IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC04-2119

vs.

ANNA L. BROWN,

Respondent.
_____/

ANSWER BRIEF ON REMAND

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SYMBOLS AND REFERENCES

In this brief the petitioner on remand, the Florida Bar, is referred to as "the disciplinary authority," or "the Florida Bar" or simply "the Bar." The respondent on remand, Anna L. Brown, Esq., is referred to as "Ms. Brown."

"TR-1" refers to the transcript of a final hearing before the referee in Case SC04-2119, conducted November 10, 2005. "TR-2" refers to the transcript of a final hearing conducted November 18, 2005. "TR-3" shall refer to the transcript of a hearing upon remand conducted on March 2, 2007.

"RR-1" shall refer to a preliminary report of referee dated November 10, 2005, and "RR-2" shall refer to the final report of referee dated December 1, 2005. "RR-Remand" refers to the amended Report of Referee after remand.

"TFB Exh." will refer to exhibits submitted to the record by the Florida Bar, while "Resp. Exh." shall refer to exhibits submitted by Ms. Brown.

"Rule" or "Rules," unless otherwise further identified, refers to the Rules Regulating the Florida Bar, and "Standard" or "Standards" will refer to the Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS ON REMAND

Ms. Brown disputes the Florida Bar's statement of facts and sets forth the following facts pertinent to the issues on remand and the Bar's appeal of the Amended Report of Referee after the hearing upon remand. She incorporates by reference the Statement of the Facts in her original combined Answer Brief/Initial Brief on Cross-appeal, and states further:

In October, 2001, Trooper John Benton of the Florida Highway Patrol stopped a car for speeding on Alligator Alley. In the car were Antoine Parks ("Parks") and Renfred Spillman ("Spillman"), residents of Miami. After being stopped, the two tried to switch places in the vehicle, which the officer observed and noted. *See* Resp. Exh. 2 (Arresting Officer's affidavit). Parks was driving a car owned by Spillman. *See* TR-Remand at 21, 25. Both men were arrested; Parks was charged with habitual driving while his license was suspended or revoked and Spillman was charged with possession of a firearm by a convicted felon. *See* Resp. Exh. B (composite), certified case file, State v. Parks.

Parks hired Anna Brown in November, 2001, and returned to her office with Spillman a week later so that he could also hire Ms. Brown. TR-Remand at 16. Her non-lawyer employee, Mark Patterson ("Patterson"), did a new client intake on Spillman. TR-1 at 33-34; TR-1 at 70. Ms. Brown declined the representation,

however, and she referred Spillman to Peter T. Flood, Esq. TR-1 at 70.

The Parks and Spillman cases were numbered consecutively, and they proceeded together on the same docket through the criminal court. TR-Remand at 16-17. In May 2002, in Flood's absence, Ms. Brown handled a hearing in Spillman's case, and later wrote to the judge regarding it. *See* TR-1 at 105-06, TR-1 at 121; TFB Exh. 13. After that, she performed other tasks to benefit Flood (and Spillman), such as trying to locate Spillman and get him to appear in court. Though Ms. Brown felt she was merely assisting Flood, the referee found that she had represented Spillman by and through these discrete acts, and that Spillman had a reasonable belief that Ms. Brown was his attorney. *See* original Report of Referee, dated November 10, 2005.

Both cases were set for hearing September 20, 2002. When neither attorney heard from Spillman, despite their efforts, Flood sought to withdraw as counsel of record. On September 10, 2002, Ms. Brown's staff prepared, and she signed and filed a motion for withdrawal "on behalf of Peter T. Flood." *See* TFB Exh. 14. Her office sent a Notice of Hearing regarding the motion, set for the same date, September 20, 2002. Ms. Brown's representation of Parks ended on that date, when he entered into a plea agreement and was sentenced. TR-Remand at xx-yy.

Flood and Ms. Brown both appeared at the hearing on September 20, 2002.

Spillman did not appear, despite the fact that he admitted having received official notice of it. *See* TR-1 at 115-17 and 137-38. The court declined to hear Flood's motion to withdraw, due to Spillman's absence. TR-1 at 137; TR-1 at 116-17. Thereafter, Spillman was arrested on a bench warrant, and the authorities advised Flood of that, as his counsel of record. TR-1 at 139-41. Flood had the State's discovery delivered to Spillman at the jail. *Id.* Flood's motion to withdraw was heard and granted on December 19, 2002, effectively ending the relationship between Spillman, Flood, and Ms. Brown.

At the hearing on remand held March 2, 2007, the Florida Bar sought to prove that, because Parks was a convicted felon at the time Ms. Brown represented him, he *might have been* charged with the same crime Spillman had been charged with, that is, possession of a firearm by a convicted felon. This possibility, the Bar argued, made Ms. Brown liable for violating Rule 4-1.7(a) and Rule 4-1.7(b).

The referee, however, disagreed with the Bar's assertions regarding conflict and recommended that she be found not guilty of violating either rule. Ms. Brown adopts and incorporates all factual findings contained in the Amended Report of Referee.

