IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

CASE NO.: SC04-2119
TFB NO.:2003-11,109(20B)

v.

ANNA L. BROWN,

Respondent.
_____/

INITIAL BRIEF OF THE FLORIDA BAR

Troy Matthew Lovell
Assistant Staff Counsel
The Florida Bar
5521 W. Spruce Street, Suite C-49
Tampa, Florida 33607-5958
(813) 875-9821
Florida Bar No. 946036

TABLE OF CONTENTS PAGE

CASES PAGE

RULES OF DISCIPLINE

[1]All references to Rule 4-1.7 are made to the rule as it existed as the time of the conduct at issue in this case, based on the text located at 605 So.2d 252.

SYMBOLS AND REFERENCES

In this Brief, the Petitioner, The Florida Bar, will be referred to as "The Florida Bar" or the "Bar." The Respondent, Anna L. Brown, will be referred to as "Respondent."

"TT1" will refer to the transcript of that portion of the final hearing in this proceeding held on November 10, 2005. "TT2" will refer to the transcript of that portion of the final hearing in this proceeding held on November 18, 2005. "TT3" will refer to the transcript of the supplemental final hearing in this proceeding held on March 2, 2007.

The Report of Referee dated December 2, 2005, will be referred to as the "2005 Report"; the Amendment to Report of Referee dated April 3, 2007, will be referred to as the "2007 Report."

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee in this proceeding.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar.

STATEMENT OF THE FACTS AND OF THE CASE

This proceeding is an attorney disciplinary proceeding arising out of Respondent's representation of Renfred Spillman ("Spillman") and his cousin, Antoine Parks ("Parks"), who were stopped for a traffic violation in Collier County, Florida on October 30, 2001. (TFB Exh. 101, 102). At the time of their arrest, both Parks and Spillman were convicted felons. (TFB Exh. 101, 103-110; TT3 22). During the stop, the officer found a handgun in the center console of the car. (TFB Exh. 101; TT3 21). As a result of the stop, Parks was charged with Driving While License Suspended, a third degree felony. (TT2 102; TFB Exh. 102). Spillman was charged with Possession of a Firearm by a Convicted Felon, a second degree felony. (TT1 32).

Parks retained the services of Respondent to represent him on the charges arising out of the stop on or about November 30, 2001. (TT1 108-09). 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. (TT1 33, 69-70). Respondent arranged for another attorney, Peter Timothy Flood ("Flood"), to make a formal appearance on Spillman's behalf. (TT1 70). Spillman had no knowledge that Flood would be appearing on his behalf and believed he was represented by Respondent. (TT1 36-40). Spillman became dissatisfied with the lack of communication on his

case and ceased making payments to Respondent. (TT1 40-41, 64). Eventually, Flood formally withdrew and alternate counsel was appointed for Spillman. (R. Exh. E).

The Florida Bar's original complaint in this proceeding alleged numerous violations arising out of Respondent's representation of Spillman, including allegations of a conflict of interest in representing both Spillman and Parks. On April 18, 2005, the Referee dismissed the original complaint, including the dismissal with prejudice of all allegations related to the conflict of interest. The Florida Bar then filed an Amended Complaint, which contained the remaining allegations against Respondent, but not the conflict of interest allegations. The Referee conducted a final hearing on November 10 and November 18, 2005. The first hearing was to determine whether an attorney-client relationship existed between Respondent and Spillman. After considering the evidence, the Referee found that, pursuant to *Bartholomew v. Bartholomew*, 611 So.2d 85 (Fla. 2d DCA 1992), and its progeny, an attorney-client relationship was created. (Partial Final Judgment of Referee). The second hearing was to determine if any violations had been committed. After the second hearing, the Referee recommended finding violations of Rule 4-1.3 (lack of diligence), Rule 4-1.4 (failure to communicate), and Rule 4-8.4(c) (conduct involving dishonesty). The Referee recommended finding no violation of Rule 4-8.4(d) (conduct prejudicial to

the administration of justice). The Referee recommended that Respondent be admonished for her conduct and required to attend The Florida Bar's Ethics School. (2005 Report).

The Bar petitioned for review of both the Referee's dismissal with prejudice of the conflict of interest allegations, and the Referee's recommended sanction. Respondent cross-petitioned, challenging the finding that an attorney-client relationship existed between Respondent and Spillman and, by extension, the recommended finding of guilt.

