IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC04-2119

vs.

ANNA L. BROWN,

Respondent.
_____/

ANSWER BRIEF

and

INITIAL BRIEF ON CROSS APPEAL

(Combined)

BRETT ALAN GEER
The Geer Law Firm, L.C.
3837 Northdale Blvd., No. 350
Tampa, Florida 33624-1841
(813) 961-8912
(813) 265-0278 Facsimile
Florida Bar No. 61107

TOPICAL INDEX TO BRIEF

TABLE OF AUTHORITIES

SYMBOLS AND REFERENCES

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

"TR-1" will refer to the transcript of a final hearing before the referee in this case, SC04-2119, that was conducted November 10, 2005. Similarly, "TR-2" will refer to the transcript of a final hearing before the referee that was conducted November 18, 2005.

"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.

"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

This case involves a comedy of errors, for want of a better term. At the trial level, several material facts were disputed. Due to this, and because the referee's final report does not include detailed factual findings, the following factual recitation is offered by Ms. Brown.

In October, 2001, outside of Naples, Florida, a Florida Highway Patrol officer (Trooper Benton) stopped a car speeding down Alligator Alley. In the car were Antoine Parks and Renfred Spillman, residents of Miami. After being stopped, the two tried to switch places in the vehicle, which the trooper observed and noted. The officer arrested both men. Mr. Parks was charged with habitual driving while his license was suspended or revoked, a felony. Mr. Spillman was charged with possession of a firearm by a convicted felon, a felony. The two were assigned to the 20th Judicial Circuit Public Defender's Office for representation. *See generally* Resp. Exh. B (composite), certified case file, State v. Parks.

In late November, 2001, Antoine Parks (hereinafter, "Parks") traveled to Naples and met with the respondent, Ms. Brown, at her law office. TR-1 at 69. Parks hired Ms. Brown as his attorney, and she officially appeared in his case on November 30, 2001. Resp. Exh. B; TR-1 at 100. A few days later, Mr. Spillman ("Spillman") also presented to Ms. Brown's office, in early December 2001.

On that occasion, Ms. Brown's nonlawyer assistant, Mark Patterson ("Patterson"), conducted an initial client interview of Spillman, and took down his information. TR-1 at 33-34; TR-1 at 70. During this visit, Ms. Brown met with Spillman, but declined the representation, due to her perception of a potential conflict with her existing client, Parks. TR-1 at 70. She informed Spillman that her office worked closely with another lawyer, Peter T. Flood, Esq., and she referred him to Mr. Flood, which she had told Parks the week prior. Id. Whereupon, Patterson telephoned Mr. Flood ("Flood"). TR-1 at 84.

Flood spoke with Spillman. TR-1 at 84, 91. Flood accepted the case and came to Ms. Brown's office the next day. There, Patterson presented him with a contract for representation Spillman had signed, which form Ms. Brown typically used in her law practice at that time. TR-1 at 85. Because the contract was printed on Ms. Brown's office letterhead, that information and Ms. Brown's name had been whited-out of the documents. *See* TFB Exh. 1. Presumably, this had been done by Patterson. Mr. Flood signed the contract and also a Notice of Appearance and Notice of Discovery in Spillman's case. TFB Exh. 19 and 20. The contract and the notices had all been prepared by Patterson.

It is necessary to digress from this chronology to explain that, at that point in time, Flood's law practice was in turmoil. He maintained his own offices apart

from Ms. Brown's, but he had no staff to assist him. TR-1 at 84; TR-1 at 90. He and Ms. Brown had worked together on some cases, and they were contemplating merging their law practices. TR-1 at 90-91. Flood did not have a written contract like the one Ms. Brown used. TR-2 at 77.

In contrast to Flood's experience, Ms. Brown's client base was expanding rapidly during this time, due primarily to her participation in a direct mail program she had purchased. TR-2 at 98-100. It was to this solicitation effort that Parks had responded. Id. at 101, *see also* TR-1 at 33.