STATEMENT OF THE CASE ON REMAND

By an Order dated April 18, 2005, after an hour-long hearing held April 6, 2005, the referee dismissed the Florida Bar's original Complaint, and dismissed with prejudice all allegations relating to conflict of interest because, in the referee's view, the Bar could plead no set of facts to state a cause of action regarding a conflict of interest. That hearing was not reported.

By an Order dated October 12, 2006, this Court reversed the dismissal and remanded this case to the referee based on a determination that the original Complaint did state a cause of action for "representing adverse interests." This Court did not articulate why or how the Bar's original Complaint actually states a cause of action for "representing adverse interests." In her opening statement at the remand hearing, Ms. Brown took exception to this unexplained ruling, and set forth in the record why the original Complaint remains flawed with respect to alleging a conflict of interest. *See* TR-Remand at 8-13.

The only cogent factual allegation related to stating a cause of action for conflict is in paragraph 110 of the original Complaint, which states: *"Parks and Spillman advised Ms. Brown's assistant, Mark Patterson, that the weapon belonged to Parks, and Spillman had hidden it from Parks by placing it under the tray in the car."* There is no allegation, however, that Parks was a convicted felon.

At no time did the Bar ever adduce any credible evidence proving that the revelation alleged in paragraph 110 actually occurred, nor any evidence that Ms. Brown ever learned of this supposed revelation from Mr. Patterson.

The Bar put on its case, whereby it sought to prove by clear and convincing evidence that Ms. Brown had represented adverse interests in providing services to Parks and Spillman. The crux of its presentation was the "fact" that Antoine Parks was a convicted felon at the time Ms. Brown represented him on charges of habitually driving while his driver's license was suspended or revoked. Due to this crucial "fact", the argument went, Mr. Parks *possibly could have been* charged with possession of a firearm by a convicted felon (the crime charged to Spillman), since Parks had been in the car where Spillman's gun was found. This possibility placed Ms. Brown in a conflict situation, so the argument went.

One huge problem with this argument is that this crucial "fact" was never pleaded by the Florida Bar. Nowhere in its pleadings did the Bar ever allege that Parks was a convicted felon, and nowhere was it ever alleged that Ms. Brown knew or should have known that Parks was a convicted felon. At the remand hearing, Ms. Brown's counsel noted that she had first been made aware of this essential "fact" – upon which the entire prosecution apparently now hinged – just ten minutes before. *See* TR-Remand at 7, 10.

If this crucial "fact" is, indeed, what proves the conflict of interest charge against Ms. Brown, then there has been a gross failure of due process in this case. This last-minute presentation by the Florida Bar of this new theory of strict professional liability not only prejudiced Ms. Brown's ability to defend, it actually (and fully) exposed the gross insufficiency of the Bar's 149-paragraph Complaint, since the ultimate fact of Parks' status as a felon – which the Bar now concedes is *essential* to its cause of action – is nowhere alleged in the subject pleading, and it cannot be reasonably inferred therefrom. It simply isn't there.

Moreover, this essential "fact" was never brought before the grievance committee, never brought up in discovery, and never established by the Bar at the previous two-day trial. In addition, no evidence of any kind was adduced upon remand – nor at any point in this proceeding – that clearly and convincingly proved that Ms. Brown *ever knew* that Parks was a convicted felon prior to September 20, 2002, the date on which her representation ended. *See* Amended Report of Referee, *see also* TR-Remand at 67. The only evidence of her possible awareness was the "sentencing score sheet" filed by the prosecution in State v. Parks on September 20, 2002 – the very same date she got off his case. *See* TR-Remand at 30-33.

Lastly, a dispute arose regarding the scope of this Court's Order remanding

the cause for hearing. Ms. Brown argued that the plain language of the Order (holding without elaboration that the Bar's original pleading stated a cause of action for "representing adverse interests"), effectively limited the parameters of the remand proceeding to a prosecution under Rule 4-1.7(a) (representing adverse interests). The Florida Bar disagreed, arguing that her conduct violated Rule 4-1.7(b) (limitation on lawyer's independent professional judgment).

When the Bar rested its case-in-chief on remand, Ms. Brown moved for a directed verdict. After an extended colloquy between the court and counsel as to the evidence and the conflict rule, the referee ruled that the Bar had not met its evidentiary burden, thus, in effect, granting a directed verdict. The referee held that neither Rule 4-1.7(a) or (b) applied to the evidence presented or the court's factual findings, and that neither rule imposed a strict professional liability, that is, a liability divorced from a lawyer's lack of awareness of essential facts that may create a real or potential adversity between two clients.

The Bar elected to appeal the directed verdict.

SUMMARY OF THE ARGUMENT ON REMAND

1. The Court is precluded from reweighing the evidence and substituting its judgment for that of the referee, because the referee's findings are supported by competent substantial evidence. In this regard, the referee found no evidence that Ms. Brown ever knew that her client, Mr. Parks, was a convicted felon prior to the day her representation ended.