On October 12, 2006, this Court issued an Order directing the Referee to conduct a hearing on the conflict of interest allegations. The other issues of the 2005 Report were not addressed by this Court. The Referee conducted a supplemental final hearing on March 2, 2007, which was memorialized by the Referee in the 2007 Report. In the 2007 Report, the Referee recommended that Respondent be found not guilty of violating the conflict of interest rules. The Florida Bar timely filed a petition for review of the Referee's recommendation. This brief is filed to address the issues arising from the 2007 Report; the remaining issues were addressed in the prior briefs.

SUMMARY OF THE ARGUMENT

The Referee erred when he recommended a finding of not guilty on the conflict of interest allegations. The facts demonstrate that Spillman and Parks had adverse interests and should not have been represented by the same attorney. Specifically, both Parks and Spillman were convicted felons traveling in a car in which a gun was found in the center console. Each had an interest in having possession of the firearm attributed to the other felon. Therefore, the interests of the two felons were directly adverse and the same attorney could not ethically represent both felons.

Furthermore, in representing both Parks and Spillman, Respondent's independent professional judgment was inevitably limited by the dual representation. Respondent could provide neither candid advice to Spillman regarding his options nor challenge the evidence against Spillman because such action could have jeopardized Parks's position.

The Referee misapplied the law in making his recommendation of a not guilty finding. The Referee added an additional requirement that the attorney have actual knowledge of the conflict in order to prove a violation of the rule. This additional requirement is supported neither by the rule nor by applicable caselaw and would shift the burden to avoid conflicts of interest from the attorney to the client.

Because the established facts demonstrate a violation occurred, this Court

should find Respondent guilty of violating Rule 4-1.7(a) and (b). Combining the conflict of interest violations with the prior violations found by the Referee, this Court should suspend Respondent for 90 days.

STANDARD OF REVIEW

A referee's findings of fact carry a presumption of correctness. *Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla. 1986). A party challenging a referee's findings of fact must demonstrate that those findings are clearly erroneous or without support in the record. *Florida Bar v. Rue*, 643 So.2d 1080, 1082 (Fla. 1994).

Where there are no genuine issues of material fact and the only disagreement is whether the undisputed facts constitute unethical conduct, the referee's findings present a question of law that the Court reviews de novo. *Florida Bar v. Cosnow*, 797 So.2d 1255, 1258 (Fla. 2001).

As to discipline, although a referee's recommendation is persuasive, this Court does not pay the same deference to this recommendation as it does to the guilt recommendation because this Court has the ultimate responsibility to determine the appropriate sanction. *Florida Bar v. Kossow*, 912 So.2d 544, 546 (Fla. 2005). Generally speaking, this Court will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw or in the Florida Standards for Imposing Lawyer Sanctions. *Id*.

ARGUMENT

I. THE REPRESENTATION OF SPILLMAN WAS DIRECTLY ADVERSE TO THE INTERESTS OF PARKS.

In its original complaint, The Florida Bar alleged violations of both Rule 4-1.7(a) and Rule 4-1.7(b). At the time of Respondent's representation of Parks and Spillman (late 2001 through late 2002), Rule 4-1.7(a) read in relevant part, "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client[.]" The facts found by the Referee demonstrate that Respondent's representation of Spillman was directly adverse to the interests of her other client, Parks.

The following facts have been established by the Referee or were undisputed in the proceeding:

1. Parks and Spillman were arrested at the same time while traveling in the same car. (2007 Report, paragraph II.B.ii).

2. Parks and Spillman had been traveling on opposite sides of the center console; the arresting officer found a firearm in that console. (2007 Report, paragraph II.B.iii).

3. Respondent represented Parks. (2007 Report, paragraph II.B.vii).

4. Respondent represented Spillman. (Partial Final Judgment of Referee).

Respondent has vigorously denied representing Spillman, claiming that Spillman was

represented by Flood. The Referee devoted the first final hearing on November 10, 2005 to this issue and concluded that Respondent did represent Spillman. This recommended finding has been challenged by Respondent, but should be upheld for the reasons set forth in the Bar's Cross-Answer Brief.

5. Spillman was a convicted felon at the time of the arrest and was charged with possession of a firearm. (2007 Report, paragraphs II.B.iv and II.B.v; TT3 21-22).