Ms. Brown and Flood were friends and colleagues. For her part, Ms. Brown needed someone to whom she could refer clients. Flood badly needed help, so Ms. Brown made her office and staff available to respond to his needs. She allowed her staff to assist Mr. Flood in any way that he needed. TR-1 at 110-11. It was in this context and time frame that Ms. Brown's standard contract was altered so as to insert Flood's name and redact the references to Ms. Brown. This sharing arrangement explains why Patterson also altered Ms. Brown's standard Notices for Flood's use, and why Patterson accepted Spillman's fee payment. Flood testified that Patterson had the Spillman contract and Notices ready for him to sign upon his arrival. TR-2 at 73.

Flood's staff being non-existent, he sought to have documents relating to Spillman's case addressed and delivered to Ms. Brown's office location. TR-1 at 88; 92. This is so the two case files, Parks' and Spillman's, could be maintained together, and administered by the same paralegal, Patterson. This was done because the court and everyone was treating them as companion cases; the cases were consecutively numbered and set on the same docket calendar. TR-1 at 106-07. And, both defendants were facing the same prosecutor, Dave Scuderi, Esq. For these reasons, the Notices that Patterson prepared for Flood contained Ms. Brown's law office address within Flood's signature block. TFB Exh. 19; TR-1 at 88 and 92.

The day after that, December 6, 2001, the court served a Notice to Spillman reflecting Peter T. Flood's appearance in the case. *See* Resp. Exh. A (composite). Spillman admitted that he received this Notice and all of the court's notices. TR-1 at p. 47; *see generally* TR-1 at 46 to 50.

There is a conflict in the evidence in that, according to Spillman, he never met with or spoke with Ms. Brown on that day in December 2001.[1] *See* TR-1 at 33-36. Ms. Brown testified as to the facts set forth herein. TR-1 at 70. Spillman also

[1] *But see* TR-1 at 55, line 12, where Spillman was asked if he had given an alternate address to Ms. Brown when he spoke to her and Mr. Patterson that day, and he said, "No," without denying that he had spoken to, or seen, Ms. Brown.

stated that he did not speak with Flood on the phone that day, either. TR-1 at at 35, 61. Flood testified as to the facts set forth herein. TR-1 at 84, 91.

Spillman's conflicting testimony should be ignored, as he was impeached as to his credibility. First, he admitted to an extensive criminal history as a convicted felon. TR-1 at 51-52. When asked if he had lied to Trooper Benton during the traffic stop, Mr. Spillman testified, "Of course." TR-1 at 56. He later testified that he pled guilty to – and served two years in prison for – a crime that he had not committed; that is, the instant crime: possession of a firearm by a convicted felon. *See* TR-1 at 65. In making this assertion some four years after the event, Spillman testified that the subject weapon actually had belonged to Parks.[2] Most tellingly, however, just minutes prior to this assertion, Spillman was asked whether he had complied with the order to deliver all firearms to the Sheriff, and in an unguarded moment he replied, "All what firearms? They got the gun out of my car. That was the only firearm I had."[3] *See* TR-1 at 57. In addition, when cross-examined about his guilty plea, Spillman stated that his plea agreement had been a lie to the court. TR-2 at 41.

---

[2] Mr. Parks died before the instant case was brought. TR-1 at 66.

[3] In admitting that "of course" he had lied to the police, Spillman was referring to the fact that he had told Benton that no gun was in the car. *See* TR-1 at 56.

In contrast, the testimony given by Ms. Brown and Flood was fairly consistent in material part, and the credibility of neither witness was seriously impeached regarding a material fact. The Bar presented no testimony to corroborate Spillman's unsupported assertions, whereas both Flood and Ms. Brown rebutted those assertions.

In any event, from this inauspicious start the legal representation of Spillman grew more problematic. Spillman testified that he continued to interact with Patterson about his case in early 2002. TR-1 at 37, 40. Flood was aware of those contacts. TR-2 at 82. But then Spillman ceased all contact, stopped sending fee payments, and failed to acknowledge receipt of any papers. *See* TR-1 at 40-41. Flood testified that he tried to locate Spillman, but could not. TR-1 at 85-86, 137-138. Ms. Brown made her own efforts to locate Spillman. TR-1 at 115-118.