2. The Bar's failure to plead the essential fact upon which its argument and case now turn – Mr. Parks' status as a felon – violates basic principles of due process and fair play, and merely highlights the Bar's elemental pleading flaw regarding conflict of interest.

3. The Bar's reliance on Mr. Parks' criminal history, without more, does not expose Ms. Brown to strict liability for representing adverse interests, because the conflict rule contemplates a lawyer's reasonable awareness of essential facts giving rise to an actual or potential conflict of interest.

4. Rule 4-1.7(b) was not at issue on remand, and even if it was, the Bar's sole reliance on Mr. Parks' criminal history, without more, does not expose Ms. Brown to liability thereunder, because that rule likewise contemplates a lawyer's reasonable awareness of essential facts giving rise to actual or potential limitation on his or her independent professional judgment.

5. This entire case is predicated on assigning to Ms. Brown a full spectrum of professional responsibility for representing Spillman; however, his counsel of record, Flood, assumed that total liability, and Ms, Brown's unofficial, *ad hoc* involvements only make her liable for what she actually did – not for what she did not do. Because the Bar's prosecution under Rules 4-1.3 and 4-1.4 derive from what she did not do, she cannot be found guilty under those rules.

6. Any statements Ms. Brown made with in conjunction with her *ad hoc* participation in representing Spillman were made negligently, not intentionally, meaning that they cannot form the basis of liability for violating Rule 4-8.4.

ARGUMENT ON REMAND

I. THE REFEREE'S FINDINGS AND CONCLUSIONS UPON REMAND ARE CORRECT AND SHOULD BE UPHELD.

A. The Court may not re-weigh the evidence or disturb the findings.

When the referee's findings of fact in an attorney discipline proceeding are supported by competent substantial evidence, this Court is precluded from re-weighing the evidence and substituting its judgment for that of the referee. *Florida Bar v. Vining,* 721 So.2d 1164, 1167 (Fla. 1998). Thus, the Bar's burden on review is to demonstrate "that there is no evidence in the record to support [the referee's] findings or that the record evidence clearly contradicts the conclusions." *Florida Bar v. Spann,* 682 So.2d 1070, 1073 (Fla. 1996); *see also Florida Bar v. Jordan,* 705 So.2d 1387, 1390 (Fla. 1998) (quoting same). Where the referee's findings are supported by competent substantial evidence, "this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." *Florida Bar v. MacMillan,* 600 So.2d 457, 459 (Fla. 1992); *see also Jordan,* 705 So.2d at 1390 (quoting same).

The transcript and report of the remand proceeding clearly establish that the referee's findings are supported by competent substantial evidence. As such, the Court must accept the findings and conclusions made by the referee, and may not revisit or reweigh the evidence adduced, and may not substitute its judgment for

that of the referee regarding the findings or the evidence.

All that remains, therefore, is this Court's construction of Rules 4-1.7(a) and (b); first, as to whether subsection (b) applies to the remand proceeding at all; and second, whether either subsection creates a strict liability for lawyers based solely on the fact of representation and regardless of an attorney's lack of awareness of any issue or matter giving rise to an actual or potential conflict of interest.

The Bar asks this Court to construe Rule 4-1.7 so as to ignore evidence of the attorney's lack of awareness of a potential conflict, no matter how speculative, hypothetical, or implausible that potential conflict may be. The Bar seeks this draconian interpretation because it is the only way Ms. Brown's conduct can be deemed a violation of that rule – and that this misguided prosecution thereby can be justified. Ms. Brown respectfully requests the Court to reject the Bar's effort to construct such a harsh, mindless liability, and to resist any impulse to seek to validate the Bar's improper pursuit of this case, for the reasons that follow.

B. The Bar's theory of its case is a moving target.

It must be stated that at no point in its long, torturous prosecution of this case did the Florida Bar ever reveal to Ms. Brown that the entire basis of its cause of action under Rule 4-1.7 hinged on the allegation that her client, Antoine Parks, had a felony criminal history at the time she represented him. The reason for this

singular failure is that the Bar itself never realized that this allegation was essential to its cause of action under that rule. The first time Ms. Brown received any notice of this revised theory of the Bar's case – any hint of the indispensable nature of this essential, unpleaded allegation – occurred during the remand hearing itself on March 2, 2007. *See* TR-Remand at 7, 10.

The Bar's failure to make Ms. Brown aware that her professional liability in this proceeding hinged upon this hidden "fact" is a violation of basic fairness and due process, which should not be countenanced.

C. Ms. Brown did not engage in a conflict of interest.

In *Webb v. State,* 433 So.2d 496, 498 (Fla. 1983), this Court adopted the definition of conflict of interest in the context of criminal cases articulated in *Foxworth v. Wainwright,* 516 F.2d 1072, 1076 (5th Cir. 1975), to wit:

> "A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing."

In squaring that definition with this case, it must first be stated that Parks and Spillman were not "codefendants," despite the Bar's unproven allegation that they were. The men were never charged with the same crime, and were not parties to the same criminal proceeding. Moreover, neither was ever listed by the State as an adverse witness against the other. (This is probably because both confessed to

their respective, dissimilar crimes, at the scene, to the arresting officer.)

