IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

Case No.: SC04-49

v.

TFB File No. 2001-00,356(8B)

ROLAND RAYMOND ST. LOUIS, JR.,
Respondent.
_____/

RESPONDENT'S AMENDED ANSWER BRIEF AND INITIAL BRIEF ON CROSS-APPEAL

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STATEMENT OF THE CASE AND THE FACTS

Respondent's statement of the case and the facts is necessarily highly truncated.[1] The essential facts of the decision Respondent and his partners faced on the night of August 7-8, 1996, are set forth in the Respondent's expert witness hypothetical. Resp. App. C.

The Referee made findings concerning the type of person and lawyer that Respondent is, at the conclusion of his Report:

> I heard testimony from 12 character witnesses on behalf of Mr. St. Louis, some of whom traveled across the country at their own expense and at considerable inconvenience to testify to Mr. St. Louis' impeccable trustworthiness, compassion, generosity, good character and honesty. From every walk of life, they indicated that Mr. St. Louis is an exemplary individual, who "goes the extra distance" for the downtrodden. Many testified to striking examples of Mr. St. Louis' self-sacrifice, generosity and compassion. Having heard all of the evidence, I have no doubt that Roland St. Louis is a good lawyer, and a caring and good person.[2]

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[1] References to the Report of the Referee shall be represented by the symbol "RR" followed by the appropriate page and/or paragraph number. References to specific pleadings are made to their title. References to the transcript of the final hearing are made by the symbol "TR," followed by the volume (there is no Vol. IV and an overlap of pages in Vols. XI – XIII), followed by the appropriate page number. References to Bar exhibits will be made by the symbol "TFB Ex." followed by the appropriate exhibit number. References to the Respondent's exhibits will be made by the symbol "Resp. Ex." followed by the appropriate exhibit number. Exhibits contained in Respondent's Appendices are designated "Resp. App." followed by the exhibit letter therein.

[2] RR, p. 47, fn. 20; See, e.g., TR, Vol. XII, pp. 1439-41; TR, Vol. XI, pp. 1475-76; TR, Vol. XII, p. 1435; TR, Vol. XI, pp. 1462-66.

> [Respondent is or was] quite possibly one of the most if not the most qualified Benlate plaintiffs' lawyer.[3]

Notably, the Referee also found that the 20 former clients had suffered "no actual harm," and in effect, were "**overcompensated**" as a result of the Respondent's efforts in the 1996 settlements.[4] Respondent had no prior experience in toxic tort or other serial litigation prior to the events at issue; and he was a well regarded commercial lawyer who also had no prior disciplinary record. He became involved in the Benlate litigation as a result of promising a destitute and dying farmer whose lawyers had quit that he would look into it, and do what he could. TR, Vol. VII, pp. 846-7; Vol. XIII, pp. 1508-11, 1557-9.

By extraordinarily diligent and zealous efforts, and a series of fortuitous events, Respondent and his firm succeeded in prevailing in their "lead case" (Davis Tree Farms) on a motion to strike DuPont's pleadings for fraud on the court and destruction of material evidence in June 1996 (See Resp. App. S). The prospect of adverse publicity likely to attend the

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[3] RR, p. 42.

[4] RR, pp. 42, 47. See Resp. App. B. That fact had not prevented them from bringing civil suits against the firm, its former partners and DuPont, lasting 6 years, and resulting in a confidential settlement not involving Respondent in 2003 (the "Gainesville Litigation").

issuance of a formal written order[5] embodying that ruling caused DuPont to make overwhelmingly favorable settlement offers for all of the firm's 20 Benlate clients.[6] Furthermore, DuPont was so concerned about the details of the settlements inflating settlement demands of others that it insisted 10% of each client's settlement -- $6 Million in all – be held in escrow to secure absolute confidentiality for 2 years after the settlements.

For the Respondent's law firm and clients, many of whom had deficient business records and problematic cases, this result was an incredible success. But there was a catch: the "leverage" enjoyed by the clients would disappear as soon as the adverse publicity DuPont sought to avoid would result, or as soon as the Davis Tree Farms case settled without a settlement offer to the other clients that was irrevocable as to DuPont. TR, Vol. XIII, p. 1608. So the firm negotiated simultaneous settlement offers.

The order was issued on August 5, 1996, and received in the mail on August 7, 1996. DuPont then recast its ultimate condition as requiring that

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[5] The ruling was first announced orally, at the conclusion of a hearing broadcast on Court TV, attended by a number of other Benlate plaintiffs' lawyers, with whom Respondent shared information and investigative strategies. DuPont wanted to settle before a written order issued.

[6] According to DuPont's national coordinating counsel, the amounts were for each client were exorbitant – two to three times as much as the best Benlate settlements in the world. TR, Vol. XI, p. 1378.

the Davis order be vacated without adverse publicity the following morning. After all of the client settlement offers had been negotiated, on the night of August 7, 1996, DuPont "insisted"[7] on an engagement agreement that would prospectively and indirectly preclude the firm from taking future Benlate cases, and insisted that the arrangement not be disclosed by the firm to anyone, or "there will be lawyers lined up to Key West." TR, Vol. XIII, p. 1573. After a lengthy dispute, acknowledged uncertainty about the correct application of the rules, and facing a "Hobson's choice," Respondent and his former partners acquiesced in DuPont's demands, reasoning in part that to do otherwise would effectively deprive their clients of financial survival. Respondent believed that he would make more money by rejecting DuPont's ultimatum, but that his doing so would have disastrous personal and financial consequences for his clients. TR, Vol. XIII, p. 1583.

Respondent and his former partners did not later volunteer information about the engagement agreement to Bar investigators or anyone else, in great part because of potential liability under the settlement documents and risk to the $6 Million in client escrowed funds.

[7] See TR, Vol. X, pp. 1337-9.

SUMMARY OF THE ARGUMENT

Respondent did not make a material misrepresentation in responding to the initial Bar inquiry because his letter was a point-by point reply, and the two statements cited by the Bar were accurate in the context in which they were made, and were not meant to deceive or mislead anyone. Respondent also did not fail to recognize and correct any misapprehensions of material fact by Bar investigators at the Inverness meeting, including any alleged misapprehension about the nature and purpose of a $245,000 payment in lieu of pending sanction awards in the Davis Tree Farms case, and did not improperly fail to volunteer information to the Bar.

Respondent inadvertently made two misstatements to Judge Wilson in the Native Hammock v. Sheehe & Vendittelli disqualification proceedings, but they were not made for the purpose of deceiving or misleading Judge Wilson, they were not material to the proceeding, and Judge Wilson was not given any false impression as a result of the statements.

Respondent never entered into an attorney-client relationship with DuPont and the Referee rightly concluded that Respondent did not simultaneously represent opposite sides in litigation.

The Referee's recommended discipline, with the exception of the $2 Million "fee forfeiture," has a legitimate basis in existing law, represents a

careful application of all potential aggravating and mitigating factors, and should be approved.

The 1998 Consent Judgment, which the Bar and the Respondent entered into and which by its terms concluded the Bar's investigation of all 20 Benlate cases, should have been deemed a final judgment which the Bar did not seek to set aside or vacate, barring many of the allegations and charges herein under principles of res judicata and/or impermissible collateral attack.

The $2 Million "fee forfeiture" and schedule of required payments to The Florida Bar Clients' Security Fund recommended by the Referee in this case, which was ordered as a sanction, for its "deterrent effect," is an improper and unconstitutional fine. The funds or assets that the Bar seeks to forfeit are not in the possession of either the Respondent or an identifiable custodian, and Respondent has no practical ability to pay the forfeiture. Furthermore, none of Respondent's former partners have paid a "fee forfeiture," and the Bar's sole alleged basis of Respondent's financial ability to pay is alleged appreciation in a homestead property that Respondent and his wife own as tenants by the entireties.

The Referee failed to address Respondent's defenses based upon the rule of lenity, whereby the ambiguity or lack of clarity in Rule 4-5.6(b), on

August 7, 1996, the date Respondent was required to make a decision and act, in the absence of meaningful judicial pronouncements, should have permitted that defense, particularly in view of the extenuating circumstances.

The Referee erred in rejecting Respondent's defenses and mitigating factors based upon necessity, duress and coercion. Those defenses should have applied in the context of DuPont unfairly placing Respondent in a position in which he was forced to choose in effect the lesser of two evils in a predicament of uncertainty, choosing not to reject overwhelmingly favorable settlements for the benefit of his clients. Contrary to the Referee's opinion, these defenses do apply in extraordinary circumstances such as this case, where the harm sought to be avoided is catastrophic economic loss rather than the threat of imminent bodily harm.

Rule 4-5.6(b) is unconstitutional as applied in this case because it is overbroad, arbitrary, infringes on an attorney's fundamental property and liberty rights and creates conflicting duties with other rules. Therefore, all of the alleged violations that stem from a Rule 4-5.6(b) violation should fail.

ARGUMENT

RESPONDENT'S ANSWER BRIEF

I. RESPONDENT DID NOT MAKE A MATERIAL MISREPRESENTATION IN RESPONDING TO THE FLORIDA BAR'S INITIAL INQUIRY LETTER

Read appropriately in the context in which they were written, as a point-by-point response to specific allegations in the Gilleys' original Bar complaint that was part of the Florida Bar's initial inquiry letter, Respondent's two statements that form the basis of this charge were actually true. The suggested falsity of those statements comes not from a fair reading of what was written, but rather, from a revisionist misconstruction by Bar counsel, suggesting that they have some other, broader meaning, and were made for the purpose of deceiving.

The test for fraud and misrepresentation under Florida law is a specific false statement of material fact, made for the purpose of inducing reliance (See, e.g., *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So.2d 204, 209 (Fla. 3d DCA 2003)); not a true statement which is capable of being misconstrued in unintended ways, in order to infer an implied intent to deceive.

