IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ANNA L. BROWN,

Respondent.
_____/

CASE NO.: SC04-2119

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

INITIAL BRIEF OF THE FLORIDA BAR

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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 the final hearing before the Referee in Supreme Court Case No. SC04-2119 held on November 10, 2005. "TT2" will refer to the transcript of the final hearing held on November 18, 2005.

The Report of Referee dated December 1, 2005, will be referred to as "RR."

"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 Supreme Court Case No. SC04-2119.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar. "Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS AND OF THE CASE

Renfred Spillman ("Spillman") and his cousin, Antoine Parks ("Parks") were stopped for a traffic violation in Collier County, Florida. During the stop, the officer found a handgun which had been concealed in the car. As a result of the stop, Parks was charged with Driving While License Suspended, a third degree felony, and Speeding. (TT2 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. Spillman signed a representation agreement, paid a portion of Respondent's fee pursuant to that agreement, and discussed the case with Respondent's staff. (TT1 33-36) (TFB Exhs. 1, 2).

Respondent was concerned that representation of both Spillman and Parks would constitute a conflict of interest. (TT2 25-26). After Spillman left Respondent's office, the representation agreement was altered, without Spillman's knowledge, removing all references to Respondent. (TT1 34-35), (Partial Final Judgment of Referee filed November 16, 2005). Respondent's office prepared filings to be made on Spillman's behalf, but these filings were made using another attorney's name, Peter

Timothy Flood[1] ("Flood"), instead of Respondent's, but using Respondent's office address rather than Flood's. (TFB Exhs. 19, 20). Spillman was never informed that Flood, not Respondent, would be appearing on his behalf, nor did Spillman agree to such appearance. (TT1 39-40).

After the initial meeting, Spillman received minimal communication from Respondent. Spillman testified that he called Respondent's office, but was simply told to continue making payments. (TT1 40). No substantive information was ever conveyed by Respondent to Spillman about his case. Spillman tired of this treatment and stopped sending payments. Flood never communicated with Spillman. (TT1 39-40).

Eventually, a warrant was issued for Spillman's arrest. (TT1 40). Flood was permitted to withdraw from the representation of Spillman. (TFB Exh. 14). Respondent and Flood met with Spillman at the jail. Spillman obtained alternate counsel to handle his case thereafter. (TT1 43).

Spillman filed a grievance with the Bar against Respondent. (TT1 43). After the grievance committee found probable cause, The Florida Bar filed a Complaint in this Court alleging that an attorney-client relationship had been established between Spillman and Respondent and that Respondent had breached her duties to Spillman.

[1]The Florida Bar also pursued a disciplinary proceeding against Flood that resulted in a thirty (30) day suspension pursuant to a consent judgment. Supreme Court Case No.

Among the violations alleged was 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. The Amended Complaint alleged violations of Rule 4-1.3 (diligence), Rule 4-1.4 (communication), and Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) based on Respondent's failure to represent Spillman diligently, failure to maintain communication with him, and her intentional failure to inform Spillman that Flood would be appearing on Spillman's behalf. The violation of Rule 4-8.4(c) was also based on Respondent's intentional deception of the criminal court regarding the representation of Spillman. The Amended Complaint also alleged violation of Rule 4-8.4(d) (conduct prejudicial to the administration of justice) based on the fact that the deception of the criminal court about who represented Spillman precluded the criminal court from determining whether Respondent's representation of both Spillman and Parks was permissible.[2]

The Referee conducted a final hearing on November 10 and November 18,

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SC04-2120 (TFB No. 2004-10,688(20B)).

[2] The Amended Complaint also alleged violations of Rule 4-1.5 (excessive fee) based on Respondent's claim that she did not represent Spillman, which became moot after the Referee's finding that Respondent did represent Spillman, and Rule 4-8.4(a) (violation of the Rules through the acts of another), based on allegations related to the manner the violations were committed, not allegations of separate violations.

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 filed November 16, 2005). The second hearing was to determine if any violations had been committed. After that hearing, the Referee recommended finding violations of Rule 4-1.3 (diligence), Rule 4-1.4 (communication), and Rule 4-8.4(c) (misrepresentation). The Referee recommended finding no violation of Rule 4-8.4(d) (conduct prejudicial to the administration of justice). The Florida Bar had previously dismissed a count alleging misrepresentation by Respondent in her testimony to the grievance committee.