The record of this case includes no finding and no evidence whatsoever that Ms. Brown ever adduced any probative evidence, or ever advanced any plausible argument that damaged Spillman's cause. More to the point, there is no evidence that she ever had any opportunity to do so. She performed perfunctory, mundane tasks is assisting her colleague's representation of Spillman.

The Bar posits that Ms. Brown should have told the court or prosecutor that the handgun actually belonged to Parks, despite a total lack of any evidentiary basis for her to believe that might be true. Her failure to act affirmatively in this regard, for the benefit of Spillman and to the detriment of Parks, proves that she was in a conflict situation, so the Bar's argument goes.

As the referee found, there is no evidentiary basis to conclude that Ms. Brown ever knew or should have known that Parks was a convicted felon – that is, excluding the very day her representation of Parks ended. Moreover, as the referee found, there is no basis to conclude that Spillman ever indicated that the gun was not in fact his, except for a letter he wrote to Flood that was dated two months after Ms. Brown stopped representing Parks. How this factual scenario still created a conflict situation for Ms. Brown requires some mental gymnastics by the Florida Bar, which, frankly, defy credibility.

In practical terms, the Florida Bar is suggesting that Ms. Brown should have lied to the court or the state attorney regarding a material fact. Because there is no evidence that she had any good faith basis to believe that the gun actually was Parks' property, the Bar really is suggesting that Ms. Brown simply should have imagined that it *might* be his gun, and to affirmatively report this unsubstantiated supposition in a patently unethical effort to create a defense out of whole cloth for Spillman, for whom she was not even counsel of record.

This startling suggestion is so fraught with ethical concerns as to not even merit a response, other than to note that the assistant state attorney was probably clever enough to imagine that same unsubstantiated supposition – gee, maybe it was the other guy's gun – without any affirmative prompting by Ms. Brown.

When one considers that there is no evidentiary basis to conclude that Ms. Brown knew that it would be against Parks' interest to report this affirmative defense for Spillman (i.e., is, no basis to conclude she knew Parks was a convicted felon), the case for establishing the "adverse interests" necessary to show a violation under Rule 4-1.7 becomes flimsier.

When one realizes that the Bar never adduced any credible evidence proving up paragraph 110 of its Complaint, nor any evidence that Ms. Brown ever learned of any such revelation, the case for establishing "adverse interests" grows

fainter. When one considers that Ms. Brown assumed no such affirmative duty with regard to defending Spillman's case – she merely assisted Flood's representation – the case for establishing adverse interests starts to disappear.

Lastly, when one considers the undisputed fact that Parks and Spillman were not "codefendants," the case for establishing "adverse interests" expires altogether, and the Bar's prosecution of this case utterly fails to meet this Court's definitive test for representing adverse interests in a criminal context.

Moreover, a disparity in the quantum of evidence establishing guilt does not itself create a conflict of interest. *See Washington v. State,* 419 So.2d 1100, 1102 (Fla. 3d DCA 1982); *State v. Oliver,* 442 So.2d 1073, 1075 (Fla. 3d DCA 1983). This only applies, however, in situations where two people are charged with the same crime. Even in the instant, dissimilar context, however, it is important to note that the evidence was quite strong establishing Spillman's guilt for the crime of possession of a firearm by a felon. Nonetheless, any disparity in the quantum of evidence (i.e., an assertion that it was Parks' gun) in and of itself, still would not have created a conflict of interest in Ms. Brown's representation of Parks in a separate case where that crime was not charged.

This brings us to the Bar's contention that Ms. Brown had an affirmative duty to advance the argument – within her limited, *ad hoc* representation of

Spillman – that the gun belonged to Parks. The referee found specifically that there was no evidence that Ms. Brown (or anyone) ever knew that Spillman had ever asserted this as a possible defense, or wanted it asserted. Even assuming *arguendo* that there was any proof that she ever had this awareness, and even assuming *arguendo* that she had the responsibility or opportunity to advance this as a plausible argument on Spillman's behalf (despite not being his counsel of record), it is highly doubtful, given Spillman's confession and the trooper's testimony, that such an argument could ever be deemed as "plausible" under the standard for establishing a conflict quoted above.

For any judicial action to lie based on a conflict of interest, the *Webb* case requires that the record "affirmatively indicate that due to the joint representation, the co-defendant gained significantly at [defendant's] expense, [or] that appellee was damaged by the common defense." *See Oliver*, 442 So.2d at 1075. The referee in this case has found that Spillman was not prejudiced in any way as a result of Ms. Brown's dual representation. There is absolutely no evidence that Parks "gained significantly" in his separate case at Spillman's expense. Thus, from a constitutional standpoint, there is no substance to the Bar's allegation that Ms. Brown represented materially adverse interests.

