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.
_____/

INITIAL BRIEF

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PRELIMINARY STATEMENT

The Complainant, The Florida Bar, is seeking review of a Report of Referee recommending suspension for 60 days, probation for 3 years with pro bono and additional CLE ethics hours, and forfeiture of $2,277,633.00 to The Florida Bar's Client Security Fund under a 10 year payment plan and to pay costs, and further seeking review of the referee's failure to find guilt of Rule 4-1.7(a) Representing Adverse Interests).

Complainant will be referred to as The Florida Bar, or as The Bar. Roland Raymond St. Louis, Jr., Respondent, will be referred to as Respondent, or as Mr. St. Louis throughout this brief. Mr. St. Louis is seeking cross review of the Report of Referee.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to specific pleadings will be made by title. Reference to the transcript of the final hearing are by symbol TR, followed by the volume, followed by the appropriate page number. (e.g., TR III, 289).

References to Bar exhibits shall be by the symbol TFB Ex followed by the appropriate exhibit number (e.g., TFB Ex. 10).

STATEMENT OF THE CASE

On January 13, 2004, The Florida Bar filed its Complaint against Respondent, charging him with violations of 16 Rules and subparts (Formal Complaint).

On April 22, 2004, a motion hearing was held on all pending motions. By Order dated May 3, 2004, The Florida Bar's Motion to Amend the Complaint was granted. The Respondent's Motion to Strike for a More Definite Statement was denied, and Respondent's Motion for More Definite Statement was denied.

On May 10, 2004, Respondent filed his Answer to the Complaint.

A Case Management Conference and Motion Hearing were held on June 17, 2004, on all pending motions. By Order dated July 8, 2004, The Florida Bar's Motion to Compel Production of Documents under Protective Order was denied, Respondent's Motion to Compel Answer to Interrogatory One was denied, Respondent's Motion to Compel Answers to Interrogatories Two, Three and Five was denied based upon the Bar's representations and clarifications at the hearing, and Respondent's Motion to Continue Trial and Reschedule the Discovery Cutoff Date was granted. The date for trial was set commencing September 27, 2004, for two weeks. Respondent's Motion for Case Management Order was denied, Respondent's Motion to Clarify Discovery Responsibility was granted.

By Order dated August 18, 2004, Respondent's Motion for Additional Requests for Admissions and Interrogatories was granted. The Florida Bar was ordered to answer

Respondent's Requests for Admissions numbered 31-51 that had already been propounded within 30 days and Respondent was granted leave to propound an additional set of 30 interrogatories and 30 requests for admissions. It was further ordered that The Florida Bar's objection to Interrogatory 1 of Respondent's Fourth Set of Interrogatories is sustained as burdensome.

On August 25, 2004 and August 30, 2004, Respondent filed Motions for Partial Summary Judgment on various grounds, and on September 1, 2004, Respondent filed a Motion to Recuse Judge Ronald Dresnick as Referee on Paragraphs 50-58 of the Complaint relating to the Judge Wilson Count.

By Order dated September 13, 2004, that motion was denied as legally insufficient because it was not timely filed.

On August 18, 2004, Respondent filed a Motion in Limne to Exclude the Proposed Expert Testimony of Timothy Chinaris and Harriet Rubin Roberts. The Florida Bar filed a Reply on September 10, 2004.

On August 16, 2004, August 17, 2004 and August 25, 2004, Respondent filed Motions for Partial Summary Judgment on various additional grounds.

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On September 16, 2004, Respondent filed a Motion in Limne to Exclude the Testimony of Judge Thomas Wilson.

On September 20, 2004, Respondent filed a Petition for Writ of Prohibition and Emergency Motion for Stay. Both motions were denied by Order of the Supreme Court of Florida on September 25, 2004.

A motion hearing was held on September 27, 2004 to hear all pending motions. All motions were denied with the exception of the following three, which were held in abeyance pending the completion of evidence:

1. Motion for Partial Summary Judgment; Rule 4-5.6(b) the Interest Provision on Procedural Grounds.
2. Motion for Partial Summary Judgment, the Practice Restriction; and
3. Motion for Partial Summary Judgment, misrepresentation to Joan Fowler.