So far, none of these facts implicate any professional misconduct by Ms. Brown regarding the rules she was charged with violating. No evidence was presented showing that Ms. Brown had any awareness of the fact that her standard contract had been altered and utilized as described above. By May 2002, however, because the cases were proceeding together, Ms. Brown began to notice Flood's lack of attention to the Spillman case. TR-1 at 121. That month, she covered a hearing in that case for Flood, in his absence. Afterward, she corresponded with

the judge in order to correct something that had transpired at the hearing. *See* TFB Exh. 13 and TR-1 at 105-06.

After that *ad hoc* involvement, Ms. Brown began asserting herself more actively in both cases. She arranged the deposition of Trooper Benton; her office issued a Subpoena to the deponent and filed respective Notices of Deposition in each case, using the different case styles. *See* TFB Exh. 11 and 12, *see also* Resp. Exh. B (*see* corresponding Notice of Deposition). This was done for expedience or convenience. *See* TR-1 at 119-120.

From that point forward, for all practical purposes, Flood and Ms. Brown worked the cases together; certainly, her work in the Parks case was conflated with her participation in the Spillman case. For example, when she spoke to ASA Scuderi about Parks, it was natural and expedient for her to discuss the Spillman case as well. TR-2 at 106. Flood researched a suppression issue. TR-2 at 85. Ms. Brown and Flood discussed and attended the trooper's deposition. TR-1 at 93-94; TR-2 at 130-31.

A day of reckoning came, regarding Spillman's disengagement in his criminal case, a hearing that required his attendance.[4] That hearing was set for September 20, 2002. Flood and Ms. Brown renewed their efforts to locate

[4] Spillman testified that he was just waiting until the authorities re-arrested him. *See* TR-1 at 41.

Spillman. *See* TR-1 at 115-17; TR-1 at 137-38. Not succeeding, on September 10, 2002, Ms. Brown caused a Motion for Withdrawal to be filed "on behalf of Peter T. Flood." *See* TFB Exh. 14. Her office sent out a notice of hearing regarding the motion, set for the same date, September 20, 2002.

Both cases were set for final hearing on September 20, 2002. Parks appeared, pled guilty, and received 18 months probation. *See* Resp. Exh. B (composite) case disposition form; *see also* TR-1 at 115-17 and 137-38. Ms. Brown represented Parks at the hearing. Flood also attended the hearing, however, Spillman did not appear, despite the fact that he admitted in testimony that he had received official notice of it. Id.

Flood testified that the court declined to hear his motion to withdraw due to Spillman's absence. TR-1 at 137; TR-1 at 116-17. There is no evidence that the court was confused regarding the motion that Ms. Brown had signed and filed on Flood's behalf, or who represented whom.[5] Id.

The court issued a bench warrant, and the sheriff re-arrested Spillman sometime thereafter. Ms. Brown's office re-noticed the motion to withdraw for

[5] Inexplicably, Ms. Brown's office sent out a redundant – yet dissimilar – Motion to Withdraw in the Spillman case, which she signed, one week after the original motion was filed. Ms. Brown admitted that, by that time, for several reasons, her office was dysfunctional and in disarray, and that she was mismanaging her staff's output. *See* TR-2 at 128-130. Indeed, her staff recopied and refiled this second (wrong) Motion to Withdraw twice more, in December 2002, in setting the motion for hearing.

hearing, and the matter eventually was heard on December 19, 2002. *See* footnote 3, *infra*.

It is undisputed that Flood was Spillman's counsel of record. Moreover, Flood received and reviewed the State's discovery when it finally was produced. TR-2 at 84-85. He researched a constitutional rights issue and attended the deposition of the state's only witness. Id. He discussed with Ms. Brown procedural and factual issues presented by the Spillman case. He tried to locate Spillman, to no avail. He attended the September 20, 2002 hearing at which Spillman failed or refused to appear. Later, when Spillman was picked up, the authorities advised Flood of that, as Spillman's counsel of record. TR-1 at 139-41. Flood then had the State's discovery delivered to Spillman, at the jail. Id. Flood attended another hearing, at which the court granted him leave to withdraw. Flood then visited Mr. Spillman at the jail, at Spillman's request.