The Sixth Amendment to the U.S. Constitution guarantees every criminal

defendant the right to effective assistance of counsel. The U.S. Supreme Court has long recognized that this right may be impaired when one attorney represents multiple defendants. *See e.g., Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) (rehearing denied); *Kretske v. United States*, 315 U.S. 827, 62 S.Ct. 629, 86 L.Ed. 1222 (superseded on other grounds by Fed.R.Evid. 104(a) as stated in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)).

The U.S. Supreme Court has observed that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Thus, under both the Sixth Amendment and article I, section 9, the right to the counsel of one's choosing "must be balanced against the requirements of the fair and proper administration of justice." *United States v. Micke*, 859 F.2d 473, 480 (7th Cir. 1988).

The existence of a conflict of interest is a vital consideration to this balance.

Indeed, the United States Supreme Court has held that a trial court may disqualify or remove a defendant's counsel of choice where there exists an actual conflict of interest or a serious potential for conflict. *See Wheat*, 486 U.S. at 164, 108 S.Ct. 1692 (stating that a trial court "must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict."). In short, trial courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat,* 486 U.S. at 160, 108 S.Ct. 1692. The *Wheat* Court further stated:

> "When a trial court finds an actual conflict of interest that impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over [...] the fairness of the proceedings in his own court[.]

Wheat, 486 U.S. at 162, 108 S.Ct. 1692 (quoting *United States v. Dolan,* 570 F.2d 1177, 1184 (3d Cir. 1978)).

Thus, the Sixth Amendment conflict inquiry is co-extensive with the ethical inquiry. Rule 4-1.7 of the Rules Regulating the Florida Bar makes no material

distinction between representing adverse interests in a criminal, as opposed to a civil or administrative proceeding. The instant case involves two separate criminal cases. Therefore, criminal case law must be instructive in these premises.

It is important to recognize these highly material facts that the Florida Bar failed to establish or prove in its case against Ms. Brown:

1) The Bar never proved that Peter Flood, Esq. was not Spillman's attorney. Indeed, it is incontrovertible that he was Spillman's counsel of record.[1] This undisputed fact proves that Anna Brown was not the only lawyer representing Spillman. So, this is not a situation where Ms. Brown represented Parks and Spillman all by herself. The evidence shows that she did represent Parks all by herself, and represented Spillman in conjunction with Flood – and only then through her discrete interventions intended to assist Flood's representation.

2) The Bar failed to prove that any of the discrete interventions Ms. Brown performed (by which she was deemed to have represented Spillman) had any material, adverse effect on Spillman's cause. A fair reading of the evidence shows that her participation involved routine or mundane matters such as covering a docket sounding in Flood's absence; advising the court of a misapprehension regarding the same; having her staff prepare boilerplate notices (which Flood

[1] The Court should note that the Florida Bar prosecuted Peter Flood solely based on the fact of his legal representation of Renfred Spillman.

signed); having her staff prepare a Motion for Withdrawal for Flood (which she signed in Flood's behalf); and having her staff notice the hearing on that motion (which she signed). The foregoing describes the sum and substance of Ms. Brown's participation in "representing" Spillman – other than her attending the deposition of the arresting officer (which Flood also attended). To repeat, the Bar never proved any harm inuring to Spillman's cause through any of the discrete acts by Ms. Brown.

3) The only opportunity Ms. Brown ever had to exercise (or to limit the exercise of) her independent professional judgment in representing Spillman would have been at the deposition of Trooper Benton. That, however, is a red herring, due to the undisputed fact that Spillman's counsel of record, Mr. Flood, also attended the deposition. Because Notices of Deposition were filed in both the Parks and Spillman case files, only one conclusion emerges: that Ms. Brown was at the deposition representing Parks, and Flood was there representing Spillman. Because Spillman's record counsel was at the deposition, Ms. Brown cannot be held liable for the fact that Flood – for whatever reason – asked no questions of the witness on the record. Any failing associated with that event, with regard to Spillman, would have been Flood's professional liability alone.

As Ms. Brown argued in her previous Answer / Cross-Appeal brief, the fact

that Flood officially entered Spillman's case as counsel of record per Fla. R. Jud. Admin. 2.060 (now Rule 2.505(e)), vested him with the overarching legal and ethical responsibility for the representation. The undisputed fact that Ms. Brown did not officially appear in Spillman's case, per the rule governing appearances, limited her legal and ethical liability to what she actually did in the case – and that liability cannot be expanded to include what she did not do. She simply did not have that overarching professional responsibility, and it cannot reasonably be imputed or assigned to her.

Thus, it was only Peter Flood at whom the Bar could point and say, "you failed to do this, you failed to advise that, and you had a duty to do so." And, the Bar has done that. And Flood has admitted that. And he was suspended.

More to the point, the Bar has utterly failed to prove that any of the discrete acts undertaken by Ms. Brown violated any other ethical rule. Her attempts to contact Spillman cannot reasonably be seen as violating Rule 4-1.4. Her efforts in covering a hearing for Flood, or in trying to locate Spillman to convince him to appear for a hearing cannot be viewed as a lack of diligence under Rule 4-1.3.