Respondent's statement that he could not give copies of documents to the Gilleys that did not exist related to the Gilleys' allegation that they had demanded and Respondent had withheld documentation relating to the back-and-forth negotiation of a settlement offer amount for the Gilleys' case. See TR, Vol. XIII, pp. 1615-6. Respondent's statement that he had not promised

DuPont something not contained in the settlement documents and related papers was in response to the Gilleys' allegation that contrary to the express terms of the documents, Respondent had threatened to give their entire case file to DuPont if they chose not to settle (as opposed to returning internal DuPont documents to DuPont if they did settle, as required by their protective order – See Resp. App. N). See TR, Vol. XIII, pp. 1617-20. Both of Respondent's statements were true, and were intended only to rebut the specific allegations made. The Referee erred in accepting at face value the Bar's suggestions that because the statements were capable of being misconstrued, they should be deemed to have been dishonest.

II. RESPONDENT DID NOT MAKE A MATERIAL MISREPRESENTATION TO THE BAR AND DID NOT FAIL TO RECOGNIZE AND CORRECT ANY APPARENT MISAPPREHENSION OF MATERIAL FACT BY BAR COUNSEL AT THE MEETING IN INVERNESS

The record reflects no credible evidence whatsoever that 1997 Bar investigators Joan Fowler and Jeannette Haag were lied to or under any misapprehensions of fact at the Inverness meeting, much less that there were any outwardly manifested "misapprehensions" that could have been deemed to have been known to Respondent. By all accounts, the questioning principally concerned whether or not there had been an undisclosed "aggregate settlement" within the meaning of Rule 4-1.8(g). Both Mr.

Rodriguez and Respondent explained the circumstances and the dynamics of the settlements in that light, under the watchful eye of their shared counsel (Mr. Batsel), and truthfully answered questions put to them by Bar counsel, who should be presumed competent for the task. There was no evidence that anything prevented Bar counsel from looking at all of the documents or asking any or all conceivable questions.

Ms. Haag did not appear to testify, claiming she could not remember any details of the Inverness meeting. The Referee rejected the Bar's arguments about explicit misstatements of material fact to the Bar investigators, in effect, rejecting the credibility of Joan Fowler's claims that she repeatedly asked Mr. Rodriguez and Respondent, before, during and after the Inverness meeting whether they had shown her every agreement between their firm and DuPont and they had lied to her and said they had. See, e.g., TR, Vol. III, p. 302; TR, Vol. XV, pp. 1955-6.[8]

In the final analysis, the only proven aspect of the Bar's multi-faceted argument about Respondent's alleged "misrepresentations" to the Bar at the

[8] It is respectfully submitted that the Referee would been well within his discretion to reject Fowler's testimony outright, since it was so rife with contradictions, and was further undermined by her reluctant admission that Bar counsel in this action had recently asked her for "enhanced" details of the meeting that took place over 8 years ago, for which she has no contemporaneous notes or other records and about which she has given highly variable testimony over time.

Inverness meeting turns out to be that Respondent did not voluntarily disclose the engagement agreement, even though the Bar did not make any explicit inquiries that called for it to be disclosed. Respondent admits and has always admitted that he did not volunteer that information.

Lost in the years of rhetoric about deceit and greed is a very simple explanation: the 1997 Bar investigators did not ask Mr. Rodriguez and Respondent for more information, did not demand to see all of the settlement documents when they were placed on the table, did not request or make copies of any of them, did not take detailed notes or create a reliable written record, for one reason. It was not that they were "charmed" and deceived. It was not that they were mesmerized by a display of documents. It was that Ms. Fowler (and her forgetful colleague whom the Bar could not bring to testify, Ms. Haag) actually shared Mr. Rodriguez and Respondent's concerns that public disclosure of any of the settlement terms and details through the Bar investigation might be utilized by DuPont to jeopardize the former clients' entitlement to escrowed funds of $6 Million and/or spawn a second round of litigation with the clients on the defensive.

Despite Ms. Fowler's ever-changing testimony on other aspects of the meeting, she specifically conceded the point, during the Rodriguez trial:

> One of the conditions that DuPont had put on the settlement was that in order to assure confidentiality by the plaintiffs that they would hold out 10 percent of recovery for I believe like a period of two years to assure the confidentiality. Then that would be released to them.[9]

However, during the instant trial, Ms. Fowler made no mention of the problem of the jeopardy to $6 Million in client escrowed funds – perhaps a material omission intended to make the Respondent's failure to volunteer information at Inverness seem less excusable. In any event, it is indisputable that the settlement escrow arrangement, intended to secure absolute confidentiality concerning all of the terms and conditions of the settlement, continued in effect for 2 years, until September 1998.

Just less than a year after the Inverness meeting, in negotiating the initial case Consent Judgments with Mr. Rodriguez and Respondent,[10] Ms. Fowler insisted that recital 2-C, recounting the investigation process, be amended to include "The Florida Bar":

> The respondents [Rodriguez and St. Louis], the firm [Friedman Rodriguez] **and The Florida Bar** protected the firm's clients' confidentiality throughout this process. (emphasis supplied).

Recital 2-E then explained the imperative for confidentiality:

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[9] Florida Bar v. Rodriguez, trial transcript of December 9, 2003, at p. 287.

[10] See Resp. App. I, and Resp. Exs. 109-112 (exchanges of drafts)

> As a result of its desire to keep the settlement terms confidential, Dupont insisted that the settlement provide for a strict confidentiality covenant for the firm and each client, and for a certain percentage of the settlement amount for each client to remain in an escrow account for two years…

At the time of the Inverness meeting, Respondent wanted to do the right thing, and believed that meant he had to respond truthfully to the Bar's inquiries, which primarily concerned the false allegations that there had been an undisclosed aggregate settlement. He did so. TR, Vol. XIII, p. 1631. He was reluctant, however, to volunteer any information or details of the settlement that were not required by Bar investigators' inquiries, because he was understandably concerned that DuPont would claim that any voluntary disclosure of settlement details that were not inquired about would violate the confidentiality covenant, and jeopardize his clients' interest in their $6 Million escrowed funds. That concern could not be deemed unreasonable or baseless, in no small part because it was shared by the Bar investigators.

Respondent acknowledged at trial that he personally would not have wanted to open up the issue of the engagement agreement, because although he believed that he and his firm had <u>not</u> violated their duties under the circumstances, he also knew that it would take a very substantial effort to explain all of the circumstances and reasons for his decision (as it has during

the 3-week trial here).[11] However, Respondent did not lie or fail to correct any obvious misapprehension of material facts, and the record evidence is that notwithstanding his own reluctance to "open the door" to a discussion of the engagement agreement, he would have done so had the Bar's inquiries called for that information. They did not. Messrs. Batsel and Rodriguez have testified exactly the same way. Only the uncorroborated, chameleon-like and suggested recollection testimony of Ms. Fowler differs.

The Referee properly found no violation of Rule 4-8.1(a), for a deliberate false statement of material fact at Inverness. However, as an apparent concession to the Bar, the Referee found that Respondent had failed to correct a misapprehension of fact by Ms. Fowler, described in ¶ 44 of his Report. What was that alleged misapprehension? It was a fiction, invented by the Bar as a "fallback argument" to establish a violation involving dishonesty, for the purpose of justifying more severe sanctions, as the Bar urges in its Initial Brief. The alleged "misapprehension" is that Ms. Fowler supposedly was under the false impression that the $245,000 paid to the firm by DuPont in lieu of already ordered sanctions in the Davis Tree

[11] TR, Vol. XIII, p. 1632. The Referee erred by accepting the Bar's proposed ¶ 44, falsely converting that candid admission into a concession that Respondent had lied by omission. See RR, ¶ 44.

Farms case (which Davis Tree Farms approved of) was compensation to it for a future practice restriction.[12]

The findings of ¶ 44 are in a sense pivotal. Much of the impetus for Judge Wilson's referral was based upon his premise that the Bar had been lied to in the 1997 investigation. But after a lengthy trial, the Referee found that the Bar investigators had not been expressly lied to. The one instance of a supposed "misapprehension" of material fact that Respondent had failed to correct is the one contained in RR, ¶ 44. The first problem with this conclusion is that there is no evidence whatsoever of it in the record – not even Ms. Fowler, whose testimony changed by the minute, said that she had such a misapprehension. For that reason, the violation of Rule 4-8.1(b) and the implicit finding of "dishonesty" on the part of Respondent fail.

There is a second significance to RR, ¶ 44, supplied to the Referee by the Bar: it reflects that the Bar investigators knew or suspected that a compensated practice restriction was part of the 1996 settlement negotiations before the Bar found probable cause, filed the original action, conducted discovery and entered into the original 1998 consent judgments with Mr. Rodriguez and Respondent. If that were the case, alleged violations based

[12] This paragraph, like most of the Referee's Report, was supplied verbatim by the Bar in its proposed report.

upon the compensated practice restriction would be barred by the doctrine of res judicata for the purposes of this proceeding. *Arrieta-Gimenez v. Arrieta-Negron*, 551 So. 2d 1184 (Fla. 1989).[13]

The purported "misapprehension" about the $245,000 is not only unsupported by the record, it is rebutted by substantial competent evidence. Two days after the Inverness meeting, on June 26, 1997, Ms. Haag (Ms. Fowler's fellow investigator) sent Respondent a letter requesting documentation on the $245,000 "sanction" line item. Four days after that, Mr. Rodriguez sent Ms. Fowler the requested documentation. See Resp. App. R. Ms. Haag's letter stands as a testament to the fact that the investigators left the Inverness meeting with the correct understanding that the $245,000 line item was for outstanding sanction awards.[14]

In sum, the Bar argued and the Referee apparently accepted the premise that, (a) despite the fact that Respondent did not believe he and his firm had violated the rules in the August 1996 settlement, (b) despite the fact that Respondent believed his voluntary disclosure of settlement terms to the

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[13] In that sense, the Referee's Report is inherently contradictory.