Testimony by Flood and Ms. Brown proved that, even though Spillman's fee payments went through her law office account, Ms. Brown paid to Flood all or most of the fees Spillman paid. *See* TR-2 at 107-08; *cf.* TR-2 at 75-76; Resp. Exh. H (composite). For this reason the Bar declined to prosecute the allegations relating to Rule 4-1.5.

The Florida Bar prosecuted an attorney disciplinary case against Peter T. Flood for his conduct in representing Spillman. Flood pled guilty via a consent judgment to violating Rule 4-1.3 and Rule 4-1.4, *inter alia*, and served a 30-day suspension of his law license. *See* Resp. Exh. F, G.

STATEMENT OF THE CASE

In a 149-paragraph Complaint, the Florida Bar charged Ms. Brown with violating thirteen (13) different Rules of Professional Conduct. These were: Rule 4-1.3 (diligence); Rule 4-1.4(a) (client communication); Rule 4-1.4(b) (client communication upon request); Rule 4-1.5(a) (excessive, illegal or prohibited fee); Rule 4-1.5(e) (failure to explain rate or basis of fee); Rule 4-1.7(a) (conflict of interest regarding other client); Rule 4-1.7(b) (conflict of interest regarding lawyer's own interest); Rule 4-1.7(c) (failure to advise of risks of multiple representation); Rule 4-8.1(a) (false statement to disciplinary authority); 4-8.1(b) (failure to disclose known fact to disciplinary authority); 4-8.4(a); (knowingly attempting to violate rules or assisting others to do so); 4-8.4(c) (conduct involving dishonesty, fraud, deceit, misrepresentations); and 4-8.4(d) (conduct prejudicial to the administration of justice).

Ms. Brown defended that no actual conflict of interest ever existed between Parks and Spillman during her involvement, and that there was, therefore, no professional liability for participating in Spillman's case despite representing Parks. Upon proper motion and hearing, the referee agreed and dismissed the Complaint. Specifically, all allegations relating to conflict of interest were

dismissed with prejudice. *See* Order of Dismissal (April 18, 2005). That disposed of the three alleged rule violations under Rule 4-1.7.

After filing an Amended Complaint, the Bar voluntarily dismissed all allegations relating to Rule 4-8.1(a) and (b). This disposed of two more alleged rule violations. The Bar recognized that it had no proof that Ms. Brown had made false statements or documents to the disciplinary authority, or had failed to advise the Bar of known facts. *See* Notice of Voluntary Dismissal (file).

At pretrial, the referee bifurcated the proceeding, *sua sponte*, to try the issue of whether Ms. Brown actually represented Spillman before trying the rest of the case, if warranted. This explains why the same three witnesses (Spillman, Flood and Ms. Brown) appeared at two separate evidentiary hearings, on November 10 and November 18, 2005.

Just before the final evidentiary hearing, the Bar notified the Court that it would not present evidence relating to any alleged violation of Rule 4-1.5(a) or (e). This disposed of two more alleged rule violations. Thus, before the final hearing, over half of the original 13 alleged rule violations were disposed of for lack of substance or proof. After trial, the referee disposed of two more allegations for lack of proof: those relating to Rule 4-8.4(a) and 4-8.4(d). In all, therefore, nine

(9) of the original 13 alleged rule violations for which probable cause had been found were unfounded.

SUMMARY OF THE ARGUMENT

1. Ms. Brown's discrete, *ad hoc* participation in Spillman's case did not impose on her the full panoply of professional responsibility – as did Flood's acceptance of the same, as Spillman's *de jure* counsel of record.

2. Because Ms. Brown owed no global professional responsibility with respect to Spillman, she can only be held liable for her actual participation in his case – that is, for what she did – she cannot be liable for what she did not do.

3. The referee's finding that Ms. Brown violated Rule 4-1.3 is legally incorrect because it punishes her for what she did not do for Spillman. That responsibility was Flood's alone – and he was found guilty of that.

4. The referee's finding that Ms. Brown violated Rule 4-1.4 is legally incorrect because it punishes her for what she did not do for Spillman. That responsibility was Flood's alone – and he was found guilty of that also.