The Bar's case rests on the (incorrect) imputation of global professional liability onto Ms. Brown as to Spillman, based solely on her limited, discrete, inconsequential involvements in his criminal case, described above. The Bar

implores that she be liable for the full complement of affirmative professional and ethical obligations as a result of her voluntary assistance of Flood's representation by and through those small acts. Ms. Brown replies that it is fundamentally wrong and unfair for the Bar to saddle her with this overarching responsibility when that rested with Flood alone, especially since the Bar has disciplined Flood based on that ultimate responsibility, which he alone assumed via the rules of court.

Once one realizes the limited, *ad hoc* responsibility Ms. Brown voluntarily assumed with respect to Spillman's case, it becomes apparent that the Bar's entire case against her hinges on the conflict of interest allegation. In a real sense, the proceeding on remand is the Bar's entire case, and it consists of this simple allegation: That Ms. Brown should not have done any of those discrete acts, because anything she did for Spillman was materially adverse to her representation of Parks, period. Thus is it demonstrated that this prosecution hinges completely on the allegation of representing materially adverse interests.

How superbly uncomplicated the Bar's conflict analysis is! She went to that hearing; she is guilty. She signed that motion to withdraw; she is guilty. The Bar does not assert, for example, that Ms. Brown said this, or did that, and that this statement or that act was materially adverse to Spillman's cause – or to Ms. Parks' cause, for that matter. The Bar cannot reasonably argue that because the referee

has found that Mr. Spillman was not harmed in any way by Ms. Brown's conduct. Moreover, there is no evidence in the record with which to challenge that particular finding.

The Bar explains that Ms. Brown's official representation of Parks was materially adverse to her unofficial, *ad hoc* representation of Spillman because both men were arrested at the same traffic stop with a gun in the car, and both were convicted felons at the time. Thus, the argument goes, either potentially could have been charged with the crime that only Spillman ended up being charged with: possession of a firearm by a convicted felon.

In support of its argument for strict liability under these "facts," the Bar urges this Court to construe an attorney's liability for violating Rule 4-1.7(a) regardless of the fact that Ms. Brown had no knowledge that one of the men, Parks, even was a convicted felon. The Bar asserts that her lack of awareness of this key fact is totally irrelevant to a determination that she engaged in a conflict.[2]

This shows how wrong-headed and mean this Bar prosecution has been: The Florida Bar does not discover the essential "fact" justifying its cause of action for conflict of interest until 2007 – after the trial and upon remand – some four

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[2] Apparently, the converse is not true: The Florida Bar's ignorance of that same key fact imposes no liability whatsoever in finding probable cause based on it, or filing a complaint based on it, or prosecuting a lawyer based on it.

years after processing and investigating Spillman's original grievance. Throughout that time the Bar adduced no evidence at all to indicate that Ms. Brown herself ever knew or discovered this "fact." Yet the Bar now contends that both her awareness and ignorance of the fact (pick one) is totally irrelevant to finding her guilty based on that fact.

In this regard the Bar argues a tautology – it is a conflict because it is a conflict. Both clients possibly could have been charged with the same crime, even though they weren't. And, even though Ms. Brown could not possibly have known or realized that possibility at the time (through lack of awareness), she is guilty of engaging in a conflicted representation. The logic is inelegant.

But, the argument gets even better: the Bar argues that a potential conflict doesn't even have to be plausible. A merely hypothetical or speculative conflict, of which a lawyer is totally ignorant, is enough to convict that lawyer of engaging in a conflict of interest by representing adverse interests. This is the substance of the Bar's argument to the referee, and to this Court. The referee rejected it.

Dave Scuderi, Esq,, the assistant state attorney who prosecuted both the Parks and Spillman criminal cases, testified at the remand hearing at the instance of the Florida Bar, and the questioning went as follows:

Q: And did you have any good faith basis at all, during the entire

proceeding against Antoine Parks, to charge him with possession of a firearm by a felon?

A: No.

Q: And did you have any good faith basis at all, during the entire prosecution of Renfred Spillman, to charge him with being the driver of that car? Speeding, in other words?

A: No.

See TR-Remand at 36.

So, the state prosecutor had no reasonable, good faith basis to believe that there existed at any time any quantum of evidence sufficient to charge Parks with the crime that the Florida Bar now insists he hypothetically might have been charged with committing. Apparently, the Bar is the only one that thinks so, and even it took several years to envision this abstruse possibility.

It is abundantly clear that, at no time did Ms. Brown reasonably believe that her attempts to help Flood in the Spillman case would adversely affect any of her responsibilities to Parks, nor her relationship with Parks. Stated more cogently, there is no clear and convincing evidence that she had no such reasonable belief. Moreover, the Bar never alleged that she lacked such a reasonable belief, and it never proved such lack by any clear and convincing evidence. The Bar never

alleged the existence of this abstruse, possible conflict, and never alleged (nor proved) that it would have been objectively reasonable for Ms. Brown to have discerned its potential existence and import. All aspects are purely speculative.