The final hearing commenced on September 27, 2004. The Referee announced his findings of guilt verbally on the record on October 15, 2004. At the conclusion of the guilt phase, Respondent renewed his motions that had previously been held in abeyance. Two motions were denied: The Practice Restriction and misrepresentation to Joan Fowler. The Florida Bar withdrew the allegation of a violation of Rule 4-1.8(a), so the motion concerning the interest provision was moot. The referee found that Respondent has violated Rules 4-1.4(a) (Informing Client of Status of Representation), 4-1.4(b) (Duty to Explain Matters to Client), 4-1.5(a) (Prohibited Fees), 4-1.7(b) (Duty to Avoid Limitation on Independent Professional Judgment), 4-3.3 (Candor Toward the Tribunal)

(RR, 36), 4-1.5(c) (Responsibilities of a Partner), 4-5.6(b) (Restriction on Right to Practice), 4-8.1(a) (Knowingly Making a False statement of Material Fact), 4-8.1(b) (Fail to Disclose a Fact Necessary to Correct a Misapprehension), 4-8.4(a) (Violate or Attempt to Violate the Rules of Professional Conduct and 4-8.4(c) (Engage in Conduct Involving Misrepresentation) of the Rules Regulating The Florida Bar. Thereafter, on October 15, 2004, the discipline phase commenced and was concluded on October 15, 2004.

On October 18, 2004, a telephonic hearing was held and the Referee indicated that he was considering an additional recommendation of a forfeiture of the prohibited fee. However, the financial situation of the Respondent was desired as well as proof from the Bar that Mr. St. Louis was not being singled out among the FRF&S shareholders.

Subsequently, The Florida Bar filed a Brief on the matter and Respondent produced a financial statement.

On February 4, 2005, the Referee filed his Report of Referee.

STATEMENT OF THE FACTS

THE SECRET SIDE AGREEMENT ("ENGAGEMENT AGREEMENT")

In 1996, Respondent was a shareholder in the law firm of Friedman, Rodriguez, Ferraro & St. Louis (hereinafter referred to as "FRF&S"). Respondent represented 20 plaintiffs in tort litigation against Dupont arising out of Dupont's faulty product, Benlate 50DF.

Respondent was the lawyer who brought all the Benlate clients to FRF&S, was the primary strategist for the firm, and had the primary authority for communicating with clients. (RR, 11). Settlement discussions began on July 3, 1996, with a telephone call to respondent's partner, Francisco Ramon Rodriguez, from James Shomper and Patrick Lee, who represented Dupont. Mr. Rodriguez, at that time, learned that Dupont was requesting that the firm get out of the Benlate business as a condition to any settlement (RR, 14). Settlement discussions continued throughout July, 1996, and FRF&S did legal research regarding Dupont's request and knew of Rule 4-5.6(b) (RR, 15).

On August 7, 1996, Respondent and his partner, Francisco Ramon Rodriguez, entered into a secret side agreement (the referee refers to it as the "Engagement Agreement") with Dupont, unbeknownst to their clients. Respondent was "the scrivener". (RR, 20). The document is labeled "Engagement Agreement" and provided that 1.) Respondent and his partners would become consultants for Dupont in future Benlate litigation; 2.) they would be paid a fee of $6.445 million dollars within two days

of execution of the agreement even though the clients' claims had not been finalized by that time (the $6.445 million dollar fee was the end result of negotiation between Respondent and his firm and Dupont, with Respondent having initiated the bidding with a $12 million demand and eventually agreeing to accept $6.445 million); 3.) the $6.445 million dollar fee was to be considered earned at the time of payment, even though there may be no future need for their consultant services; and 4.) the agreement would remain confidential, even as regards their clients (TFB Ex. 10). Additionally, a significant portion of the clients' settlement funds would be impounded for a period of two years in order to secure a confidentiality provision of the settlement agreement (RR, 18).

Respondent was the one who signed the secret side agreement and the settlement agreement on behalf of FRF&S. Respondent was aware, at that time, that Rule 4-5.6(b) prohibited the offering or making of such an agreement. (RR, 22).

On August 12, 1996, FRF&S received the $6,445,000.00 from Dupont by wire transfer. (RR, 20).