[14] Inadvertently omitted from Mr. Rodriguez's letter was also the $10,000 per day sanction against DuPont imposed by Judge Donner in the Davis Tree Farms case on June 17, 1996, for DuPont's failure to produce legible copies of certain documents ordered to be produced in that case.

Bar could result in extreme jeopardy to his former clients, and (c) despite the fact that Bar investigators had not asked him for such information, Respondent was supposed to volunteer that information anyway because it could or might pertain to arguable violations by him. Such a proposition is a novel one at best, unsupported by any known decisions of this Court, and certainly not described in any of the rules. Given the element of jeopardy to the clients' interests, it is respectfully submitted that on this question of first impression, the Respondent should not be condemned and sanctioned, even if this Court were to announce a rule with prospective effect.[15]

Rule 4-8.1(b), the rule the Referee determined Respondent had violated at the Inverness meeting by allegedly failing to correct a non-existent misapprehension about the $245,000 sanctions payment, contains an express limitation on protecting client confidentiality.[16] Furthermore, even

[15] Respondent is reluctant to venture what such a rule or ruling would entail, but extrapolating from the Bar's argument herein and the testimony it elicited through witnesses Joan Fowler and Judge Thomas Wilson, it would likely involve a requirement that any attorney under investigation for any alleged or suspected infraction of the disciplinary rules must disclose to the Bar all information which could or might be argued to relate in any way to any other potential infraction.

[16] Respondent believes that it is another question of first impression, but that the limitation language of Rule 4-1.6(e), read in conjunction with the exception language of Rule 4-8.1(b), suggests that a lawyer should correct any obvious misapprehension by the Bar in an admission or disciplinary

when a lawyer withdraws from representing a client, he or she must do so in a way that best protects against or minimizes any prejudice to the client. When a lawyer has a dispute with a former client, he or she may reveal only so much of the client's confidential information as is necessary and pertinent to the dispute, and may not volunteer information that harms the former client. See Rule 4-1.6(e), and *Florida Bar v. Carricarte*, 733 So. 2d 975 (Fla. 1999).

A presumption of honesty is generally observed in transactions between persons, and courts therefore require clear and convincing proof of fraud, and hold that fraud is not to be presumed, inferred, deduced or assumed. See *Florida Power & Light Co. v. Horn*, 131 So. 219 (Fla. 1930). Here, the Bar has argued the opposite: although there is an explanation for Messrs. Batsel, Rodriguez and Respondent not volunteering information about the engagement agreement at the Inverness meeting that involves legitimate prudential concerns for their clients, the Bar pushed the Referee to find that their failure to do so entailed "dishonesty." That recommendation should be rejected.

III. RESPONDENT MADE INADVERTENT MISSTATEMENTS, BUT DID NOT MAKE

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matter, but only to the extent necessary to correct the misapprehension if it compromises a client or former client's confidentiality interests.

DELIBERATE MISREPRESENTATIONS OF MATERIAL FACT TO JUDGE WILSON

Respondent represented Dale and Carolyn Smith in a case against their former Benlate attorneys, Sheehe & Vendittelli ("S&V"), for issues largely related to their failed settlement negotiations in 1994. Among other things, S&V had not disclosed to the Smiths that S&V would retain $1 Million ostensibly offered to them by DuPont in settlement of their Benlate claims if they turned the offer down, and would presumably fold it into a single undisclosed aggregate settlement pot of funds. See Resp. App. H, unredacted p. 1.

Some 7 months after the suit began, S&V filed a motion to disqualify Respondent from representing his clients, first falsely swearing that their undisclosed settlement agreement with DuPont had been sealed by Judge Donner in the Davis Tree Farms case. Subsequently, S&V filed recently unsealed pleadings in the Gainesville litigation, as "further support" for the disqualification of Respondent. Miami-Dade Circuit Court Judge Thomas S. Wilson, Jr. conducted a series of hearings (See TFB, Ex. 3A-D), and disqualified Respondent. During the hearings, Respondent admits that he misspoke in stating that he had made "full disclosure" to the Bar, when he meant to say that he had fully cooperated and had truthfully answered the

Bar investigator's questions in 1997. TR, Vol. XIII, pp. 1638-9. The Respondent then and now questioned how that inquiry was "material" to the Smiths' case against S&V generally, or the disqualification motion in particular. See TFB, Ex. 3, October 19, 2000 hearing, at pp. 14-6; TR, Vol. XIII, p. 1639.[17]

Although Respondent admitted that he misspoke in using the words "disclosed" and "full disclosure" in relation to the events several years earlier, Judge Wilson knew exactly what Respondent meant and was not misled by the statements. At trial, Judge Wilson, who was the first witness called by the Bar, acknowledged:

> [Respondent] testified about or there was testimony about going to a Florida Bar meeting and putting the documents on the table in a stack next to him which was supposedly the disclosure; that's the way I read it.[18]

Judge Wilson, a close personal friend of the Referee, referred this matter to the Bar based largely upon the previously sealed, uncorroborated pleadings from the Gainesville litigation. Judge Wilson's letter of referral (TFB, Ex. 5) concerns the engagement agreement, the allegations that Respondent had not volunteered information about it to the Bar in the 1997

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[17] The Referee did not understand the materiality either, asking Respondent to try to explain it to him. TR, Vol. XIII, pp. 1639-40.

[18] TR, Vol. I, p. 115.

investigation, and his own claim that Respondent should have made a voluntary disclosure of the engagement agreement to him at the commencement of the Sheehe & Vendittelli case as part of requesting his permission to represent the Smiths in that action.[19]

Judge Wilson's letter of referral does not state that Respondent made misrepresentations of material fact to him, but the Bar elicited that testimony from Judge Wilson despite his own admission that he understood what Respondent meant by "disclosure," as part of the Bar's insistence that Respondent's "dishonesty" required more extreme discipline to be imposed.

Judge Wilson had no knowledge of many of the material facts pertaining to the 1996 settlement negotiations, including of the clients' financial and business predicaments, the strength of DuPont's defenses to their claims, the existence of and potential jeopardy to the $6 Million escrow fund, and DuPont's admitted "insistence" upon the engagement agreement. Instead, he made it clear during his deposition in this cause that he intended to indulge every possible inference against Respondent and had no intention

[19] It is not clear to Respondent, to this day, what legal authority supports Judge Wilson's implicit premise that an attorney must approach a presiding judge at the beginning of a civil suit, make "disclosures" of any facts and circumstances that might support a motion to disqualify that lawyer, and seek the judge's permission to represent his or her clients.

of letting the facts get in the way.[20] Among other things, Judge Wilson concluded that Respondent had "harmed" the Smiths' chances for a Benlate recovery, a conclusion that Dale Smith testified was clearly wrong (See, e.g., TR, Vol. X, pp. 1252-3), and ignored the fact that the Smiths' malpractice claims against S&V could have been time barred if not filed when they were (See, e.g., TR, Vol. XIII, p. 1648).

One of the threshold issues in determining whether any statement could be a violation of Rule 4-3.3 is whether or not it is "material." Judge Wilson maintained that all of Respondent's statements to him were "material," but never indicated why or how they were material, and there is no credible evidence in the record of such materiality.

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[20] See, e.g., his deposition testimony, cited in Respondent's Motion in Limine to Exclude the Testimony of Judge Thomas S. Wilson dated September 16, 2004. Respondent was so concerned about the admitted close personal friendship between the Referee and Judge Wilson, and about the expanding scope of topics that Judge Wilson was permitted to testify about, as well as Judge Wilson's many questionable inferences, assumptions and deductions, that he took the extraordinary steps of filing a Motion to Recuse Judge Dresnick dated September 1, 2004, and the aforesaid Motion in Limine, both of which were denied by the Referee. Respondent filed a Petition for Writ of Prohibition dated September 20, 2004, challenging the denial of his motion to recuse, which was denied without prejudice by this Court. For all of the reasons set forth in those papers, which are incorporated herein by reference, as well as the scope of testimony elicited by the Bar and permitted over Respondent's objections at trial, Respondent believes that he was unduly prejudiced.

Respondent has acknowledged remorse about misspeaking, even inadvertently, before Judge Wilson. But the statements have not been shown to have been made in a knowingly false manner, nor that they were material, nor even that Judge Wilson was left with a false impression as a result.[21] The statements do not suggest that any severe disciplinary sanctions are warranted.

IV. THE REFEREE DID NOT ERR IN DETERMINING THAT RESPONDENT DID NOT SIMULTANEOUSLY REPRESENT ADVERSE INTERESTS

The test in Florida for whether or not an attorney-client relationship has been formed is one of the client's subjective belief that he or she is consulting a lawyer in that capacity with the intention of seeking professional legal advice, coupled with the requirement that such belief be

[21] Perhaps it is belaboring the point, but the "knowing" and "material" requirements of the Rule are probably intended to exclude ordinary misstatements, of which this record has many. For example, Judge Wilson testified that Mr. & Mrs. Smith testified before him on the issue of Respondent's disqualification, and he took their testimony into account (TR, Vol. I, pp. 112-3). In fact, they were not permitted to testify on the subject (TR, Vol. X, p. 1250), TFB, Ex. 3A-D. Bar witness Marc Ossinsky testified that it was Respondent's counsel who instructed Patrick Lee not to answer the 4 questions that would have required disclosure of the engagement agreement in his 1997 deposition (TR, Vol. II, p. 229); in fact, the transcript reveals that it was Mr. Reid, DuPont's counsel, that gave those instructions. See Resp. App. F. And Bar witness Ms. Fowler was caught in several contradictions from prior testimony, and acknowledged that she had "misspoken." TR, Vol. IV, pp. 418-9.

reasonable under the circumstances. See, e.g., *Estate of Jones ex rel. Gay v. Beverly Health and Rehabilitation Services, Inc.*, 68 F. Supp. 2d 1304 (N.D. Fla. 1999).