The Bar is wrong in contending that a lawyer's awareness, knowledge or beliefs have no pertinence whatsoever in a proper interpretation or operation of Rule 4-1.7. The identical text of the Rule's two savings clauses (Rule 4-1.7(a) (1) and (2) and Rule 4-1.7(b)(1) and (2)) fairly contemplate such awareness, knowledge and belief regarding the actual basis or contours of a conflict or potential conflict. Indeed, absent any such awareness, a lawyer could never arrive at a "reasonable belief" regarding adverse interests if he or she has no awareness of such adversity under 4-1.7(a)(1) and, likewise, a lawyer could never comply with the "client consultation" requirement in 4-1.7(a)(2). No lawyer can consult with a client regarding a matter of which he has no awareness, *ipso facto*.

A lawyer's understanding of an actual or potential adversity is central to interpreting Rule 4-1.7, and the real question, as the referee correctly intuited, is whether the lawyer's failure to discern or identify a possible conflict – as alleged here – is objectively reasonable.

In that regard the referee found that the very first written (read: competent and substantial) evidence of an adverse interest is contained in Bar's Exhibit 5,

dated 11/10/02 (a letter by Spillman to Flood). This letter is dated two months after Ms. Brown's representation of Parks ended. TR-Remand, p. 67, lines 1-6. Thus, the first inkling of a possible conflict appeared at a time when Ms. Brown no longer represented Parks. From this undisputed fact she could not have represented two clients with adverse interests, *ipso facto*.

The referee went on, "Mr. Spillman's credibility is not what I would call strong, so the detail often modifies itself to suit his needs or his frustrations or his emotions at the moment, but there's nothing in the court file, there's nothing in the police report, there's nothing in the sheriff's office report, nothing in the deposition, nothing in the trooper's report, that suggested adverse interests." TR-Remand, p. 67, lines 7-15.

The essence of the Bar's argument on review invokes basic issue-spotting – the Bar argues that Ms. Brown should have divined this abstruse, possible conflict, which the referee deemed not objectively reasonable, and which the Bar's own prosecutors took four years to discern. Such a purported failure, however, would more properly be prosecuted under Rule 4-1.1 (competence), and not under Rule 4-1.7(a). Ms. Brown was not charged with a lack of basic competence, however, nor could she be, in good faith, under these facts.

Astonishingly, the Bar argues that it doesn't matter at all that Ms. Brown

could not or did not divine this esoteric premise of conflict. It urges this Court to deem that the simple fact that any obscure, possible conflict exists at all is enough to convict her – or any Florida attorney – of engaging in an impermissible conflict of interest for representing adverse interests. No awareness or knowledge or belief by the attorney of an actual adversity of interests is required.

In essence, the Bar asks this Court to reject a rule of reason – to abandon logic – in this case because it realizes that is the only way this Honorable Court can convict Ms. Brown of anything at all after four years of a misguided prosecution. The Court should reject this request as the product of misbegotten obstinance.

Under the Bar's rigid proposal of strict liability, the Court must necessarily disregard the savings clauses contained in Rules 4-1.7(a) and (b), since those obviously contemplate an attorney's reasonable awareness of a serious potential or actual conflict so as to permit the lawyer to advise her clients of the same, and gain their understanding and consent. Under the Bar's theory, Ms. Brown doesn't have to be aware of the facts giving rise to a conflict, but the rules still require her to inform her clients of those facts that she doesn't know. Such patently illogical reasoning cannot be legitimized.

II. THE RECOMMENDATIONS OF GUILT ARE IN ERROR.

A. Ms. Brown had no affirmative duties toward Spillman.

At the risk of belaboring the distinction between Ms. Brown's official representation of Parks (per the Fla. R. Jud. Admin.) and her unofficial, *ad hoc* representation of Spillman (expounded on, supra), Ms. Brown argues that this distinction is highly pertinent to this case, because it establishes the parameters of her professional duties. With respect to Parks, Ms. Brown's duties were total, and non-delegable. In Spillman's case, however, her duties were limited to her specific involvements in his case. In short, she was only covering for Flood, thus only liable for what she did on his behalf. She cannot be held liable for what she failed to do, since she never assumed the full scope of responsibility and risk.

There is no finding, and no clear and convincing evidence, that she did assume the full panoply of professional responsibilities with respect to Spillman, as did Mr. Flood. The referee did find that Spillman had a reasonable belief that Ms. Brown was his lawyer, and he did find that Ms. Brown, through those *ad hoc* involvements, did represent Spillman. That is not to imply, or impute, that she thereby became fully responsible for the representation, on a co-equal basis with Flood. There is no basis to infer such imputation from the evidence or findings.

In this regard, Ms. Brown directs the Court's attention to her arguments

previously made in the Answer / Initial Cross Appeal Brief filed in this case. Ms. Brown has asked the Bar and the referee to elucidate what it is that she should have done, but failed to do, in representing Renfred Spillman. It was never explained. Indeed, the Bar's Complaint doesn't explain what Ms. Brown should have done for Spillman but failed to do. As such, she cannot be found guilty of violating Rule 4-1.3, a lack of diligence, so that recommendation should be disapproved. The same argument holds regarding the alleged lack of client communication (Rule 4-1.4). These were Mr. Flood's area of responsibility, the liability and discipline for which he has accepted.