Immediately after announcing the recommendations as to guilt, the Referee announced that he recommended that the appropriate sanction would be an admonishment, with an additional requirement that Respondent complete the Ethics School program. After the Bar filed a Motion for Reconsideration based on the Referee's failure to permit evidence or argument as to the appropriate sanction, the Referee invited the parties to submit written argument regarding the appropriate sanction. After considering the arguments submitted, the Referee retained the same

recommended sanction.[3] The Florida Bar timely filed its Petition for Review as to both the conflict of interest and the recommended sanction. Respondent has filed a Cross-Petition for Review raising additional issues.

[3] The Referee's description of the recommended sanction has been somewhat confusing. At the hearing, he originally recommended a "private reprimand," which he corrected to an admonishment for minor misconduct. (TT2 183, 185). In his Report of Referee, the Referee describes the sanction as a "public admonishment." The Florida Bar presumes that the Referee intended that the sanction be an admonishment.

SUMMARY OF THE ARGUMENT

The Referee's recommended sanction of an admonishment for minor misconduct, plus a requirement that Respondent complete Ethics School, is insufficient for the violations found. Violations of Rule 4-8.4(c) (intentional misrepresentations) require a more severe sanction; this Court should impose a ninety (90) day suspension against Respondent.

The Referee also erred by dismissing with prejudice the Bar's allegations regarding a conflict of interest. The facts and evidence presented demonstrate that Respondent also violated Rule 4-1.7 and this Court should add that violation to the violations found by the Referee or, if necessary, remand that portion of the proceeding to the Referee for further consideration.

STANDARD OF REVIEW

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.

The determination of whether a complaint sufficiently states a cause of action is an issue of law, therefore an order granting a motion to dismiss is reviewable on appeal by the de novo standard of review. Sobi v. Fairfield Resorts, Inc., 846 So.2d 1204, 1207 (Fla. 5th DCA 2003). 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).

ARGUMENT

I. THE RECOMMENDED SANCTION IS INSUFFICIENT FOR THE VIOLATIONS FOUND BY THE REFEREE.

The Referee found that Respondent had breached the following Rules Regulating The Florida Bar: Rule 4-1.3 (diligence); Rule 4-1.4 (communication), and Rule 4-8.4(c) (misrepresentation). Of these Rules, the violation of Rule 4-8.4(c) is the most serious. The clear and convincing evidence demonstrated that Respondent intentionally did not inform Spillman that Flood would be the attorney officially appearing on Spillman's behalf. Respondent also intentionally misled the court into believing that Flood was Spillman's true attorney. Misleading a court and misleading a client are extremely serious breaches of an attorney's obligations, such that an admonishment for minor misconduct is inappropriate. Considering all of the circumstances of this case, The Florida Bar recommends a ninety (90) day suspension be imposed on Respondent.

The Referee's recommendation of the sanction of admonishment appears to have been based on the Referee's conclusion that Respondent did not have a greedy motive for her misrepresentations. (TT2 182-84). The Referee concluded that Respondent was merely trying to hide the conflict of interest problem and did not expect to gain any monetary or other tangible benefit from her deception. While The Florida Bar agrees that relatively benign motive is a factor which warrants a more

lenient sanction, the Bar contends that a lenient sanction for a violation of Rule 4-8.4(c) is more severe than an admonishment. Based on this Court's precedent, a non-rehabilitative suspension is warranted for a breach of 4-8.4(c) with benign motives; a rehabilitative suspension or disbarment would have been appropriate had Respondent's misrepresentation been intended for personal profit. Based on the facts and circumstances of this misrepresentation, including the conflict of interest discussed below, The Florida Bar urges that this Court impose a suspension of ninety (90) days on Respondent.

Ordinarily, the Florida Standards for Imposing Lawyer Sanctions (the "Standards") provide a useful starting point for determining an appropriate sanction.[4] In this instance, however, the conclusions suggested by the Standards are inconsistent with one another and with the applicable case law. For example, Standard 6.11 provides for disbarment when an attorney knowingly makes a false statement with intent to deceive a court. Based on that standard, Respondent's misrepresentations to the criminal court would warrant disbarment, regardless of motive.