5. The referee's finding that Ms. Brown's conduct amounted to a misrepresentation is incorrect as a matter of law, as it was merely negligent.

6. The harm to be avoided, and the ethical issues that are implicated in the factual scenario presented herein, revolve around an actual conflict of interest. No actual conflict of interest existed with respect to the cases involving Parks and Spillman, however; thus, the referee correctly dismissed those allegations with

prejudice. As such, Ms. Brown's involvement in both cases implicated no charged ethical prohibitions, in an of itself.

7. Ms. Brown's professional conduct did not violate any rule violation for which the grievance committee found probable cause.

8. The disciplinary authority is sanctioning Ms. Brown for the very same violations and conduct for which it sanctioned Flood, as if they each shared co-equal responsibility for the Spillman representation, which is not correct.

10. Given the facts and procedural history of this case, the referee should have taxed the Bar's costs more fairly.

ARGUMENT

I. THE RECOMMENDATIONS OF GUILT ARE INCORRECT AS A MATTER OF LAW UNDER THE EVIDENCE PRESENTED.

With all due respect to the disciplinary authority, this is a case of overzealous prosecution. The fact that 9 of the 13 original charged rules violations fell by the wayside short of trial testifies to that. More pertinent, however, is that the allegations that remained in the case were inapposite to the fact pattern. In other words, probable cause was found for the wrong rules.

The fact pattern certainly seems to implicate some of the Rules Regulating the Florida Bar. The conduct of Mark Patterson, and Ms. Brown's ill-conceived determination to let Flood use her law office as his own seems to implicate Rule 4-5.3 (Responsibilities regarding nonlawyer assistants). The fact that Patterson accepted Spillman's payment and Ms. Brown's law firm processed and distributed the money possibly implicates Chapter 5 (involving trust funds); however, the contract Spillman signed defined the fee as non-refundable; thus, the fee would likely be deemed earned upon receipt.

Obviously, a discussion of charges that could have been brought, but were not, is an academic endeavor at this juncture. It is important to note, however, that Ms. Brown has never contended that she is blameless in this matter. Rather, her point is a legal one: that she is not guilty of the rules for which the grievance

committee found probable cause. It is the disciplinary authority's responsibility to investigate the facts of the grievance and to correctly assess how the lawyer's conduct squares with the Bar rules. If the grievance committee fails to do this correctly, the fault cannot lie with the responding attorney.

A. Ms. Brown cannot be deemed guilty of violating Rule 4-1.3.

Regarding this count, Ms. Brown asked the Bar and the referee to elucidate and explain what it is that she should have done, but failed to do, in representing Renfred Spillman. No answer was forthcoming. Lack of diligence in an agency relationship cannot merely exist "in the air." There must be an agency relationship to begin with, *ipso facto*. And if an agency relationship exists, then what is the scope of that agency? That question is central to this case. The referee bifurcated the trial to determine whether an agency relationship existed. Once that was done, the referee made no determination regarding the scope or extent of the agency relationship. Ms. Brown contends that the scope was strictly a limited one.

This issue has far-reaching implications for the everyday practitioner of law. Certainly, it is not unusual (nor unethical) for a lawyer to cover a hearing, or to otherwise work informally, behind the scenes or at bar, on an *ad hoc* basis, to assist a fellow lawyer. The question is: What is the extent of the professional

responsibility owed to the client by a covering lawyer, or, what is the scope of the assumption of risk that the covering lawyer assumes?

In such situations, the covering lawyer "stands in" for counsel of record – he or she does not *become* the record counsel. Ms. Brown's position is that a covering lawyer becomes professionally liable for any negligence or misconduct related to his actual, voluntary participation. He or she does not assume a global duty, nor should an overarching responsibility be imputed, based on any discrete, *ad hoc* involvement in the matter. The assumption of risk by a covering lawyer must be limited to the scope and extent of his or her involvement. To make the assisting lawyer jointly and severally liable for any lapses occurring in the representation is unjust, and hostile to the concept of professional collegiality.