Given Mr. Shomper's express testimony,[22] and the record evidence as a whole which does not reflect any intent on the part of DuPont to seek professional legal advice from Friedman Rodriguez or any of its partners, including Respondent, the Referee was correct in holding that there was not a dual representation conflict.

V. THE REFEREE'S REJECTION OF DISBARMENT AND LENGTHY SUSPENSION IS APPROPRIATE AND CONSISTENT WITH FLORIDA LAW

As conceded by the Bar, the Referee's recommended discipline will not be second-guessed "so long as that discipline has a reasonable basis in existing case law." *Florida Bar v. Vining*, 707 So. 2d 670, 673 (Fla. 1998) (citing *Florida Bar v. Lecznar*, 690 So. 2d 1284, 1288 (Fla. 1997).[23] After insisting, contrary to the actual record evidence, that Respondent and his former partners had engaged in a "massive cover-up" and had made numerous fraudulent misrepresentations as discussed above, the Bar insists

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[22] Deposition testimony of March 1, 2000, pp. 147-8; TR, Vol. XII, pp. 1459-60.

[23] See Bar's Initial Brief at p. 14.

that the Respondent be disbarred, or at a minimum, suspended for an extended period of time.[24] The Bar insisted on severe sanctions at trial. The Referee, having heard all of the evidence, having considered arguments and evidence of aggravating and mitigating factors, soundly rejected the Bar's position:

> I considered disbarment and rejected it easily. He [Respondent] is a good man. He is a good lawyer, and but for this he would be a credit to the profession and his family and the community.
>
> This was a terrible -- this is a tragedy. This case is a real tragedy, to do such good work and to have it turn into eight years of misery, and God only knows what this had to cost. I'm sure somebody knows besides God. It had to cost a lot.

The Referee recommended discipline which included (A) suspension for 60 days; (B) probation for 3 years, during which Respondent is to perform 100 hours of pro bono services and take 5 additional ethics hours of continuing legal education per year; (C) a fee forfeiture for monies Respondent does not have, which is an inappropriate and unconstitutional fine;[25] and (D) payment of the Bar's alleged taxable costs of this proceeding, in the amount of $72,218.37. (RR, pp. 44-48).

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[24] See Bar's Initial Brief at pp. 15-24.

[25] See Argument VII, below.

As acknowledged by the Referee, Respondent has been through the rigors of 8 years of civil litigation and Bar proceedings, resulting in his incurring astronomical legal fees and costs, consuming inordinate amounts of his time and energies, resulting in the near total disparagement of his professional reputation and the virtual decimation of his legal practice. In short, Respondent has already paid an enormous price for choices he made in 1996,[26] and now effectively has a negative net worth.

The Bar contends that a 60-day suspension, extended probation, community service / pro bono obligation, and additional ethics educational requirement, are not appropriate sanctions supported by Florida law, because Respondent deliberately violated numerous ethics rules, and repeatedly lied about it after the fact, in a heinous and incorrigible manner.[27]

The Bar's contentions in this regard are premised upon findings of fact that are not supported by competent evidence in the record, reflect excessively unequal and disproportionately excessive punishment of Respondent, and ignore the Order of the Florida Supreme Court approving the lesser sanction of a public reprimand in a factually analogous case.

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[26] Whether or not one believes that he acted to save his clients from a similar financial fate to the one he and his family now endure.

[27] See Bar's Initial Brief at pp. 16-18.

Based upon the totality of the facts found by the Referee, including the extenuating circumstances and mitigating factors, with the exception of an unprecedented "fee forfeiture" of substantial money the Respondent does not have, the sanctions recommended by the Referee[28] are appropriate.

The Referee found that Respondent is an exceptional lawyer, and a good, generous and deeply compassionate man. The Referee has made it clear that he disagrees with the decision made by Respondent on the night of August 7, 1996, and strongly reacted (perhaps, overreacted) to the fact that three highly respected lawyers, Richard McFarlain, Bruce Winick and Jack Hickey, each testified that they thought Respondent acted appropriately and if put in the same predicament, they would have done the same thing themselves. Curiously, the Referee himself never answered the thorny question posed by Respondent's expert witness hypothetical (Resp. Ex. 329; Resp. App. C), stated succinctly: if rejecting or disclosing to your clients DuPont's demanded prospective engagement agreement would cost your clients otherwise unattainably beneficial settlements representing the difference between their financial salvation and ruin, and you were uncertain

[28] The Referee originally announced these recommendations – without any mention of the "fee forfeiture" – at the conclusion of the trial on October 15, 2004 (TR, Vol. XV, pp. 2062-63), before the mysterious reconvening to consider the Bar's fee forfeiture demand.

of the scope of the rule that ostensibly prohibited it for the remote benefit of persons you do not represent, what would you do?

Of course, on August 7, 1996, when Respondent had to make a decision under extreme time constraints, there were no cases construing or shedding any light on Rule 4-5.6(b), other than *Lee v. Dept. of Ins. and Treas.*, 586 So. 2d 1185 (Fla. 1st DCA 1991), which held that the rule did not invalidate a private contract, and for that reason, presumably such a contract is not invalid as violating public policy. There was also academic debate about the very mechanism proposed by DuPont – a consulting agreement to indirectly preclude the law firm from taking future Benlate cases, and then Director of the Florida Bar Ethics Department would four years later conclude that such an arrangement does not violate the rule.[29]

Respondent has already been financially ruined and has experienced immense damage to his professional reputation and stature. He has large outstanding debts and a negative net worth. He and his family have suffered emotionally and physically for some 9 years, enduring protracted litigation

[29] See Resp. App. D. The author, Timothy Chinaris, was listed as an expert witness but not called to testify by the Bar in this action, after his affidavit came to light and was reluctantly produced. Respondent challenges the Referee's refusal to consider the Chinaris Declaration, not for the truth of the matters asserted therein, but for its reflection of tenable doubt on the issue of the propriety of "indirect preclusion" in 1996.

and two separate disciplinary proceedings. As a result of Judge Wilson's determinations, Respondent was disqualified in a case in which he had already invested substantial time and money, and was also held liable for his opponents' legal fees and costs of more than $100,000 (TFB, Ex. 4). In short, the costs and penalties already suffered by Respondent have been enormous. In the words of the Referee, "the overall effect on his family has been very detrimental… …a sentence of anything more than a [60-day] suspension from the practice of law will be disproportionate to the lapse in his judgment." (RR, p. 47).

The Referee found numerous mitigating factors, including the fact that the primary wrongdoers, DuPont and its counsel, were not before him, the absence of a prior disciplinary record, Respondent's inexperience in mass tort litigation, Respondent's character and reputation (summarized at RR, fn. 20: "impeccable trustworthiness, compassion, generosity, good character and honesty… …an exemplary individual, who 'goes the extra distance' for the downtrodden"). Based upon all of the evidence and circumstances, the Referee specifically intended to recommend discipline which he would have otherwise considered "very lenient" given the nature of the charges. It is not clear from the Report, but is perhaps implicit in the recommendation for lenient discipline, that the Referee acknowledged Respondent was forced

to act with his 20 clients' interests in jeopardy in a complicated and difficult situation.[30] No doubt the Referee was moved in part by the testimony of a number of witnesses to the Respondent's selflessness and compassion throughout his lifetime and as a lawyer frequently providing *pro bono* assistance to others, who ought to be permitted to continue to do so.

Commensurate with this Court's approval of a public reprimand in *Florida Bar v. Mandelkorn*, 874 So. 2d 1193 (Table) (2004),[31] the *Florida Bar v. King*, 174 So. 2d 398 (Fla. 1965), and the final or recommended disposition of the related cases (Resp. App. A),[32] the Referee recommended

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[30] It is not clear from some aspects of the Report that the Referee understood or acknowledged just how potentially compromising that situation was for the clients. In any event, the Referee was entitled to recommend leniency or to consider as an additional mitigating factor the fact that Respondent procured an excellent result for his clients and they were not harmed. See *Florida Bar v. Quinon*, 773 So. 2d 58 (Fla. 2000). This mitigating factor is especially compelling because (a) there was substantial evidence that it was Respondent's desire to protect and benefit his clients that led to what the Referee deemed his "lapse in judgment," and (b) had Respondent taken the actions that the Bar's expert witness suggested were appropriate, there was substantial evidence that the clients would have suffered irreparable harm.

[31] A disciplinary proceeding arising from the far more egregious *Adams v. BellSouth* case, which occurred after the settlement at issue in this case, in which the plaintiffs' lawyers received a majority of the settlement funds, including monies from the common settlement "pot of funds" ostensibly negotiated for the client settlements, reflecting a direct conflict of interest.

[32] The Sheehe and Vendittelli cases also involve an underlying set of facts which is far more egregious than this case. They structured an undisclosed

the lenient discipline of a 60-day suspension, probation, additional *pro bono* service and continuing ethics education, and payment of the Bar's costs, which are very substantial.[33]

Acknowledging that a Referee's recommended sanction should not be second guessed so long as it has a reasonable basis in existing case law,[34] the Bar ignores the results of the other cases cited above, dramatically overstates the evidence of alleged dishonesty by Respondent, and demands the severest sanction of disbarment.