During the week following the settlement, Mr. St. Louis traveled around the state meeting with the firm's Benlate clients, presenting the Dupont settlement offers. (TR, 13, 1579). He urged them to accept the settlements. He also told some of the clients that, if they didn't accept, the firm would withdraw as their lawyers. (RR, 23) (TR, II, 152). Some of the clients, including Beasley (TR, XIII, 1594), Haupt and Wagner, initially refused to accept the settlement. Respondent continued to represent the Benlate clients in

these efforts to convince them to accept the approximately $59,000,000.00 Settlement Agreement without telling the clients that they were retained by Dupont and such representation continued until the 10% "hold back" escrow money was disbursed two years later. Each client received a redacted copy of the settlement agreement containing only his own settlement offer and an authorization to settle form prepared by the firm. (TR, 13, 1576). No client was told about the secret side agreement ("Engagement Agreement") the firm entered into with Dupont. (TR, V, 465). In the event that any client chose not to settle, it would not be bound by the confidentiality covenants of the settlement agreement. (TR, 13, 1572).

Every client ended up authorizing the settlement, but some were clearly unhappy and demanded more information, including information about what each other client received in settlement. In fact, one client, Jerry Gilley, demanded to know the specifics of the settlement negotiations. Respondent refused to tell him anything other than the dollar amount he would receive. As a result of Respondent's refusal to advise Mr. Gilley, he felt compelled to hire another attorney, Marc P. Ossinsky, to attempt to find out the details of the settlement negotiations. (TR, 13, 1581). On August 19, 1996 Mr. Ossinsky appeared unannounced with the clients at a meeting with Mr. St. Louis at the firm's office in Miami (TR, 13, 1580). Mr. Ossinsky, who testified at trial, demanded information regarding the details of the settlement from Mr. St. Louis. Mr. St. Louis refused to provide Mr. Ossinsky or the Gilleys any information about the Engagement Agreement

(TR, 2, 208) and continued to refuse to tell them anything other than to take the amount offered or to get another attorney and to take nothing. (RR, 25)

With the exception of the Davis Tree Farms, none of the clients were ever told about the "Engagement Agreement." Respondent knew that they had not been told, did not do so himself, and never explained its terms to any of the clients. (TR, XIV, 1747). By not disclosing the secret side agreement, Respondent was protecting FRF&S interest in $6,445,000.00, his own interest in his share of that fee ($2,277,663.00) and Dupont's economic interests in not having it disclosed to the world that it had paid a law firm in violation of Rule 4-5.6(b) of The Rules of Professional Conduct. Dupont had ongoing Benlate related litigation across the country and was engaging in similar conduct in those other cases. (RR, 27).

Thereafter, Respondent accepted his share of the $6,445,000.00 secret side agreement payment, which was $2,277,663.00 (TR, IV, 356, 362), (TFB Ex. 45). His total fee was approximately 6 million dollars (his share of the contingency from the settlement agreement and his share of the engagement agreement), (TR, XIV, 1735). By accepting those proceeds, Respondent ratified the terms of the secret side agreement, and the actions of his partner, Francisco Ramon Rodriguez. Respondent participated fully in all of the discussions and negotiations with Dupont concerning the secret side agreement, was its primary architect and proponent, and was aware of all the actions of Mr. Rodriguez. Respondent, in executing, delivering and entering into the secret side

agreement, and keeping its terms secret from the clients, has therefore violated Rule 4-5.1(c). The $6.445 million secret side agreement payment was in violation of Rule 4-5.6(b) and was a prohibited fee. (TR, VI, 623).

THE LYING TO COVER UP THE SECRET SIDE AGREEMENT

In 1997, having received informal complaints, The Florida Bar conducted an investigation into allegations that, in essence, the $59,000,000.00 settlement agreement was not explained to the clients and that it was a prohibited aggregate settlement (RR, 29). The Florida Bar did not know of the existence of the secret side agreement ("Engagement Agreement"). Respondent sent his letter response to the Bar complaint to Elena Evans, Bar Counsel. In that response, he made the following statement: "It is disappointing that Mr. Ossinsky would continue to insist that we have withheld some kind of 'documentation' relating to the settlement negotiations; we simply cannot furnish him with what does not exist.") (TFB Ex. 29, p. 7, FN9). That statement was false and Respondent knew that it was false. (RR, 29).