In such instances, the attorney who actually appears in court is not the record counsel. Unless there is clear proof that the assisting attorney: a) is in privity with the client; b) has actually appeared as record counsel; or c) works for the same firm as the counsel of record; it is fundamentally unfair to impute to the assisting lawyer the full complement of professional responsibilities. Yet, this is the theory under which the Bar has operated throughout Ms. Brown's case: Not only is Flood liable for his lapses in representing Renfred Spillman, Ms. Brown is co-equally liable for

Flood's lapses, because she participated in the representation by trying to assist or facilitate Flood's admittedly deficient representation.

The delineation is neither blurry nor uncertain. Mr. Flood was counsel of record for Spillman, period. With respect to Spillman, Flood assumed the full panoply of professional responsibilities voluntarily – regardless of whom Spillman thought (or misconceived) was representing him, and regardless of the accuracy of his thoughts or impressions.

If Ms. Brown, through her discrete participation, assumed an overarching professional obligation to diligently pursue Spillman's case, per Rule 4-1.3, she had no adequate notice of such duty through the rules, the case law, or otherwise. It is therefore fundamentally unfair to impute such responsibility to her under these facts, at this juncture, due to a lack of such notice . . . and because Mr. Flood, as record counsel, already had shouldered that responsibility.

In its Initial Brief, the Florida Bar seeks to blur this distinction and this issue on Page 1, where it states, "A few days later, Spillman went to Respondent's office and retained her services to represent him on his criminal charges arising out of the same stop." This is an overstatement that is unsupported in the record. The referee found that Spillman had a reasonable, subjective belief that he had hired Ms. Brown, based on the circumstances. *See* RR-1. That is not the same, however, as

proving the existence and scope of an actual agency relationship by clear and convincing evidence – which the Bar assuredly did not do. No contract was presented with Ms. Brown's signature on it. A contract does exist – with Flood's signature, and Flood officially entered Spillman's case immediately upon signing it. Thus, there is clear and convincing proof of the existence and scope of an agency relationship between Spillman and Flood – if for no other reason than Flood voluntarily assumed the role of agent. There is no such proof that a full agency relationship existed between Spillman and Ms. Brown.

Because Spillman had a reasonable, subjective belief that he had hired Ms. Brown, based on the circumstances, certain professional obligations did arise in Ms. Brown, regarding client confidences and attorney-client privilege (Rule 4-1.6). Under those circumstances, Ms. Brown became duty-bound to maintain Spillman's confidences and to assert a privilege regarding the same, if that ever became necessary. Again, however, there is no allegation that she violated that duty or that rule.

That is a primary example of imputing a <u>limited</u> professional duty, based on a limited, discrete involvement, and this occurs every day in the practice of law: that is, when a lawyer declines the representation after interviewing a client, based on a conflict or potential conflict with another client. In this case, Ms. Brown had

her paralegal conduct an initial client intake at her law office. Ms. Brown accepts the imposition or imputation of professional obligations that flow to her as a result of that fact. She rejects the imputation of an overarching liability, however, under these facts.

Lastly, with no pleaded allegations as to what Ms. Brown should have done for Spillman, but failed to diligently perform, with no proof of same, and with no specific finding regarding same, the referee's recommendation of guilt regarding this allegation cannot reasonably withstand legal scrutiny. Indeed, the evidence presented of what she did do in Spillman's case serves to deny the allegation.

At the very most, Ms. Brown can only be deemed a co-counsel with Peter Flood in representing Spillman, because Mr. Flood was the counsel of record. Because the duty of diligence must rest with Flood under these circumstances, Ms. Brown cannot be professionally liable for what was <u>not</u> accomplished in the representation, since she did not officially join the case as a co-counsel, per Fla. R. Jud. Admin. 2.060. Accordingly, this allegation should have been dismissed.

B. <u>Ms. Brown cannot be deemed guilty of violating Rule 4-1.4.</u>

For the reasons stated above, and without belaboring the point, the recommendation of guilt regarding Rules 4-1.4(a) and (b) likewise cannot stand as a matter of law. Ms. Brown did not assume a co-equal liability with Mr. Flood for

communicating with Spillman about his legal matter, by or through her assistance or facilitation of Flood's representation.