By contrast, Section 4.6 of the Standards is not only much more lenient, but also does not provide a single option that precisely fits this case. Standard 4.62 provides for a suspension when an attorney knowingly deceives a client and causes

4 The Florida Bar urged the Referee to find several aggravating factors, while Respondent urged him to find several mitigating factors. The Referee made no

injury. Standard 4.63 provides for a public reprimand when an attorney negligently fails to inform a client and causes injury. Standard 4.64 provides for an admonishment when an attorney negligently fails to inform a client but causes no harm. In this case, Respondent's deception of her client was intentional, but appears to have caused no harm. Thus, none of the Standards precisely fits the situation.

Applicable case law governing similar cases provides far better guidance. The two cases which are most similar are Florida Bar v. Morse, 587 So.2d 1120 (Fla. 1991) and Florida Bar v. Varner, 780 So.2d 1 (Fla. 2001). In Morse, the respondent's partner represented a pedestrian in an automobile accident. The defendant's insurance company offered a settlement of $2,500 which was rejected by the plaintiff. Meanwhile, the statute of limitations expired without suit being filed. Upon realizing his partner's error, Morse attempted to negotiate a settlement with the insurance company, which was unwilling to pay anything to settle the then-worthless claim. Morse then advised the plaintiff that the insurance company would not pay more than $2,500 and issued a check to the plaintiff in that amount.

In Varner, the respondent represented a client in a personal injury matter. During the deposition of the client, Varner advised the insurance company's representative that suit had already been filed, which Varner believed to be true at the time. After the deposition, the parties agreed to settle the case for $415, which

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findings of either aggravating or mitigating factors.

included $215 in filing fees. The insurance company sent the check and requested a Notice of Voluntary Dismissal. Varner requested that his secretary prepare the Notice, but she told Varner she could not fill in the case number because no suit had been filed. Varner took the Notice, filled in a fictitious case number, signed it, and sent it to the insurance company. Id. at 2. This Court rejected both the referee's recommended sanction of a thirty (30) day suspension and the Bar's request for a ninety-one (91) day suspension and, relying on Morse, imposed a ninety (90) day suspension. This Court considered the two cases to be similar because they both involved an error being made in the representation of a client and, instead of admitting the error, the attorney engaged in a deceptive effort to conceal the error. As the Varner Court explained:

> Varner's error in representing that a suit had been filed was pardonable and correctable upon his learning that such a suit had not in fact been filed. However, Varner, like Morse, instead chose to keep this truth to himself and hatched a scheme to conceal the error. Varner's decision to go forward with a deception rather than honestly admitting to his mistake is so contrary to the most basic requirement of candor that we cannot countenance a short-term suspension in this instance.

Id. at 5-6.

In this proceeding, as in Varner and Morse, the cover-up of the original error was more serious than the original error. In Varner, the initial misrepresentation about suit being filed was innocent. In Morse, the malpractice was not committed by Morse,

but rather his partner, so there was no initial error by Morse. Similarly, Respondent's conflict of interest could have been easily resolved had it been handled in a direct and straight-forward manner. Instead, however, Respondent engaged in a scheme to hide her representation of Spillman, just as Varner attempted to hide his innocent misrepresentation about suit being filed and Morse attempted to hide his partner's malpractice. Furthermore, Varner, like this proceeding, did not involve great harm to any party, nor a greedy motive by the respondent. The most any party in Varner could have been harmed is the insurance company, by its payment of the settlement amount of $415, a sum which is arguably far less significant to that insurance company than the $1200 in paid fees was to Spillman.

The Florida Bar does not argue for a suspension greater than ninety (90) days. Cases which impose a suspension of ninety-one (91) days or more, or which impose disbarment as a sanction, are distinguishable from this proceeding. Most of those cases involve efforts to defraud, to obtain substantial personal benefit for the attorney. Florida Bar v. Van Stillman, 606 So.2d 360 (Fla. 1992)(attorney suspended for one year for false statements to lender to hide secondary financing); Florida Bar v. St. Laurent, 617 So.2d 1055 (Fla. 1993)(Attorney suspended 91 days for fraudulent activities committed as president of a marketing agent for a time share, not in practice of law). The Referee concluded that Respondent in this case was not attempting to

defraud anyone nor to enrich herself; however, she did intentionally make misrepresentations.