The cases relied upon by the Bar for more stringent sanctions all involve conduct far more egregious, without any element of the lawyer

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aggregate settlement, manufactured backdated documents to conceal that fact, arranged for direct payments from DuPont unrelated to any demand by DuPont or condition of the settlement, arranged with DuPont to keep a $1 Million allocation of settlement monies if a client (Native Hammock/Smith) declined its purported "offer" without disclosing that prospect or fact to the client, and agreed with their adversary, DuPont, that they would withdraw from representing a client with terminal cancer (James Davis) as consideration for the aggregate settlement of other cases. The Bar entered into consent judgments with Messrs. Sheehe and Vendittelli for an admonishment and public reprimand, respectively.

[33] There was apparently no evidentiary hearing directed to the costs, but the Bar submitted a summary affidavit and the Referee awarded all $72,218.37 that the Bar demanded. It is not known what, if any, documentation exists in support of certain line items, such as "witness expenses" of $10,383.43. The separately recommended $2 Million "fee forfeiture" that Respondent maintains is inappropriate and is dealt with at Argument VII, below.

[34] See Bar's Initial Brief at p. 14.

involved acting to protect the interests of the clients. *In re Hager*, 812 A. 2d 904 (D.C. 2002), involved attorneys in a failed product liability class action lawsuit who essentially "threw the fight" by negotiating only a $10,000 product cost refund for their 90 clients, with no damages paid to them at all, while secretly negotiating and taking a $225,000 fee from the same pot of settlement monies for themselves. If they had not insisted on that fee, the defendant, Warner-Lambert, would have gone through with the settlement without any confidentiality covenants. 812 A. 2d at 910. In that respect, the dynamics of the settlement in *Hager* were radically different than this case. In particular, the Court was concerned not with lawyers attempting to utilize a perceived exception to Rule 4-5.6(b) at the demand of an adversary in order to secure an overwhelmingly beneficial settlement for clients in dire need, but rather, lawyers deceiving their clients about the clients' continuing entitlement to sue for damages, in order to bring the litigation to a halt and earn fees equal to more than 95% of the settlement proceeds:

> …the danger being that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.[35]

In this context, the Bar also cites *Florida Bar v. Senton*, 882 So. 2d 997 (Fla. 2004), a completely inapposite case in which an attorney

[35] 812 A. 2d at 912-913.

repeatedly exploited his attorney-client relationship to pressure a woman into having sexual relations with him, then repeatedly lied to the Bar about those facts under oath. The Bar also relies on *Florida Bar v. Budnitz*, 690 So. 2d 1239 (Fla. 1997), another inapposite case in which the attorney had been found, by clear and convincing evidence, to have attempted to conceal crimes by lying under oath to a grand jury in New Hampshire, and lying to the New Hampshire Bar in the disciplinary investigation of that matter (leading to his disbarment in New Hampshire).

The Bar cites *Florida Bar v. Rightmyer*, 616 So. 2d 953 (Fla. 1993), a case in which an attorney convicted of criminal perjury charges and numerous trust account violations, after prior disciplinary misconduct, warranted disbarment. In a similar vein, *Florida Bar v. Langford*, 126 So. 2d 538 (Fla. 1961), concerned an attorney who explicitly lied to a grievance committee and requested another attorney to falsely corroborate such testimony in an effort to conceal his filing of a forged deed. Finally, the Bar cites *Florida Bar v. Oxner*, 431 So. 2d 983 (Fla. 1983), a case in which a lawyer repeatedly lied to a judge in order to obtain a continuance from trial because of his lack of preparation, and was given a 60-day suspension.

With the exception of the unprecedented $2 Million "fee forfeiture" addressed below, the Referee's other recommended disciplinary sanctions are appropriate and should be followed.

RESPONDENT'S INITIAL BRIEF ON CROSS-APPEAL

VI. THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND/OR COLLATERAL ATTACK ON A PRIOR CONSENT JUDGMENT BAR FINDINGS OF GUILT AS TO MULTIPLE OF THE CURRENT ALLEGED VIOLATIONS.

Respondent adopts by reference and incorporates herein the argument of Francisco R. Rodriguez in Case No. SC03-909, concerning the Bar's impermissible collateral attack on the 1998 Consent Judgment in the original disciplinary proceeding against Respondent, Case No. 91,917,[36] and the res judicata / collateral estoppel bars to relitigating issues involved (that is, which were or could have been litigated) in such initial proceeding.[37] See, *e.g.*, *Arrieta-Gimenez v. Arrieta-Negron*, 551 So. 2d 1184 (Fla. 1989); Rule 1.540(b), *Fla. R. Civ. P.*; *Florida Bar v. Collier*, 526 So. 2d 916 (Fla. 1988);

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[36] See Resp. App. I.

[37] See Rodriguez's Initial Brief, Argument I. Respondent concedes that the determination made on this issue as to Mr. Rodriguez must overlap to a large degree with the Court's determination as to Respondent. Nevertheless, there are some points Respondent believes should be considered that are not addressed in Mr. Rodriguez's Initial Brief.

ICC Chemical Corp. v. Freeman, 640 So. 2d 92 (Fla. 3d DCA 1994); *Hay v. Salisbury*, 109 So. 617 (Fla. 1926); *Kimbrell v. Paige*, 448 So. 2d 1009 (Fla. 1984); *Dept. of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 570 So. 2d 892 (Fla. 1990)(explaining rule against splitting causes of action). However, Respondent makes the following additional observations:

(1) As noted above, throughout the period of the Inverness meeting and the initial Bar investigation, the Bar investigators, Mr. Rodriguez and Respondent were acutely aware of the potential jeopardy to the clients' $6 Million settlement escrow account, and that risk played a role in how each of the participants conducted themselves.

(2) The only and uncorroborated Bar witness for the alleged "misrepresentations" in Inverness, Joan Fowler, cannot recall what specific communications she had with either Mr. Rodriguez or Respondent, either at Inverness or otherwise, cannot remember whether the documents came in a box or a trial briefcase, cannot recount the precise nature of any purported misrepresentations, cannot state precisely what factual misapprehensions she had at the time or in what precise manner she allegedly revealed those misapprehensions. Ms. Fowler admits to having no notes or records of the meeting, and has testified that she and/or the Bar "purged" the file after the investigation, such that she cannot produce a single corroborating

contemporaneous note, photocopy or other tangible thing. She now claims that she did not make more direct inquiries or examine all pertinent documents because Mr. Rodriguez and Respondent were "charming."[38] Ms. Fowler's purported recollections of the Inverness meeting have also "improved" over the years. This very type of uneven and uncorroborated "enhanced recollection" of a single witness has been found insufficient to support serious charges against an attorney in Bar disciplinary proceedings. See *Florida Bar v. Rayman*, 238 So. 2d 594, 596-7 (Fla. 1970); *Florida Bar v. Fredericks*, 731 So. 2d 1249, 1251 (Fla. 1999).

(3) Respondent received the legal advice[39] that he testified to from the Late Hon. Daniel Pearson, Robert Batsel, Esq. a respected member of his local Grievance Committee, and highly qualified counsel for Mr. Rodriguez and the firm (under a joint defense privilege), that he had to tell the truth but did not have to volunteer information that could jeopardize his clients'

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[38] TR, Vol. III, p. 298.

[39] Another question of first impression in Florida is whether advice of counsel is a defense to the *mens rea* element of a claim of knowingly violating disciplinary rules. The Bar took the inconsistent position herein that all lawyers are expected to have full knowledge of the rules, and yet, its case was built on "expert testimony" ostensibly interpreting the rules, supplied principally by Associate Professor Harriet Rubin Roberts.

interests unless the Bar requested such information.[40] Under those circumstances, and owing to the fact that he fully cooperated, Respondent has never felt that he had been dishonest or failed to fulfill his duty in connection with the Inverness meeting in particular or the 1997 Bar investigation generally.[41] Outside of the meeting in Inverness, Mr. Rodriguez had virtually all of the communications with the investigators, and Mr. Rodriguez was the one who had custody of and brought the box of settlement documents (that were kept in a locked closet in Mr. Rodriguez's office – an office that Respondent had not been in for 8 months beforehand) to the meeting for the investigators' review.

(4) It was the Bar that proposed the Consent Judgment, as a means of bringing closure and finality to the initial disciplinary proceeding, consistent with its precise language: "This concludes any Bar Investigation into all of the firm's twenty (20) Benlate clients."

(5) Among the many contradictions in Ms. Fowler's accounts and conduct is the fact that she was unquestionably aware of the DuPont

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[40] TR, Vol. XIII, p. 1631.

[41] The Referee acknowledges the specific legal advice Respondent received and followed in Inverness (RR, p. 31, ¶ 41), but neither the Bar nor the Referee cited any legal authority demonstrating that advice to be false or inappropriate.

engagement agreement of the Friedman Rodriguez law firm by the time of her February 8, 2000 deposition in the Gainesville litigation, was specifically questioned about it, and yet Ms. Fowler, a longtime Bar investigating and prosecuting attorney who was thoroughly conversant with the disciplinary rules, did not initiate any complaint or inquiry with the Bar against Mr. Rodriguez and Respondent for supposedly having made false statements during the prior Bar disciplinary proceeding, as she herself would have been required to do under Rule 4-8.3(a).

Respondent has been prejudiced by the very manner in which this proceeding has been conducted by the Bar, including the enormity and multiplicity of the allegations, and the extent to which they have required relitigation of matters already resolved by the Consent Decree.[42] As outlined in Mr. Rodriguez's Initial Brief, a substantial portion of the charges herein, including a number of the Referee's findings of rule violations, represent an

[42] At one point, the Referee quipped, "when Professor Roberts was testifying, my eyes were glassing over with the number of violations. It was like a house of cards." TR, Vol. XV, pp. 1899-1900. Bar counsel herein has been extremely aggressive about soliciting and encouraging any kind of negative testimony about Respondent, in conjunction with the former clients' civil case attorneys. See, e.g., Resp. App. J. This Court has on occasion had to remind the Bar that "The Bar has consistently demanded that attorneys turn 'square corners' in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct." *Florida Bar v. Rubin*, 362 So. 2d 12, 16 (Fla. 1978).

impermissible collateral attack, or alternatively, should have been barred by principles of res judicata or collateral estoppel.