Regarding these allegations, Ms. Brown asked the Bar and the referee to elucidate and explain what it is that she should have done to communicate with Spillman, but failed to do. Again, no adequate answer was forthcoming. Recall that Spillman basically checked out of the whole case early on, and refused to cooperate or acknowledge these lawyers' efforts to help him.

With no pleaded allegations as to what Ms. Brown should have said or written to Spillman, but failed to, and lacking proof of same, and no specific findings regarding same, the referee's recommendation of guilt regarding this allegation cannot reasonably withstand legal scrutiny. Indeed, the evidence of what Ms. Brown did attempt to do for Spillman serves to deny these allegations.

C. 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

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 <u>negligent</u> misrepresentation.

II THE REFEREE'S DISMISSAL OF THE ALLEGATIONS RELATING TO CONFLICT OF INTEREST WAS CORRECT AS A MATTER OF LAW.

A. <u>Liability for violating Rule 4-1.7 requires an actual conflict.</u>

A lawyer may decline a representation based on a potential or perceived conflict with another client. A conflict of interest does not have to actually exist for the lawyer to make such a declination. If the lawyer does, however, undertake to represent a client, her professional liability for engaging in a conflicted representation <u>does</u> depend on such a conflict <u>actually</u> existing. Here, no actual

conflict was ever proven, or even pleaded. The Bar urges this Court to deem that a potential conflict is enough to impose sanctions under the pertinent rule. That cannot be the law.

Here is the basic disconnect in the Bar's case: Nowhere did the Bar ever allege or prove any client harm inuring to Mr. Spillman as a result of the conduct of either of these prosecuted attorneys. Certainly, the referee did not find any harm had occurred to Spillman. Yet, if an actual conflict of interest existed in the legal representation of Parks and Spillman, that would qualify as "client harm." The acknowledgment by the Florida Bar that Spillman suffered no harm is a backward admission that no actual conflict existed. Indeed, the Bar does not assert that a conflict actually existed. The Bar imagines that a conflict may have potentially existed. That was the basic flaw in the Bar's assessment of this case all along.

The referee found that Ms. Brown did engage in a dual representation; she went to court representing Parks and also did the same in representing Spillman, trying to assist Flood's deficient representation. Because there was no actual conflict of interest between the two, however, there was no ethical liability in representing both Spillman and Parks.

The criminal case law regarding dual representations is instructive in these premises. A survey of that case authority identifies the indicia of conflicts

regarding criminal co-defendants. Those indicia of conflict are: a) Are the two clients defendants in the same proceeding? b) Were the two clients charged with the same crime? c) Are their respective defenses (legal positions) antagonistic to each other? and d) Was either client listed by the State as a prosecution witness in the other's criminal case? *See generally*, *Foster v. State*, 387 So.2d 344 (Fla. 1980); *Bellows v. State*, 508 So.2d 1330 (Fla. 2d DCA 1987); *Delarosa v. State*, 757 So.2d 1284 (Fla. 4th DCA 2000); *Rock v. State*, 622 So.2d 487 (Fla. 1st DCA 1993); *Tarawneh v. State*, 562 So.2d 770 (Fla. 4th DCA 1990).

The cases are clear that the issue of conflict requires an actual conflict – not a potential, or probable, or intuited conflict. Where a potential conflict appears, the appellate tribunals will remand with instructions to conduct proceedings to determine whether an actual conflict exists.

In the instant case the Bar did not allege any of the foregoing indicia of an actual conflict in its allegations; nor could it do so in good faith. None of the foregoing indicia were shown clearly and convincingly – or even alleged – to exist between Parks and Spillman. They were not parties in the same legal proceeding. They were not charged with the same crime. They were not "co-defendants" (as the Bar labeled them in pleadings). After initially failing to fool Trooper Benton,

Parks and Spillman told virtually the same story. Neither was listed by the State as a witness against the other. Thus, no conflict existed.