The cases which merely impose a public reprimand for misrepresentation are likewise distinguishable. Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989); Florida Bar v. Day, 520 So.2d 581 (Fla. 1988)(public reprimand imposed on attorney who notarized affidavits without requiring the affiants to appear personally before her). In Anderson, the attorney was sanctioned for a misleading recitation of facts and argument based thereon in an appellate brief which was not corrected even after the errors were pointed out by the opposing party. Two attorneys were involved in the handling of the case; Anderson was deemed the less culpable because she had not been personally involved in the events related to the misleading arguments. Because she was deemed less culpable, Anderson received only a public reprimand while the other attorney was suspended. 538 So.2d at 853. Anderson is not persuasive in determining a sanction in this proceeding because Respondent was in full control of the misrepresentations which were made in her representation of Spillman. Even if Anderson were persuasive, it would still require this Court to increase the sanction from an admonishment.

Respondent was fully culpable for her misrepresentations; therefore, her conducts warrants a suspension. Her relatively benign motive, however, warrants the

more lenient sanction of a non-rehabilitative suspension of ninety (90) days.

II. THE REFEREE ERRED WHEN HE DISMISSED THE CONFLICT OF INTEREST ALLEGATIONS WITH PREJUDICE.

A. Respondent violated Rule 4-1.7 by representing two criminal defendants with potentially conflicting interests.

In its initial Complaint filed on November 1, 2004, the Bar alleged a violation of Rule 4-1.7 (conflict of interest) based on Respondent's representation of both Spillman and Parks on criminal charges arising out of the same incident. After a hearing on Respondent's motion to dismiss, the Referee dismissed with prejudice all allegations relating to a conflict of interest. (Order of Dismissal dated April 18, 2005).

In determining whether a complaint properly states a cause of action upon which relief can be granted, the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. Sobi v. Fairfield Resorts, Inc., 846 So.2d 1204, 1206 (Fla. 5th DCA 2003). Although admittedly somewhat conclusory, the allegations in the Bar's Complaint included allegations regarding a conflict of interest sufficient to state a violation of the Rules. (Complaint, paragraphs 22, 83, 100-103). The Referee erred in dismissing those allegations. Even if the allegations of the original Complaint had not been sufficient, the proper course of action would have been to dismiss the allegations without prejudice and with leave to file an Amended Complaint. See, e.g.,

Kairalla v. John D. and Catherine T. MacArthur Foundation, 534 So.2d 774 (Fla. 4th DCA 1988) ("[A] dismissal with prejudice should not be ordered without giving the plaintiff an opportunity to amend the defective pleading, unless it is apparent that the pleading cannot be amended to state a cause of action.") As discussed more fully below, the evidence presented in this matter demonstrated that Respondent's dual representation violated the Rules.

Respondent argued that the Complaint failed to state a cause of action for conflict of interest because it did not allege an actual conflict of interest in Respondent's representation of both Spillman and Parks. Rule 4-1.7 does not require an actual conflict of interest in order to find a violation of the rule. A potential conflict of interest can be sufficient to violate the Rule. Rule 4-1.7(b) provides:

> A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

The Comment to Rule 4-1.7 points out that subsections (b) and (c) govern situations involving the simultaneous representation of parties whose interest in litigation may conflict, such as co-plaintiffs or co-defendants. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony,

incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Id. The Comment also states that "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant." Id. The two defendants represented by Respondent were charged based on the same traffic stop, had cases which proceeded through the criminal court together (TT1 106, 109-10, 135), and each had an incentive to testify against the other.

Case law involving criminal appeals illustrates the potential for conflict that arises in representing criminal defendants with conflicting interests. The courts have held that "an actual conflict of interest exists if counsel's course of action is affected by the conflicting representation, i.e., where there is divided loyalty with the result that a course of action beneficial to one client would be damaging to the interests of the other client." Main v. State, 557 So. 2d 946, 947 (Fla. 1st DCA 1990), quoting McCrae v. State, 510 So.2d 874 (Fla. 1987). It is not necessary that there be an actual conflict of interest to require the disqualification of defense counsel. For example, in Kolker v. State, 649 So.2d 250 (Fla. 3rd DCA 1990), an attorney was disqualified from representing a defendant where the attorney had previously represented a government witness in a substantially related case. The court reasoned that, "[e]ven though this

matter is in the pretrial stages and an actual conflict may yet not be apparent, the case is rife with the potential for such conflict." Id. at 251-52. The court relied on Wheat v. United States, 486 U.S. 153, 164, 108 S.Ct. 1692, 1700, 100 L.Ed.2d 140, 152 (1988), which held that a criminal defendant's presumptive right to counsel of his own choosing may be overcome "not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." Of course, because of Respondent's misrepresentation to the criminal court that Flood represented Spillman, that court had no opportunity to determine whether an impermissible conflict existed. See, e.g., Toneatti v. State, 805 So. 2d 112 (Fla. 4th DCA 2002) (adverse defenses of defendant and co-defendant presented clear potential for conflict of interest requiring trial court to conduct inquiry).