VII. THE UNPRECEDENTED "FEE FORFEITURE" THAT THE REFEREE RECOMMENDED IN THIS CASE IS AN UNCONSTITUTIONAL FINE, AN IMPROPER FORM OF "DETERRENCE," IMPROPER IN VIEW OF THE FACT THAT THERE IS NO REASONABLE BASIS TO BELIEVE THAT RESPONDENT HAS OR WILL HAVE THE FINANCIAL ABILITY TO PAY IT, AND REPRESENTS UNFAIRLY INCONSISTENT TREATMENT.

The undisputed evidence was that Respondent has been financially ruined by this experience, presently has a negative net worth,[43] has had his law practice severely impaired, and has no practical ability to pay any forfeiture. Respondent has substantial debts and outstanding judgments, has liquidated virtually all assets, and has no savings for his family's basic needs. Respondent and his family have exhausted all of their financial resources in litigation costs over the past 8 years, and have had to borrow heavily from relatives in order to sustain themselves. In short, Respondent has no funds and no assets traceable or attributable to any funds derived from the 1996 distributions, and no practical ability to pay a substantial fine.

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[43] See reviewed financial statement and supporting affidavit by forensic accountant, submitted under seal to this court by filing dated December 17, 2004, and the Referee's comments at RR, p. 44, fn. 17.

The "forfeiture" penalty insisted upon by the Bar is unequal, disproportionate and unprecedented. Contrary to the Bar's suggestions, Respondent's former partners have not heretofore been required to pay any "fee forfeiture" to the Florida Bar Clients' Security Fund. Ms. Ferraro and Mr. Friedman had paid negotiated settlements to some of the firm's former clients and their lawyers to settle claims against them in the Gainesville litigation in lieu of defending same, and then characterized those payments as "restitution" in their disciplinary cases. "Restitution" is compensation to former clients for harms visited upon them.[44] "Restitution" is not a "fee forfeiture," which is a confiscation of fees wrongfully obtained and held by a lawyer, required to be paid to the Clients' Security Fund.

Fee forfeiture under Rule 3-5.1(h) was proposed and adopted as a method of addressing improper attorney advertising (see *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar – Advertising Issues*, 571 So. 2d 451, 452, 455 (Fla. 1990); see also Standard 13 of the *Standards for Imposing Lawyer Sanctions*), and not as an all-purpose

[44] However, the Referee found that the former Benlate clients of the Friedman Rodriguez firm were not harmed but in fact were "over-compensated." They also received undisclosed settlement proceeds in the Gainesville litigation, a "second windfall," that belies any inference that restitution is appropriate, and of course, the Referee found no basis for restitution.

sanction whenever a disciplined lawyer has received remuneration of any kind (see Standard 2 of the Standards for Imposing Lawyer Sanctions). Furthermore, in *Florida Bar v. Frederick*, 756 So. 2d 79 (Fla. 2000), this Court pointed out that the essential purpose of the Clients' Security Fund was to "provide monetary relief to persons who suffer reimbursable losses as a result of misappropriation, embezzlement, or other wrongful taking or conversion by a member of The Florida Bar of money or other property that comes into the member's possession or control…" (fn. 6).[45]

In this action, the Bar does not contend and has not argued that the money it seeks to forfeit from Respondent is reimbursable to or should somehow be channeled back to the former clients, who have already received one or two windfall recoveries, were found to have been "over-compensated," and would therefore be unjustly enriched, or to DuPont. The Bar has also never argued that there was an improper conversion or act of embezzlement of trust funds or other client property by Respondent or his law firm. Rather, the Bar argues for forfeiture for the purpose of punishing Respondent and adding to the general funds of the Clients' Security Fund.

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[45] A question posed herein is whether the legitimate purposes or the public perception of the disciplinary process could be impaired by the Bar's pursuit of financial recoveries from lawyers unconnected with the essential purposes of the Clients' Security Fund?

"Fee forfeiture" was the Bar's fallback argument in the event that the Referee found disbarment unwarranted, which he did.[46] Such a "fee forfeiture" is a fine which is not permitted. See, e.g., *Frederick*, *supra*.; *Florida Bar v. Greene*, 589 So. 2d 281 (Fla. 1991); and *R. Regulating Fla. Bar* 3-5.1 (types of discipline authorized do not include imposition of fine).

Assuming, *arguendo*, that forfeiture could be appropriate under Rule 3-5.1, in the exercise of reasonable discretion, the Referee should not have recommended it where there was no evidence that Respondent has the

[46] During the January 24, 2005 hearing to reconsider and address the Bar's demand for a fee forfeiture, the Referee specifically noted that it was not his intention to effectively suspend or disbar Respondent by requiring the payment of a substantial forfeiture sum, failing which Respondent would be suspended from practice (TR, Vol. XVI, p. 2079), yet at the Bar's insistent urging, "backdoor" indefinite suspension or disbarment is exactly what he ultimately recommended (RR, pp. 44-45). The after-tax amounts recommended by the Referee as required to be paid by the Respondent, whose law practice has indisputably been "decimated" and who also has to support a family of 5, over a 10-year period, are so substantial that all but the most financially successful lawyers, in lucrative practice fields, at the prime of their careers, would find it practically <u>impossible</u> to pay ($125,000 to $300,000 per year in pre-tax income, in addition to the amounts required to satisfy outstanding judgments, pay debts and support his family). The Respondent respectfully submits that the Referee may have been goaded into recommending such an enormous and unprecedented fine by Bar counsel's insistence that Respondent's "financial condition is irrelevant" (TR, Vol. XVI, p. 2076), citing caselaw that deals only with liability for costs of suit, and Bar counsel's baseless, untrue and inappropriate suggestions that Respondent has "offshore accounts," airplanes, boats and/or other hidden assets or funds. TR, Vol. XVI, pp. 2082, 2087-89.

practical ability to pay it. In this connection, nothing prevented the Bar from taking financial discovery of any kind prior to trial, but its sole "evidence" of Respondent's financial ability to pay was a written appraisal conducted after the trial without the appraiser testifying, introduced over Respondent's objection, reflecting that Respondent and his wife's homestead property (owned by them at all times by the entireties) had appreciated more than Respondent estimated. The Respondent and his wife have never waived the benefit of the homestead exemption conferred on them under Article X, Section 4 of the Florida Constitution, which has been held to prohibit civil, criminal or other forfeiture, and Respondent's wife has not waived her common law protection and entitlement as a tenant by the entireties. See *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992); *Havoco of America v. Hill*, 790 So. 2d 1018 (Fla. 2001); *Callava v. Feinberg*, 864 So. 2d 429 (Fla. 3d DCA 2003); *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45 (Fla. 2001).

Respondent's counsel raised below[47] and Respondent incorporates herein by reference the additional arguments that the forfeiture of the type sought by the Bar is unconstitutional under the Seventh Amendment of the

[47] See Respondent's Memorandum of Law in Opposition to Bar's Demand for Forfeiture and exhibits thereto dated January 21, 2005, incorporated herein by reference.

United States Constitution, as a taking of property without due process of law, including the right to a jury trial. See, e.g., *United States v. One 1976 Mercedes Benz*, 618 F. 2d 453 (7th Cir. 1980).[48] The forfeiture recommended by the Referee is also constitutionally infirm as being "excessive" under the facts and circumstances of this case. See, *e.g*., *United States v. Bajakajian*, 524 U.S. 321 (1998).

The Referee's own commentary connected to the forfeiture portion of his Report raise other problematical issues. Because prominent members of the Bar appeared and gave thoughtful opinions that under these highly complex circumstances, Respondent may indeed have acted appropriately under the circumstances and they would have done likewise, the Referee reasoned that there is a need for additional deterrence, an *in terrorem* effect, that presumably would not be necessary if all agreed that what Respondent did was clearly wrong. Furthermore, the Referee admits that "in the realm

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[48] Some authority exists which suggests that the same conclusion results from applying the Florida Constitution in the context of forfeitures. See, *e.g*., *Dept. of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991); *City of Miami v. Wellman*, 875 So. 2d 635 (Fla. 3d DCA 2004). Some authorities require full and adequate prior notice of intent to forfeit, identification and tracing of the subject property, and at least implicitly, the requirement that the specific property to be forfeited is in the possession of either the subject or the forfeiting authority, none of which occurred here. See, *e.g*., *Dept. of Law Enforcement, Id*.; *United States v. James Daniel Good Real Property, Inc.*, 510 U.S. 43 (1993).

of pure supposition" – that is, without any evidence and without even having given Respondent the opportunity to address the issue by making an inquiry during the proceedings – the Respondent's financial ruin would not now be so complete had he made immediate disclosure to his clients.[49] Such "suppositions" are not a legitimate basis for the imposition of disciplinary sanctions. They are not findings of fact entitled to the presumption of correctness, because they are not based upon evidence or even a reasonable inference from the evidence,[50] and they do not support a reasonable

[49] See RR, pp. 44-45, fn. 17. Although not acknowledged by the Referee in this context, there was substantial competent evidence supporting Respondent's testimony that immediate disclosure, contrary to DuPont's conditions of settlement, would have effectively been a rejection of the $60 Million settlements that represented financial salvation to the firm's existing clients, and afterwards, jeopardized their $6 Million escrowed funds. Many of the former clients sued their former lawyers in spite of actually receiving world record settlements and having been thereby "overcompensated," so it is difficult to fathom the Referee's logic that they would not have sued if they had gotten far less or nothing at all. Furthermore, at least one client, whose settlement was for $30,000,000 and would presumably have at least arguable damages in that amount if the settlement collapsed, has testified she "would have sued the pants off" of Respondent if he had done precisely what the Referee "supposes" would have minimized the financial hardships he has suffered, and the Referee elsewhere noted as much (RR, ¶ 20).