Under Rule 2.060 (now 2.505(e)) of the Rules of Judicial Administration, a lawyer is either officially in a case as counsel, or she is not. It is unfair to impute such total responsibility to Ms. Brown under these facts, at this juncture, due to a lack of fair notice that she was assuming such total responsibility. Had she known that, she likely would have left Mr. Flood to flounder, not sought to help him.

B. Ms. Brown cannot be deemed guilty of violating Rule 4-8.4(c)

This allegation does not depend on whether or not an agency exists, or the scope of agency. A lawyer is not permitted to knowingly or intentionally engage in conduct involving dishonesty, fraud, deceit or misrepresentation, period. The problem with the referee's recommendation of guilt regarding Rule 4-8.4 is that

the referee himself found that Ms. Brown had no motive or intent to deceive anyone. *See generally*, TR-2 at 147-150.

This Court has held that knowledge or intent are necessary to finding a rule violation under 4-8.4. Proof of a misrepresentation that is merely negligent will not suffice. Ms. Brown appeared in Flood's stead in court, in his absence, and her conduct in that regard was intentional; she signed papers in Flood's stead, and those actions were intentional. Ms. Brown does not contend that her discrete acts in this assisting Flood's representation were "accidental" or "mistaken," as the referee has referenced. She contends that her *ad hoc* involvements in Mr. Spillman's case were done without any intent to deceive, and her lack of *scienter* has been established by the evidence and confirmed by the referee. See TR-2 at 147-151.

The Bar presented no evidence that the circuit court or the state attorney was confounded or misled regarding Ms. Brown's *ad hoc* involvements, or regarding Flood's status as Spillman's record counsel. The Bar did not prove any intent to deceive by Ms. Brown, and did not prove that anyone was deceived. The only misapprehension appears to have been on the part of Spillman, as to who was representing him, or as to what relation Flood had with Ms. Brown's practice. She had no intent or motive to deceive Spillman regarding that relation. It was a

negligent omission or deficient communication that caused Spillman's misapprehension – most likely committed by Ms. Brown's nonlawyer assistant, Mark Patterson.

No evidence was presented showing that Ms. Brown intentionally or affirmatively misrepresented any known fact – to the court, to the adversary or to the client – which she actually knew to be false at the time. Indeed, no evidence was presented showing that the circuit court, the adversary or Mr. Spillman were actually misled, or prejudiced, by any conduct or statement(s) by Ms. Brown, and the referee found that none of the complained-of conduct harmed anyone.

To establish a violation of Rule 4-8.4(c), the Florida Bar must prove the necessary element of intent to defraud or deceive. *The Florida Bar v. Lanford*, 691 So.2d 480 (Fla. 1997). The lack of proof of her intent to defraud necessarily casts this as a negligent misrepresentation, which is not actionable under the case law. *See Florida Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999). Absent clear and convincing proof of such bad intent, Ms. Brown cannot be found guilty of violating Rule 4-8.4(c).

The referee assumed that the misrepresentation was failure to adequately explain matters to Spillman. TR-2 at 143-44. The second part of the misrepresentation is to the court in that Mr. Flood's name appeared on pleadings

using Ms. Brown's address so that both files were kept in her office. Id. With all due respect, those are not misrepresentations, and if they are, they were negligently made.

Reading the record, one surmises that the referee found a negligent misrepresentation generally, through the sheer fact of Ms. Brown's repeated participation in Spillman's case when she was not Spillman's counsel of record. The referee went out of his way to explain to the parties that he found no bad motive or intent on Ms. Brown's part, despite his finding that a misrepresentation had occurred. *See* TR-2 at 147-50. This lack of specific intent apparently played a significant role in the referee's recommended sanction of the lowest formal discipline, Admonishment.

The referee deemed that Ms. Brown's participation in Spillman's case – for example, issuing a notice of hearing – amounts to a misrepresentation. And so it may. Ms. Brown contends, and the referee found, that she had no bad intent regarding it. Therefore, it must be deemed a negligent misrepresentation.

CONCLUSION

For all the foregoing reasons and matters of law, the recommendations regarding guilt as contained in the Report of Referee should be denied, the referee's Amended Report should be approved in its entirety, and this case should

be remanded to the referee for proceedings consistent with an Order taxing unnecessary costs against the Florida Bar.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font standards required by Fla. R. App. P. 9.210 for computer-generated briefs.

BRETT ALAN GEER

CERTIFICATE OF SERVICE

I CERTIFY that the original and seven copies of this paper have been furnished to the Hon. Thomas D. Hall, Clerk, Supreme Court of Florida, at 500 South Duval Street, Tallahassee, Florida 32399-1925; with a copy by mail to Troy M. Lovell, Esq., at The Florida Bar, 5521 W. Spruce Street, Suite C-49, Tampa, Florida 33607-5958, and to Kenneth Marvin, Esq., Staff Counsel, at The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399 on July 21, 2007.

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