6. Parks was a convicted felon at the time of his arrest. (TT3 22, TFB Exh. 103-110). The felony record of Parks was established at the final hearing by presentation of certified copies of final judgments and by the testimony of Dave Scuderi, the prosecuting attorney for the Parks and Spillman cases; this fact was confirmed by Parks's score sheet which was admitted into evidence by Respondent. (R. Exh. B). No evidence was presented challenging Parks's felony record; the only challenge raised was whether Respondent knew of Parks's record at the time of her representation of Spillman. (TT3 30-32, R. Exh. B). Nevertheless, the 2007 Report states that Parks "may" have been a convicted felon. (2007 Report, paragraph II.B.i). The doubt appears to have been the result of the Referee's focus on Respondent's knowledge, not doubt about the underlying fact. (See, e.g., 2007 Report, paragraphs II.G and II.M; TT3 67, 71-72). Given the complete absence of

evidence casting doubt on Parks's status as a felon, this Court should recognize that any doubt about Parks's felon status is clearly erroneous and contrary to the evidence in this case. Therefore, this Court should reject the recommended finding of the Referee to the extent that the wording suggests any doubt regarding Parks's status as a convicted felon at the time of his arrest.

The facts set forth above are sufficient to demonstrate that the representation of Spillman was directly adverse to the interests of Parks. Spillman, like all criminal defendants, had an interest in not being convicted of the crime with which he was charged. One way for Spillman to avoid conviction would have been to challenge the conclusion that the firearm was in his possession. If the firearm were not in Spillman's possession, then it would necessarily have had to have been in Parks's possession. Therefore, any efforts by Spillman to disprove his own possession would necessarily have tended to prove that Parks committed that same offense, thereby increasing the likelihood that Parks would be charged. Parks had an interest in not being charged with an additional offense. The prosecuting attorney testified that Parks was not charged with possession of the firearm solely because there was insufficient evidence against him; no legal impediment precluded the bringing of the charge if more evidence became available. (TT3 22, 24, 35). Therefore, Parks had an interest in Spillman being convicted of the crime and not challenging possession of

the gun. In resolving the issue of which felon was in possession of the gun, the interests of Parks and Spillman were directly, almost perfectly, adverse.

II. RESPONDENT'S INDEPENDENT PROFESSIONAL JUDGMENT IN REPRESENTING SPILLMAN WAS MATERIALLY LIMITED BY HER REPRESENTATION OF PARKS.

The Florida Bar also charged Respondent with violating Rule 4-1.7(b). At the time of the representation, Rule 4-1.7(b) read in relevant part, "[a] lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client would be materially limited by the lawyer's responsibilities to another client[.]"

Because of her representation of Parks, Respondent was precluded from considering some of the ordinary options and tactics which a criminal defense attorney might pursue on behalf of her client. For example, one possible option for Spillman would have been to offer to cooperate in the prosecution of Parks. Specifically, Spillman could have offered to testify that Parks was the true owner of the gun. Obviously, as Parks's attorney, Respondent could never consider such an option.

The limitation on Respondent's independent professional judgment is also shown in her deposition of the arresting officer, John Robert Benton. (TFB Exh. 111). The only evidence against Spillman was his own statement to Trooper Benton

at the time of the arrest. (TT3 21, 29). Therefore, Spillman's attorney had a strong interest in challenging Benton's statement, examining the details of the arrest, and questioning the totality of what Benton did and did not do in determining the ownership of the gun. Parks's attorney had a strong interest in accepting Benton's statement at face value and not challenging Benton's conclusion regarding ownership of the gun.

Finally, the limitation on her professional judgment is shown in her failure to file a motion to suppress Spillman's statement to Trooper Benton. After the withdrawal of Respondent/Flood, alternate counsel was appointed for Spillman. This successor counsel, who had no duties to Parks, raised the issue of the suppression of Spillman's statement. The case was ultimately resolved by a plea bargain arrangement which was made after the suppression issue was raised, but before it was resolved by the criminal court. (TT3 34-35). Again, as Parks's attorney, Respondent would not have wanted to raise any challenge to Spillman being deemed in possession of the gun. Successor counsel, who was free of conflict, promptly raised such a challenge.

Courts examining similar situations have found impermissible conflicts. For example, in *Main v. State*, 557 So.2d 946 (Fla. 1st DCA 1990), two defendants in a drug case were represented by the same attorney. One of the witnesses provided

contradictory testimony; one version of events was more favorable to one defendant, the other version was more favorable to the other defendant. *Id*. at 948. The attorney was forced to choose between pursuing a defense for one client which damaged the other client or abandoning a possible defense for one client for the benefit of the other. *Id*. The court found a conflict in the joint representation and remanded the case for a new trial. *Id*. Respondent was bound by a similar conflict in dealing with the testimony of Trooper Benton. Because she placed herself in a position in which her judgment on Spillman's behalf was limited by her duties to Parks, Respondent violated Rule 4-1.7(b).