[50] It is also fundamentally misguided. There is no factual basis or reason to believe that the former clients and their contingent fee malpractice lawyers had any intention of relinquishing any claims or actions against Respondent prior to the time they settled for a second windfall with the deep pocket defendant (DuPont), or until further action against Respondent was pointless because he was already effectively insolvent and judgment-proof. In fact, the Bar listed several of the Gainesville litigation plaintiffs' lawyers as

conclusion that a $2 Million "fee forfeiture" of funds that Respondent does not have is not excessive and inappropriate.[51]

VIII. THE REFEREE ERRED IN REJECTING THE RULE OF LENITY AND IMPOSING THE UNPRECEDENTED AND SEVERE SANCTION OF A $2 MILLION "FEE FORFEITURE" IN THIS CASE, A CASE OF FIRST IMPRESSION IN WHICH THE RESPONDENT MADE A REASONABLE AND DEFENSIBLE DECISION IN GOOD FAITH FOR THE PROTECTION OF HIS CLIENTS, UNDER EXTREME TIME CONSTRAINTS AND CIRCUMSTANCES IN WHICH THERE WERE CONFLICTING DUTIES UNDER THE RULES, AND NO CLEARLY CORRECT ALTERNATIVE.

Respondent's expert witness Professor Bruce Winick testified that he believes this case represents the kind of circumstance in which the "rule of lenity" should apply – that if there is doubt about the correct application of a disciplinary rule at the time of an attorney's action, and if he/she makes a good faith determination for the benefit of clients, any ambiguity should be resolved in favor of the accused and he/she should not be subject to sanction on that account.[52] This is apparently one of the questions of first impression

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"rebuttal witnesses" specifically to give that testimony, claiming that Respondent might contend that the dismissal of the civil claims as to him was a kind of "vindication."

[51] The decade of post-settlement litigation has long since already effectively "forfeited" and "disgorged" from the lawyers all gains they had received in 1996.

[52] TR, Vol. VIII, pp. 989-90.

in a Bar disciplinary proceeding. The rule of lenity is typically applied in other types of criminal and quasi-criminal proceedings. See, *e.g.*, *State of Florida v. Burris*, 875 So. 2d 408 (Fla. 2004); *Bautista v. State of Florida*, 863 So. 2d 1180 (Fla. 2003); *Carawan v. State of Florida*, 515 So. 2d 161 (Fla. 1987).

The Referee made no determination on the rule of lenity. However, if the rule of lenity were applied in this case, in particular, to the agonizing decision faced by the Respondent on the night of August 7, 1996 concerning the proper application of Rule 4-5.6(b),[53] then the "core violation" at the heart of the Bar's case against Respondent would be resolved in his favor, and a number of the reflexive or ancillary violations, such as those based on non-disclosure of a violation, would also be affected.

On the night of August 7 and early morning of August 8, 1996, the only case decided in Florida citing Rule 4-5.6(b) was *Lee v. Dept. of Ins. and Treas.*, 586 So. 2d 1185 (Fla. 1st DCA 1991), which gives virtually no guidance on the application of the rule, other than it did not affect the enforceability of a settlement agreement that restricted the future practice of a lawyer under the facts of that case, and for that reason, presumably also

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[53] The same question answered the same way by the then Director of the Ethics Department of the Bar, 4 years later in the Chinaris Declaration.

did not represent a compelling public policy antagonistic to such a practice restriction. The other cases cited by the Bar throughout this proceeding, both within and outside of Florida,[54] were all decided afterward and therefore could have provided no guidance to Respondent at the time in question. The Referee should not have considered them in construing the rule, determining whether or not the rule was uncertain or ambiguous, or determining what Respondent reasonably believed about rule on the night in question.

IX. THE REFEREE ERRED IN REJECTING RESPONDENT'S DEFENSES AND MITIGATING FACTORS BASED UPON DURESS, NECESSITY AND COERCION.

The Referee flatly rejected Respondent's legal defenses based upon duress, necessity and coercion, stating simply that the "fear of not receiving money can not be the basis for a claim of duress."[55] It is not clear from the Report that the Referee even considered the facts cited by Respondent as establishing "extenuating factors" in recommending discipline, although

[54] For example, *In re: Brandt*, 10 P. 3d 906 (Or. 2000); *Adams v. BellSouth Telecommunications, Inc.*, 2001 WL 34032759 (S.D. Fla. 2001); *In re: Hager*, 812 A. 2d 904 (D.C. 2002).

[55] RR, p. 42.

Respondent concedes that he may have.[56] It is respectfully submitted that the Referee's premise about Respondent's argument is an oversimplification, and that his legal conclusion is erroneous.[57]

In a variety of contexts, the common law recognizes that when people are put in extremely difficult situations, often involving being pressured by others in unfair ways, and respond to that pressure by acting in ways that, in effect, reflect the choice of the lesser of two evils, or facing uncertainty, choose the course of action that prevents or minimizes the harm to others, that choice or course of action may be justifiable under the circumstances. Alternatively, the defense arises when someone is faced with an unusually difficult situation, one that would create pressures that are difficult if not impossible to resist by a person of ordinary sensibilities, and acts in a way that is arguably a violation of the law,[58] although in a good faith effort to

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[56] That is, in every respect except the subsequently considered "fee forfeiture."

[57] Admittedly, in some criminal contexts, such as the use of deadly force in self defense as a defense to manslaughter, an issue with which the Referee may have some familiarity, the "necessity" defense requires a reasonable belief in the imminent threat of serious bodily harm, but there are other contexts in which the elements of a necessity defense are different.

[58] Some examples not involving third party coercion are exceeding the speed limit while transporting an injured person to a hospital for emergency care, and trespassing while aiding people trapped in a burning building.

protect themselves or someone else, and the harm to be avoided exceeds the harm of their conduct -- the lesser of two evils, then the defense applies.[59]

In medicine, sometimes the patient dies. In law, sometimes the life of the client, particularly the economically disadvantaged and weak client, is ruined during the very course of attempting to litigate its entitlement. The Respondent gave a solemn and understandable promise to a client (Jim Davis), and watched him die without ever seeing a recovery. He took phone calls every day from clients experiencing personal and financial desperation.

Through what have been called brilliant, unwavering and tireless efforts as a lawyer, the Respondent, together with his firm, created a fragile and temporary window of consummate opportunity for 20 families to achieve the essential purposes of their representation, and negotiated settlements tenaciously on their behalf, and for their maximum advantage. See Resp. App. B.

Then, DuPont, the adversary with unlimited resources and with its own agenda of not facing Respondent again, put his devotion to his clients to the test by demanding that he either compromise his own future income or vitiate the previously negotiated settlement offers. The engagement was in effect the coerced sale of the firm's future Benlate practice. Respondent

[59] See testimony of Professor Bruce Winick, TR, Vol. VIII, pp. 1006-07.

clearly saw the ruin of many of his clients' lives at stake and dependent on his choice, and neither the Bar nor anyone else has ever offered evidence that rebuts the clarity of that vision. The Bar's position has been that Respondent should have simply disregarded the impact on the clients.

Respondent did not deliberately choose to violate a rule. If he knew for certain that DuPont's proposal was a rule violation, he would pursued other options, including refusal on account of the rule, and threatening to report DuPont's ultimatum to Judge Donner in the Davis Tree Farms case. However, Respondent did not have the comfort of that certainty. Exhausted, uncertain, facing unmitigated pressure and severe time constraints, he admittedly made a decision by following the Golden Rule.[60]

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[60] See TR, Vol. XIII, pp. 1542-44. Respondent is remorseful about any rule violation he may have committed, however inadvertent, in these complicated and difficult circumstances, and he has already paid dearly for his choices. But he is far from a moral relativist. Whether one calls a moral compass the Golden Rule, the Judeo-Christian ethic, the universal tao, the law of compassion, or any other iteration, Respondent genuinely believed and still believes as a matter of conscience that knowing what he did at the time, he did not exactly selfishly or unethically under the circumstances. His reference to the words of the Preamble are: "In the practice of law conflicting responsibilities are often encountered… …Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules… …The Rules of Professional Conduct are rules of reason… …The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be

In effect, Respondent knew that he could be later deemed wrong no matter what he did. If Respondent rejected DuPont's demand for a secret, prospective engagement agreement to indirectly preclude him from taking future cases and/or disclosed that demand to his clients, thereby depriving them of recoveries they would not obtain again, they would undoubtedly be harmed and feel that his decision was based on selfish motives, such as acting to preserve his future Benlate practice at their peril.[61] He reasoned that if he acquiesced in DuPont's demand and at least thereby secured the settlement offers for his clients, he would unquestionably benefit 20 families he had undertaken a direct responsibility for, at least 15 of whom were already on the brink of financial ruin.[62]

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completely defined by legal rules…" Despite uncertainty, he did the best he could to achieve the objectives of the rules.

[61] The Referee posits an alternative course of action that perhaps reflects the complexity of the underlying circumstances and the true nature Respondent's dilemma: that Respondent could have disclosed the engagement agreement to the firm's current clients, and then negotiated with his own clients over the engagement consideration that was supposed to be compensation for the firm's lost future earnings. RR, fn. 17. That suggestion belies the fact that if Respondent disclosed the engagement agreement to his clients, there would be no settlements for them at all, no engagement for Friedman Rodriguez, and nothing to negotiate over.

