the numerous mitigating facts found by the Referee in this case and no findings of fact regarding mitigating factors in Mr. Guerra's case.

Likewise, the Referee's recommended discipline is also reasonable in the context of the public reprimand Ms. Ferraro agreed to and which this Court approved. The Referee's Report is based upon a set of agreed facts which are, at best, incomplete. These agreed facts fail to provide the Referee with the circumstances relating to the engagement agreement, including the intent of the

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Circuit Judge. Thus, the factual record in Mr. St. Louis's case against which this Court will determine the appropriateness of that Referee's recommended discipline is significantly different from the findings of fact in this case.

parties in entering into that agreement, and the proof that the clients were not harmed (and in fact were benefitted) by the Firm's agreeing to enter into the engagement agreement. Additionally, in contrast to the numerous mitigating factors the Referee found applicable to Respondent, the Referee in Ms. Ferraro's case made no findings regarding the presence of mitigating facts.[9]

Similarly, the Referee's recommended discipline is reasonable notwithstanding that Mr. Friedman has agreed to a 90 day suspension. As this Court is certainly aware, parties settle lawsuits all the time for a myriad of reasons. It is not uncommon for one defendant to agree to jail-time and the co-defendant to proceed to trial, develop a record, and receive a lesser punishment that is reasonable in the context of the record that he developed. This is exactly the situation here. Respondent's record is different from Mr. Friedman's record. The record in Mr. Friedman's case is limited to an incomplete set of agreed facts. Additionally, Mr. Friedman admitted that he had violated the rule regarding safekeeping client property by commingling client monies with Firm money. In contrast, the Referee in this case did not find that Respondent violated any trust account rules or that he commingled monies. Further, the Referee in Mr. Friedman's case did not conduct a formal hearing at the disciplinary phase and the Referee in Mr. Friedman's case did not make the type of extensive findings regarding the presence of mitigating facts that the Referee did here.

Indeed, in its Supplemental Answer Brief, The Bar completely ignores the extensive findings of fact the Referee made in this case and does not refute in any manner Respondent's argument that the Referee's recommended discipline has a

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[9] As is discussed in Section IV. A. herein, Ms. Ferraro also paid money to the former Benlate clients to settle the civil lawsuits they filed against her: she did not–as The Bar asserts–make "voluntary restitution" to those clients.

reasonable basis in Florida law and the Standards for Imposing Lawyer Discipline. The fact that one of Respondent's former partners agreed to a 90 day suspension as part of a settlement with The Bar is not a basis for this Court to disregard its well established precedent limiting the circumstances under which the Court will "second guess" a referee's recommended discipline.

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

None of the cases cited in the Bar's Supplemental Answer Brief support suspending Respondent for two years. All of the cases cited by The Bar involve fraudulent or deceptive conduct. This case does not.[10] For example, Travis, Tauler, and Korones, discussed above, involve misuse of client funds and that conduct is not at issue in this case. In In re Hager, 812 A.2d 904 (D.C. 2002), another case cited by The Bar (and which was decided six years after the conduct at issue in this case), the misconduct for which respondent was sanctioned by a one year suspension included engaging in conduct involving fraud, dishonesty and deceit.[11] Likewise, in In re Brandt, 10 P.3d 906 (Or. 2000), the lawyers'

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[10] Despite the fact that Bar counsel has previously apologized to this Court for misrepresenting the Referee's findings by arguing that Respondent lied and engaged in dishonest conduct, The Bar asserts in its Supplemental Answer Brief that Respondent engaged in a cover-up that lasted for years. Supplemental Answer Brief at 12. The Referee made no such finding and this assertion is contrary to the Referee's findings. *See* Respondent's Reply Brief and Answer Brief to Cross-Petition at p. 12.