The Bar's Complaint clearly alleged facts presenting a situation "rife with the potential" for a conflict of interest in Respondent's dual representation of Spillman and Parks. Kolker, supra. The two men were arrested following a traffic stop when the highway patrolman found a pistol concealed in the car. Parks was driving the vehicle which was owned by Spillman. Spillman was charged with Possession of a Firearm by a Convicted Felon. Parks was charged with Driving While License Suspended (Habitual), and Speeding, but was not charged with any offense related to the concealed weapon. (Complaint, paragraphs 2-4, 8-10). Thus, a concealed weapon

was found in a car with two occupants; whichever defendant was deemed to be in possession of that weapon would have faced charges.

The Complaint further alleged that Respondent believed there was a potential for a conflict of interest in representing the two defendants, and requested that another attorney, Flood, enter an appearance on behalf of Spillman. By her own testimony, Respondent never obtained Spillman's consent to the dual representation. (TT1 70, 109). Instead, Respondent claimed that, based on the potential conflict, she declined the representation of Spillman, which claim the Referee rejected after weighing the evidence. By having Flood appear on behalf of Spillman, while Respondent continued to handle the legal representation of both Spillman and Parks, Respondent was able to give the appearance of resolving the conflict, but the actual conflict remained.

The facts alleged in the Complaint stated a claim for an impermissible conflict of interest in Respondent's representation of both men. During the traffic stop, Spillman claimed the gun was his, but testified in the Bar proceeding that he did so in order to protect his cousin, Parks, (who was dying of AIDS) from spending his remaining life in jail. (TT1 65-66). Even though they were charged with different crimes, nothing precluded the State from calling each of them to testify against the other in order to prove the charged offenses. Spillman had an incentive to testify against Parks, the alleged actual owner of the gun, in order to clear himself of the

possession charge. Had Spillman so testified, concealed weapons charges could easily have been brought against Parks. Spillman was entitled to candid legal advice regarding whether to testify against Parks, which is advice that could never be given by Parks's attorney.

No case law was found in which a Florida attorney was disciplined for violating the conflict of interest rules for dual representation of defendants in a criminal case. However, Columbus Bar Ass'n v. Ross, 107 Ohio St.3d 354, 839 N.E. 2d 918 (Ohio 2006), presents a similar factual situation. In Ross, the Supreme Court of Ohio held that an attorney's dual representation of clients in separate drug prosecutions was a conflict of interest that could not be waived. Ross represented Brown on drug charges in federal court and at the same time, represented Hollins on an unrelated drug charge in state court. Hollins was alleged to have supplied drugs to Brown in the federal case, but both clients denied any drug deals. The court found that Ross violated Ohio Code of Prof. Resp., DR 5-105(B),[5] by continuing to represent Brown and Hollins after the government identified Hollins as Brown's alleged supplier. Id. at 357. The Ohio Supreme Court agreed with the bar that the situation presented such a great potential for conflict that, even if Ross disclosed the risks of dual representation and obtained his clients' consent, the representation was not permitted. Id. at 358. The court

5 DR 5-105(b) is similar to Florida Rule 4-1.7(b) in that it prohibits a lawyer from accepting or continuing to represent clients if the lawyer's professional judgment on

suspended Ross for six months, with a stay on the condition that he commit no further misconduct. Id. at 360.

The Referee erred in dismissing the conflict of interest allegations with prejudice. Although the conflict allegations were omitted from the Bar's Amended Complaint, the evidence presented at the final hearing supports a finding that Respondent violated Rule 4-1.7. Respondent testified that she believed it would be best for Spillman and Parks to have independent counsel. (TT2 25-26). In fact, in his Report, the Referee acknowledged that Respondent was facing a potential for a conflict of interest. The Referee stated that Respondent's acts "appear to be driven by . . . assessing a potential problem (seeing the possible conflict with a co-defendant), fixing it by referral to a poorly skilled co-counsel, and seeing that the referral was not so good, doing all the key work for the client anyway . . . ." (RR 2). The Referee's findings, combined with the total record in these proceedings, provide clear and convincing evidence of a violation of Rule 4-1.7. The Bar requests that this Court find that Respondent's simultaneous representation of Parks, and Spillman constituted a conflict of interest in violation of Rule 4-1.7, or, if necessary, remand the matter for further proceedings.