These issues were heard in a hearing occurring April 6, 2005. The referee ruled that the Bar could allege no set of facts that would cure its pleading defect, and, accordingly, dismissed all allegations relating to conflict of interest with prejudice. That Order, dated April 18, 2005, should be affirmed.

Because the Bar could not in good faith allege any of the indicia of an actual conflict, it is fair to say that no probable cause ever existed for the grievance committee to find that Respondent engaged in an actual conflict of interest. It is eminently apparent that no actual conflict existed between the two men. It is also true that, had Ms. Brown simply decided to represent both Parks and Spillman, she would not be in this mess. If she had not acted generously, in trying to refer clients to a struggling friend, or cautiously, sensing a potential conflict, this case would not exist, because none of the other allegations would make any sense.

It is ironic that this case works to punish these good impulses in Ms. Brown, for it is only because another lawyer got involved that this comedy of errors ensued. And that other lawyer, Mr. Flood, stood up and accepted responsibility for – and received a serious sanction for – his involvement. In view of these considerations, the prosecution of Ms. Brown seems like so much "piling on."

This case involved a potential conflict that turned out to be not a conflict, and the conduct of these lawyers, while potentially harmful, turned out not to be. And the referee saw it that way, and held accordingly.

In its Initial Brief, the Bar strives to convince that a lawyer who engages in a merely potential conflict can be found guilty of engaging in an actual conflict. That view, being patently illogical, cannot be the law.

III EVEN IF THE COURT UPHOLDS THE RECOMMENDATIONS OF GUILT, ADMONISHMENT IS APPROPRIATE.

A. Under the undisputed facts, the Standards recommend Admonishment.

Assuming *arguendo,* that the Court affirms the recommendations regarding guilt, the recommendation of Admonishment under these circumstances remains an appropriate sanction. The following Standards apply to the instant findings:

> Standard 2.6:
>
> Admonishment is the lowest form of discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.
>
> Standard 4.4 LACK OF DILIGENCE
>
> 4.44 Admonishment is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.
>
> Standard 4.6 LACK OF CANDOR
>
> 4.64 Admonishment is appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

Standard 6.1 FALSE STATEMENTS, FRAUD, MISREPRESENTATION

> 6.14 Admonishment is appropriate when a lawyer is negligent in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

These Standards relate closely to the fact pattern adduced at trial. They relate specifically to the rules violations found by the referee: diligence, communication, and negligent misrepresentation. Because no client harm was proven or even pleaded by the Bar, and because the conduct at issue tracks the language of the quoted Standards, Admonishment should be upheld as the appropriate sanction.

Moreover, Ms. Brown has no prior disciplinary history with the Bar, and did express a great deal of regret and remorse over this episode. This further militates for leniency in the sanction imposed.

IV THE REFEREE'S REPORT REGARDING TAXING OF COSTS IS INEQUITABLE AND SHOULD BE REMANDED.

The referee awarded all of the Bar's asserted costs to the Bar, to be assessed against Ms. Brown. Ms. Brown feels this is inequitable under the circumstances of this case.

Recall that 9 of the 13 rule violations alleged by the Bar were disposed of prior to trial. They were disposed of because they either lacked substantial merit,

or sufficient evidence – which amounts to the same thing. Ms. Brown was made to pay her own costs while fighting these numerous, insubstantial allegations.

Ms. Brown is aware of the case law and the rule of court governing the taxing of costs by the referee in Bar cases. Nonetheless, she requests an abatement in equity regarding these costs, through an order remanding the case to determine a more equitable assessment based on an overreaching prosecution. If costs were expended on a matter that lacked substantial merit, Ms. Brown requests that such costs be denied.

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 Order of Dismissal dated April 18, 2005 should be affirmed, and this case should be remanded to the referee for proceedings consistent with an Order taxing unnecessary costs against the Florida Bar.

BRETT ALAN GEER
ATTORNEY FOR MS. BROWN
3837 Northdale Blvd., # 350
Tampa, Florida 33624-1841
(813) 961-8912
(813) 265-0278 (Facsimile)
Florida Bar Number 061107

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 John Anthony Boggs, Esq., Staff Counsel, at The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, on this ___ day of _____, 2006.

_____
BRETT ALAN GEER