[11] In contrast to In re Hager, in this case the Referee found that Respondent did not engage in fraudulent or deceitful conduct. Thus, The Bar's assertion that this case involves conduct that is far more egregious than in In re Hager is flat out wrong. Additionally, in In re Hager, it was the lawyer's desire for attorney's fees that resulted in the opposing party insisting that the clients not be told about the

misconduct for which they were suspended for 12 and 13 months respectively included misrepresentations to the client and The Oregon Bar. In this case, there was no such misconduct. Additionally, in In re Brandt, the Oregon Supreme Court found many aggravating factors and only one mitigating factor. The exact opposite is true in this case. The Referee found only one aggravating factor, multiple rule violations and numerous mitigating factors. R. at pp. 42-43. Indeed, the only portion of the In re Brandt decision which addresses what sanction would be imposed if the only conduct involved were agreeing to the practice restriction is consistent with the Referee's recommendation in this case. Specifically, in a concurring and dissenting opinion, Justice Kulongoski's stated that the appropriate sanction for conduct involving a practice restriction is a reprimand in light of the fact that the issue of whether an indirect practice restriction is prohibited had not been litigated (as was the situation here in 1996). Id. at 927-28. Justice Kulongoski's concurring and dissenting opinion is consistent with this Court's decision in The Florida Bar v. Mandelkorn, 874 So.2d 1193 (Table)(May 2004), discussed in Respondent's Supplemental Brief at pp. 12-14, and the Referee's recommended discipline in this case.

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

Additionally, the Bar's assertion that a two year suspension is consistent with Standard 4.32 of the Florida Standards for Imposing Lawyer Sanctions ignores the Referee's findings of fact.[12] Specifically, Standard 4.32 requires injury or potential injury to the client. The record reflects that the engagement agreement actually benefitted the clients. *See* Tr. Vol. X at 1226, 1229; R. at pp. 42-43. Further, even though Respondent's role did not include communicating the terms of the settlement to the clients (R. at ¶ 3), the sole evidence in the record reflects that the amount of the settlement offers were so substantial that the engagement agreement did not impact the advice that the clients were given with respect to whether to accept the settlement offers. *See* Tr. at 1216; Resp. Trial Ex. 71. Further, the Standards set forth guidelines for recommending a sanction in the absence of aggravating or mitigating circumstances. As set forth in Respondent's Supplemental Brief at pp. 9-10, the mitigating factors were numerous and significantly outweigh the single aggravating factor found by the Referee.

Likewise, The Bar's reliance on The Mississippi Bar v. Walls, 797 So.2d 217 (Miss. 2001) does not support suspending Respondent for two years or the novel approach The Bar urges this Court to adopt. In Walls, the court noted that it applies a proportionality requirement in Bar disciplinary cases, citing Pitts v. Mississippi State Bar Assoc., 462 So.2d 340 (Miss. 1985). Pitts makes it clear that the concept of "proportionality" discussed in Walls relates to determining the appropriateness of the sanction based on the intent of the lawyer, harm to the client, and the presence of mitigating facts as determined by the finder of fact, not in comparison to someone else, but on the lawyer's own record. Such an approach is similar to that under the Standards for Imposing Lawyer Discipline. In any event,

[12] This is the only Standard that The Bar cites in its Supplemental Answer Brief as supporting a two year suspension.

that approach does not support the conclusion that a two year suspension is appropriate in this case. According to the Court in Walls --which The Bar quotes in its Supplemental Answer Brief-- "[s]uspensions from the practice of law have been reserved for instances where some for of dishonesty has significantly harmed the client or constituted a fraud on a court, or both." Walls, 797 So.2d at 221. The Referee in this case did not find that Respondent acted with a dishonest motive or fraudulent intent. Additionally, the clients were not harmed by the Firm's entering into the engagement agreement. The record reflects that the engagement agreement actually benefitted the clients. *See* Tr. Vol. X at 1226, 1229; R. at pp. 42-43. Thus, under the concept of proportionality applied in Walls, a suspension is not appropriate in this case.[13]

[13] As the Referee correctly found, Respondent has shown interim rehabilitation and a suspension of more than 90 days would be tantamount to ending Respondent's legal career. R. at p. 42; R at 43, n. 4. As the many witnesses that testified for Respondent made clear and as the Referee found, such a result would be a loss for the legal community and Respondent's clients. Id.

IV. Disgorgement is Not Appropriate in this Case

The Bar does not dispute that if this Court follows its own precedent, disgorgement would be inappropriate in this case. Specifically, The Bar does not dispute that:

- the Referee had the discretion to decline to recommend that Respondent disgorge money to the Clients' Security Funds;
- The Referee's 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; and
- 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, The Bar has conceded that disgorgement is not appropriate in this case under existing law.