III. THE REFEREE IMPROPERLY ADDED A KNOWLEDGE REQUIREMENT FOR PROVING A CONFLICT OF INTEREST VIOLATION.

The Referee's analysis focused on Respondent's knowledge of the details of the conflict of interest between Parks and Spillman. In paragraph II.M of the 2007 Report, the Referee states his interpretation of Rule 4-1.7(a) that in order to violate the rule, "the lawyer must be aware of the interests of each party and then understand the nature of how these interests conflict." In paragraph II.E of the 2007 Report, the Referee stated that Bar had not proven that Respondent had knowledge of the adverse interests of Spillman and Parks, "as required by Rule 4-1.7(a)." Similarly, the Referee added a knowledge requirement to Rule 4-1.7(b). 2007

Report, paragraph II.N. Neither subsection of Rule 4-1.7 has a knowledge requirement; the rule focuses on the actual interests of the clients, not the attorney's perception.

Adding a knowledge requirement to the conflict of interest rules shifts the burden for discovering and raising conflict issues from the attorney to the client. The 2007 Report makes this view explicit. For example, in paragraph II.I, the Referee states, "[t]here is no credible evidence that Spillman ever asked respondent or attorney Flood about any possible defenses he might have regarding possession of the firearm[.]" Similarly, in paragraph II.J, the Referee wrote, "[t]here is no credible evidence that Spillman asked either lawyer … for their opinion on, or the likelihood of success of, any defense, specific or general, related to or affecting Parks or anyone else." By adding a new knowledge requirement, the Referee improperly shifted the burden from the attorney to the client.

"Loyalty is an essential element in the lawyer's relationship to a client." R. Regulating Fla. Bar 4-1.7 (Comment). As a result, the prohibition against representing conflicting interests has long been rigid. *Florida Bar v. Moore*, 194 So.2d 264, 269 (Fla. 1966). In other contexts, this Court has kept the burden in conflict cases squarely on the attorney. *Florida Bar v. Dunagan*, 731 So.2d 1237 (Fla. 1999) (rejecting responding attorney's argument that client's failure to object

constituted consent); *Florida Bar v. Belleville*, 591 So.2d 170 (Fla. 1991) (imposing burden on attorney to a one-sided real estate transaction to explain terms of transaction to unrepresented party). Adopting the Referee's interpretation of Rule 4-1.7 would weaken the protection of the rule for those clients who lack the sophistication to raise the issue or who hire attorneys who do not diligently inquire about possible conflicts. This Court should reject the Referee's burden-shifting interpretation, remain faithful to the text of the rule, and find Respondent guilty of a conflict of interest.

IV. AS ARGUED IN PRIOR BRIEFS, THIS COURT SHOULD SUSPEND RESPONDENT FOR 90 DAYS.

Based on the evidence presented to the Referee and the factual findings made by the Referee, this Court should find Respondent guilty of violating both Rule 4-1.7(a) and Rule 4-1.7(b). That finding of guilt should be considered along with the prior rules violations found by the Referee in determining an appropriate sanction. The Bar has previously argued that the prior violations merit a 90-day suspension from the practice of law. Because the conflict of interest violations are intrinsically linked with those prior violations, the Bar believes that the appropriate sanction for all violations combined is a 90-day suspension.

CONCLUSION

The Referee made the necessary factual findings for a violation of the conflict of interest rules, but erred in applying the law to those findings. This Court should find Respondent guilty of violating Rule 4-1.7(a) and (b). Adding these supplemental violations to those discussed in the 2005 Report and which have previously been briefed, this Court should suspend Respondent from the practice of law for a period of 90 days.

Respectfully submitted,

Troy Matthew Lovell
Assistant Staff Counsel
The Florida Bar
5521 W. Spruce Street, Suite C-49
Tampa, Florida 33607-5958
(813) 875-9821
Florida Bar No. 946036

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Airbill Number 68328591343 to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to **Brett Alan Geer**, Attorney for Respondent, 3837 Northdale Boulevard, Suite 350, Tampa, FL 33624; by regular U.S. mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, all this _____ day of June, 2007.

_____
Troy Matthew Lovell
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE

Undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.

_____
Troy Matthew Lovell
Assistant Staff Counsel