[62] Whether or not Respondent's thought process and motivations demonstrate the kind of "reasonableness" and "good faith" that evoke the necessity or duress defense is perhaps a matter for this Honorable Court to determine. But it should give pause to consider that one of the clients, the

It is respectfully submitted that the Referee is simply wrong in his premise about necessity, duress and coercion in the civil context. In *Soneet R. Kapila, P.A. v. Giuseppe America, Inc.*, 817 So. 2d 866 (Fla. 4th DCA 2002), the Fourth District held that an expert witness who coerced payment of a disputed bill by threatening to withdraw shortly before testifying, leaving the party litigant in the position of practically forfeiting a lawsuit it ultimately prevailed on, created the kind of economic "duress" that rendered the agreement and payment involuntary. See also, *Pacific Mut. Life Ins. Co. v. McCaskill*, 170 So. 579 (Fla. 1936); *City of Miami v. Kory*, 394 So. 2d 494 (Fla. 3d DCA 1981); *Spillers v. Five Points Guaranty Bank*, 335 So. 2d 851 (Fla. 1st DCA 1976); *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So. 2d 86 (Fla. 2d DCA 2005).

An obvious jurisprudential concern is whether the recognition of a defense to Bar disciplinary charges based upon necessity, duress and/or coercion would open the floodgates to innumerable rule violations all purportedly justified by the exigencies of the circumstances. It is

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one who had all of the leverage and the benefit of a default judgment against DuPont for compensatory and punitive damages, who was not told at the time (indeed, could not have been told) but now knows everything about the details of negotiating her settlement in 1996 and knows why Respondent acted as he did, is especially adamant that Respondent did the right thing by her and the other clients, and has testified that she would have felt "betrayed" if he had acted otherwise. See TR, Vol. VII, p. 844.

respectfully submitted that the recognition of the defense in such rare circumstances as this case, coupled with a pronouncement that the defense would only be allowed in extraordinary and compelling cases, and the fact that the assertion of the defense would not preempt a complete Bar investigation (leaving the charged attorney with the prospect of having to justify such a decision at considerable professional risk and having to meet a heavy burden of proof), would not create an undue incentive for abuse.[63]

Although apparently another question of first impression, Respondent respectfully submits that the very same extraordinary circumstances and considerations that apply to a defense sounding in "necessity," "duress" and/or "coercion" may be what is meant in the Preamble by the kind of "extenuating circumstances" that should be considered in imposing

[63] No matter how the Court decides this issue, it is respectfully submitted that there is nothing about Respondent's predicament or the circumstances of this case that suggest any lawyer would emulate Respondent's plight. Having been accomplished, successful and highly regarded beforehand, and having procured the highest Benlate recoveries in the world by any reasonable basis of comparison for his largely downtrodden clients, Respondent is now in every respect far worse off than he was before he agreed to represent them, has himself been financially ruined, has had his law practice decimated, and although a man of compassion and integrity, has been subjected to public humiliation and scorn.

sanctions, and therefore properly recognizable as a defense and a mitigating factor.[64]

X. RULE 4-5.6(b) IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

Another question of first impression is whether Rule 4-5.6(b) is unconstitutional as applied in this case. A number of authorities, including Professors Hazard and Gillers, have severely criticized the rule, in part because it is ambiguous, lacks a reasonable relation to a legitimate purpose, represents the "taking" of a lawyer's liberty or property rights without due process and adequate compensation, etc. Professor Patterson opined that the origins of the rule suggest that it is based on protectionism of plaintiffs' annuity practices,[65] not genuine concern for as yet unrepresented persons.

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[64] The foregoing is consistent with the language of the Preamble, which states: "The Rules of Professional Conduct are rules of reason… …The rules presuppose that disciplinary assessment of a lawyer's conduct will made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations."

[65] Perhaps it is an obvious point, but implicit in an unrestricted future practice is the lawyer's own self-interest in the future income to be derived from that practice. Implicit in a settlement proposal might be the client's interest in obtaining a favorable recovery and avoiding further litigation expense, risk and other hardships.

Many legal writers have suggested that there are innumerable lawyers available to represent those who do not have the benefit of counsel, and that the very concept of "prospective clients" – meaning anyone and everyone in the world a lawyer does not already represent, is a meaningless one.

Professor Winick gave a critical analysis of the purported bases of Rule 4-5.6(b) that had the Referee conceding he "was inclined to agree that it's a dumb rule."[66] Leaving aside the issue of whether or not a serial defendant should be prohibited from proposing or requiring a future practice restriction by the plaintiffs' lawyer in any type of serial litigation,[67] it is at least ironic that a lawyer – as a matter of fundamental liberty – is permitted to choose to stop taking cases of a particular type for such mundane reasons as boredom or lack of financial reward, but is prohibited from making that same choice specifically to benefit current clients he/she has a fiduciary duty to.

Rule 4-5.6(b) implicitly grants priority to the interests of the lawyer in future practice benefits and unidentified "prospective clients" over the

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[66] TR, Vol. IX, pp. 1061-65.

[67] It is assumed for the sake of discussion that such a prohibition – directed against the party that would typically have the incentive to promote such an arrangement for its own economic purposes, would not be overly broad or otherwise objectionable.

interests of actual present clients. It is therefore counterintuitive and contrary to Rule 4-1.9 (read in conjunction with Rules 4-1.7 and 4-1.8), which recognizes the primacy of the interests of past and current clients over the interests of the lawyer to future income and the interests of prospective new clients. The primacy of interests under the rules run in opposite directions, and in certain cases, such as that of a serial defendant refusing to settle unless it has some assurance that it is not merely "funding litigation against itself" by bankrolling a hostile and determined plaintiffs' lawyer, or the owner of trade secrets requiring as a condition of settlement that the opponent's lawyer not disclose to a future client or utilize trade secret information disclosed under a protective order in any future case (which will have the effect of restricting that lawyer from representing competitors), and perhaps other scenarios, the duties of the lawyer under the various rules appear to be in conflict.

It is perhaps easy for the Bar to contend that there is no conflict, because Rule 4-5.6(b) contains a simple prohibition that must be obeyed, irrespective of impairing the ability of a lawyer's current clients to settle a legal dispute on favorable terms. But that conclusion begs the question, which is whether model rule 5.6 and Florida rule 4-5.6(b), in the final analysis, are simply an anticipatory and artful way around that sticky

conflict problem, which serves the plaintiffs' bar's interest in preserving future income in spite of the fact that doing so may well negatively impact on current clients.[68]

Furthermore, if as Professors Gillers, Patterson and Winick, and many others have suggested, there is no reason to believe that there is or will be a shortage of lawyers willing to take on new cases (and represent as yet unrepresented clients) of the same kind being settled in serial litigation, there is no compelling "ethical" reason to protect a lawyer's future practice and income by a prohibition ostensibly for the benefit of as yet unrepresented persons.

CONCLUSION

Respondent respectfully submits that the Referee's finding of violations of Rules 4-3.3 and 4-8.1 are not supported by the record and are in

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[68] These are perhaps academic points that relate to whether or not Rule 4-5.6(b) should simply be amended or abolished, and Respondent does not contend that they were part of his thought process on the night of August 7, 1996. However, the underlying issue of an apparent conflict between a sense of duty to protect the best interests of the 20 current clients by capitalizing on overwhelmingly favorable settlements in non-recurring circumstances versus an uncertain duty to hold himself out for hire by as yet unidentified future clients and likely make far more money, was a part of Respondent's thinking. It is respectfully submitted that such a dilemma between conflicting duties is what is alluded to in the Preamble and that Respondent's perhaps overly simplistic but sincere and conscientious "Golden Rule" approach should not bring condemnation.

error. The Bar's alleged "misapprehension" concerning a $245,000 line item, reflected in paragraph 44 of the Report, has no basis in fact and should not have been proposed or recommended. The Referee appropriately found that Respondent was not simultaneously acting as the lawyer for adversaries in litigation. With the exception of the "fee forfeiture" addressed in Respondent's Initial Brief, the Referee's recommended discipline has a legitimate basis in law, is grounded in the record, and should be approved.

Many of the allegations and charges brought against Respondent herein were the subject of the 1997-98 Bar investigation and proceeding, which gave rise to a final consent judgment. Included within the scope of that proceeding were allegations that Respondent violated Rules 4-1.4(a) and (b), 4-1.5(a), 4-1.7(b), 4-5.6(b), 4-8.4(a), and 4-5.1(c), and those charges as to the 1996 Benlate settlement negotiations should have been precluded from consideration in this proceeding. The Referee's recommended findings of guilt in that regard should not be approved.

The $2 Million "fee forfeiture" is an inappropriate and unconstitutional fine and an improper means of deterrence, that was recommended in this case alone because three eminent members of the Bar testified that they believed Respondent should not be condemned for his actions under the peculiar circumstances of this case, and in spite of the fact

that Respondent does not have the funds in question and has no practical ability to pay the forfeiture. The Referee's recommendation in that regard should not be accepted.

Respondent respectfully submits that the doctrines of necessity, duress and coercion should be allowed as substantive defenses in rare circumstances such as this case, or at a minimum, as mitigating factors in determining any appropriate discipline. As a question of first impression, Respondent believes that Rule 4-5.6(b) is unconstitutional as applied in this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true, correct and complete copy of the foregoing was served by hand on this 6th day of September, 2005, upon: James A.G. Davey, Jr., Esq., John Anthony Boggs, Jr., Esq., and John F. Harkness, Jr., Esq., The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300.

By: _____
Roland R. St. Louis, Jr., Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the above and foregoing Initial Brief has been submitted in 14 point proportionately spaced Times New Roman font, and that the Respondent's Initial Brief has been filed in digital format by e-mail in accordance with the Court's Orders. The undersigned further hereby certifies that the electronically filed version of the Respondent's Initial Brief has been scanned and found to be virus-free, using Symantec/Norton Internet Security Anti-Spyware Edition 2005 software.

By: _____
Roland R. St. Louis, Jr., Esq.