Nevertheless, and once again ignoring the findings of fact made by the Referee and the law, The Bar argues that Respondent should be required to disgorge money to the Clients' Security Fund because absent disgorgement others will not be deterred and it would be unfair to not order Respondent to disgorge the money when Ferraro and Friedman have "voluntarily paid restitution" to the former clients. Neither argument is legally or factually correct and neither argument justifies this Court second guessing the Referee's recommended discipline and requiring Respondent to disgorge money to the Clients' Security Fund.

A. The fact that Ferraro and Friedman paid money to settle civil lawsuits is not a basis for requiring Respondent to disgorge money to the Clients' Security Fund.

The Bar argues that as a result of payments that Ferraro and Friedman made to the former Benlate clients, neither Ferraro nor Friedman have been permitted to profit from the engagement agreement. Although The Bar characterizes the payments that Ferraro and Friedman made to the former Benlate clients as "voluntary restitution," those payments were actually made to settle the civil lawsuits that the former Benlate clients had filed against them. Those payments were made prior to the consent decrees with The Bar. The Bar neither asked nor required Ferraro and Friedman to disgorge money to the Clients' Security Fund and The Bar chose to characterize the payments Ferraro and Friedman made as restitution, not disgorgement.

Just like Ferraro and Friedman, Respondent has not profited from the engagement agreement. He too settled the civil lawsuits the former Benlate clients brought. Tr. May 22, 2004 at 179. He also paid attorneys to defend him against those lawsuits, eventually representing himself because he could no longer afford a lawyer. Tr. May 22, 2004 at 177-78.[14] As the Referee found, based on the facts in this case, requiring Respondent to now disgorge money to the Clients' Security Fund would be a fine and inappropriate.

B. Florida Law Prohibits the Imposition of a Fine

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[14] The record reflects that it has cost Respondent over $1,000,000 to defend the various actions that have been brought against him relating to his mistake. Tr. May 22, 2004 at 177. The Bar concedes that this is not a situation in which the money the Firm was paid under the engagement agreement was money that should have gone to the clients. *See* Bar's Supplemental Answer Brief at 16. Thus, to whom Respondent paid the money in the context of litigation should not be relevant.

The Bar does not dispute that the list of sanctions in Rule 3-5.1 does not include fines. The Bar also does not dispute that even after Rule 3-5.1(h) was adopted, this Court continued to recognize that a fine is not a permissible sanction. *See e.g.*, The Florida Bar v. Frederick, 756 So. 2d 79, 89 (Fla. 2000). **Moreover, The Bar does not argue that the disgorgement which it is seeking is not a fine**. Instead, The Bar argues that because Frederick was not a Rule 3-5.1(h) case, the Referee erred in relying on that decision and rejecting The Bar's request that Respondent be required to disgorge money to the Clients' Security Fund. The Bar's argument lacks merit.

The fact that Frederick did not involve a prohibited fee or the application of Rule 3-5.1(h) does not alter the fact that in that case–which was decided years after the adoption of Rule 3-5.1(h)-- this Court recognized that "there is no authority to impose a fine as a condition of discipline." The Florida Bar v. Frederick, 756 So. 2d 79, 89 (Fla. 2000). Thus, based on this Court's precedent, fines are not a permissible sanction. The Referee did not err by relying on Frederick for this proposition.

Also without merit is The Bar's argument that because the language of Rule 3-5.1(h) does not prohibit disgorgement to the Clients' Security Fund, disgorgement is appropriate in this case. *See* Bar's Supplemental Answer Brief at 14, 16. The mere fact that payment to the Clients' Security Fund is not prohibited by Rule 3-5.1(h) does not mean that payment is appropriate. Rule 3-5.1(h) should be read in the context of this Court's decisions which recognize that a fine is not a permissible sanction.[15] The handful of cases that The Bar cites in which this Court

[15] Rule 3-5.1(h) should also be read in the context of the use and purposes of the Clients' Security Fund. Indeed, the text of Rule 3-5.1(h) mandates this construction. Specifically, Rule 3-5.1(h) states that "..a fee otherwise prohibited by the Rules Regulating The Florida Bar may be ordered forfeited to The Florida Bar