B. Respondent's conflict of interest violation warrants the sanction of a suspension

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any client's behalf is likely to be compromised by the representation.

As previously discussed, the Bar contends that Respondent's intentional misrepresentation warrants a ninety (90) day suspension. Respondent's conflict of interest violation also supports the imposition of a suspension. This Court has previously suspended attorneys who violated the conflict of interest rules. In Florida Bar v. Wilson, 714 So. 2d 381 (Fla. 1998), the attorney represented the winner of a lottery in obtaining a declaratory judgment against the Department of the Lottery to allow the lottery winner to share the winnings equally with her husband. Wilson also represented both the husband and the wife on various other matters. Later, when the husband filed for dissolution of marriage, the attorney agreed to represent the wife and sought to set aside the earlier declaratory judgment which he had obtained. This Court imposed a one-year suspension, followed by two years probation for conflict of interest. The Court increased the referee's recommended 90-day suspension based on the respondent's prior disciplinary history. Id. at 384.

Similarly, in Florida Bar v. Dunagan, 731 So.2d 1237 (Fla. 1999), this Court found that an attorney violated the conflict of interest rules by representing the husband in a dissolution of marriage proceeding after having also represented the husband and wife in a matter involving their joint ownership of a restaurant business. Ownership of the restaurant was a disputed issue in the dissolution of marriage proceedings. The referee found that Dunagan violated Rules 4-1.7 and 4-1.9. This

Court approved the recommended sanction of 91 days, considering Dunagan's record of prior discipline. This Court emphasized that Rule 4-1.7 requires that the attorney "*shall not represent* conflicting interests unless the client consents." (emphasis in original) Id. at 1241. This Court stated: "Especially where the conflict exists prior to the beginning of the representation, this can only mean that the necessary consent should be obtained before the attorney agrees to represent the conflicting interest. This was clearly not done in this case." Id.

Like Wilson and Dunagan, Respondent was faced with a situation involving conflicting loyalties to two different clients. Respondent failed to consult with and obtain her clients' consent to the dual representation. Not only did she fail to disclose the conflict, she took steps to hide the conflict. Respondent's conduct in causing Flood to enter an appearance on behalf of Spillman is further evidence that she believed the dual representation was impermissible.

As in the area of misrepresentation, the Standards for Imposing Lawyer Sanctions are not particularly helpful in establishing a sanction for conflict of interest violations. Standard 4.32 provides that suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. Standard 4.33 provides that a public reprimand is appropriate when a lawyer is negligent in

determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client. Here, the Respondent knew of the potential conflict, as evidenced by her actions in causing Peter Flood to enter an appearance on behalf of Spillman, and did not disclose the possible effect of the conflict to her clients. Therefore, her conduct cannot be deemed negligent. While the dual representation did not cause any apparent harm to either client, there was a serious potential for harm. The Bar submits that the intentional nature of Respondent's conduct, including her knowing failure to disclose the potential conflict, weighs in favor of a non-rehabilitative suspension. Because the Bar recommends the maximum non-rehabilitative suspension for the misrepresentation and believes that neither violation warrants a rehabilitative suspension, the Bar recommends the imposition of a ninety (90) day suspension to include all violations.

CONCLUSION

The admonishment recommended by the Referee is an insufficient sanction for Respondent's intentional misrepresentations to her client and to the court. The Referee also erred by dismissing the Bar's allegations related to conflict of interest. The Bar requests that this Court find Respondent guilty of violating Rule 4-1.7, in addition to approving the Referee's recommendations of guilt as to the other Rules. However, this Court should disapprove the recommended sanction and instead impose a ninety (90) day suspension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Airbill Number 7532235211 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, Tampa, FL 33624; by regular U.S. mail to **John Anthony Boggs**, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, all this 7th day of February, 2006.

_____

Troy Matthew Lovell, Esq.
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font, and the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Antivirus for Windows.

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Troy Matthew Lovell, Esq.
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