required a lawyer to repay monies to a client where the Court determined the fee was excessive (a finding not made in this case) do not alter this conclusion. *See* Bar's Supplemental Brief at 15-16. Each of the cases cited by The Bar involves restitution. The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975)(respondent was ordered to reimburse the client); The Florida Bar v. Forrester, 656 So.2d 1273 (Fla. 1995)(respondent ordered to repay estate fees he took from the estate and to which he was not entitled); The Florida Bar v. Robbins, 528 So.2d 900 (Fla. 1988)(requiring restitution to former client); The Florida Bar v. Thomas, 698 So.2d 530 (Fla. 1997)(required to make restitution to client). In this case, the concept of restitution does not apply. As The Bar concedes in its Supplemental Answer Brief at p. 16, Respondent did not take any money from the 20 Benlate clients or any money that would have otherwise gone to the 20 Benlate clients. Further, Respondent and the other members of the Firm settled the civil lawsuits that the former Benlate clients brought against them. Restitution is not involved here. Thus, these cases are inapplicable to the facts in this case.

Clients' Security Fund ***and disbursed in accordance with its rules and regulations***." Rule 3-5.1(h)(emphasis added). The inclusion of the phrase "and disbursed in accordance with its rules and regulations" would have been unnecessary if the Court could order payment to the Clients' Security Fund without regard to whether the particular payment was consistent with the purpose and use of the Clients' Security Fund. Thus, the text of Rule 3-5.1(h) does not support requiring Respondent to disgorge money to the Clients' Security Fund. Money is disbursed from the Clients' Security Fund to clients that have been harmed by the lawyer's conduct and in this case the clients were not harmed.

C. Disgorgement is not necessary to deter others from engaging in similar conduct

Notwithstanding Florida law which clearly states that a fine is not a permissible sanction, The Bar argues that disgorgement is appropriate in this case because absent disgorgement the deterrent effect of lawyer discipline will be frustrated. This argument is likewise without merit in this case.

As set forth above, this Court has held that a fine is not a permissible sanction. That precedent should not be overruled in the name of deterrence. Indeed, The Bar has not cited any case in which this Court overruled precedent in the name of deterrence.

Additionally, disgorgement is not necessary to deter others in the future. The Bar's suggestion to the contrary (by suggesting to the Court that absent disgorgement, members of the Florida Bar are likely to engage in similar conduct and take the fee if the only punishment is a public reprimand) ignores the record in this case and a part of the recommended discipline. The record in this case is replete with evidence regarding the economic, emotional, physical and professional cost that Respondent has paid for almost ten years (it was eight at the time of trial) as a result of his agreeing 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. In fact, Respondent has been so hard on himself his health has been affected. R. at p. 39. If the price that Respondent has paid for his actions does not deter someone from engaging in a similar conduct, Respondent respectfully submits that a fine will not either.

Further, the Bar ignores that while the Referee did not recommend that Respondent disgorge money to the Clients' Security Fund, in part based upon

Respondent's financial condition, the Referee did recommend that Respondent make a payment to society in a different form–through 1000 hours of pro bono legal services. While constructive, it is a deterrent as that type of commitment to public service will have a significant impact on a lawyer's private practice, and thus his income.[16]

Finally, in arguing the need for deterrence, The Bar ignores that the engagement agreement at issue in this case arose out of a singular set of unique facts that are unlikely to be repeated. Respondent did not act with a deceptive or fraudulent intent. In 1996, there was no reported decision addressing whether an agreement like the engagement agreement would run afoul of Rule 4-5.6. Today, there are reported decisions in Florida (and other states), including Fla. Ethics Opinion 04-2, that provide an attorney with clear guidance. Under the findings of fact in this case and in light of the development of the law over the past ten years, deterrence has been achieved and should not be the overriding goal of lawyer discipline, and certainly not here.

CONCLUSION

The Referee recognized that Respondent is an ethical lawyer and a good man that made a mistake ten 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 for almost ten years. The Referee's recommended

[16] In light of this significant commitment to public service and the impact that the past ten years has had on Respondent's practice, the cumulative effect of the Court requiring Respondent to disgorge $935,040 to the Clients' Security Fund–even if it were over a ten year payment plan–would be tantamount to disbarring Respondent.

discipline has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Discipline. This Court's adoption of some new concept of "proportionality" in reference to negotiated plea agreements by different lawyers in different proceedings with different findings of fact before different Referees would violate the most fundamental concepts of due process. Accordingly, this Court should follow its precedent, decline to second guess the Referee's recommended sanctions, and adopt and approve the Referee's recommended sanctions.

Dated: June 22, 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 Federal Express on June 22, 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.

_____
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