Joan Fowler was then assigned as Bar Counsel and the case was sent to the Grievance Committee. Jeannette Haag was the Investigating Member. Respondent and Mr. Rodriguez requested a meeting in Inverness, Florida. Joan Fowler asked them to bring all the documents relating to the settlements to the meeting. (TR, III, 287). Respondent and Mr. Rodriguez brought a banker's box of records to the meeting. The records of the settlement, including the secret side agreement, were in the box (TR, 13,

1635). The Respondents pulled the documents out of the box one at a time and showed them to Jeannette Haag and Joan Fowler. Respondent never revealed the existence of the secret side agreement to Joan Fowler or Jeannette Haag. Joan Fowler was under a misapprehension that she had seen all the documents, and was under the misapprehension that the $245,000.00 was the payment by Dupont for the restriction on the right to practice. Respondent knew of the misapprehensions and failed to correct them. (RR, 34). This was a misrepresentation by omission, as Respondent had a duty to disclose the secret side agreement. As a result of the misapprehension, The Florida Bar entered into very lenient consent judgments based upon the belief that no secret deal existed.

In October 2000, Respondent appeared before The Honorable Thomas S. Wilson, Jr., Circuit Judge of the Eleventh Judicial Circuit. In response to a question by Judge Wilson, Respondent said "I disclosed to The Florida Bar at the time I was questioned every piece of information, every document at my disposal". (TFB Ex. 30, p. 5) (RR, 35). Then, in response to another question by Judge Wilson, Respondent said "No, your Honor, I'm not telling you that. I am telling you, sitting as Court presiding over this case, that I made full disclosure to The Florida Bar". That statement was also false and Respondent knew that it was false. (TFB Ex. 30, p. 5) (RR, 36). By his misrepresentations to the Bar and Judge Wilson, Respondent engaged in a protracted cover-up of his misconduct in entering into the secret side agreement.

SUMMARY OF ARGUMENT

The referee's recommended discipline falls short of the discipline warranted by Respondent's misconduct in light of 1) prior decisions of the Florida Supreme Court and other State Courts and 2) The Florida Standards for Imposing Lawyer Sanctions.

The referee's failure to find guilt of Rule 4-1.7(a) (Representing Adverse Interests) was clearly erroneous.

ARGUMENT

While the referee's fact findings are presumptively correct and should not be overturned unless clearly erroneous or lacking evidentiary support, The Florida Bar v. Vining, 707 So.2d 670, 672 (Fla. 1998), the referee's recommended discipline is afforded a broader scope of review. This Court has stated, however, that a recommended discipline will not be second-guessed "so long as that discipline has a reasonable basis in existing case law". Vining at 673 (quoting The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997). The Florida Bar intends to show that the recommended discipline in this case is not supported by existing case law, nor by The Florida Standards for Imposing Lawyer Sanctions, and also that the referee's failure to find guilt of Rule 4-1.7(a) (Representing Adverse Interests) is clearly erroneous.

ISSUE I

SHOULD A LAWYER BE DISBARRED WHO MADE A SECRET SIDE AGREEMENT WITH HIS ADVERSARY IN RETURN FOR $6,445,000.00, WHO DID NOT TELL HIS CLIENTS ABOUT IT, AND THEN ENGAGED IN A COVER-UP BY LYING TWICE ABOUT IT TO THE FLORIDA BAR AND THEN LATER LYING ABOUT IT TO A CIRCUIT JUDGE

The misconduct of Respondent in entering into a secret side agreement (referred to as the "Engagement Agreement" by the referee) with Dupont in return for $6,445,000.00 and not telling his clients about it is the most egregious form of a breach of clients' trust. This is the worst nightmare for a client and the breach of trust is the equivalent of stealing the clients' money from a trust account. The breach of trust is total in both instances. Respondent's misconduct strikes at the heart of the attorney-client relationship, that is, the trust that clients place in their attorneys to pursue their legal interests. The misconduct encompasses precisely the fear clients have that their attorneys will be "bought off" by opposing counsel, or that their attorneys will use the clients' case to surreptitiously profit from the representation. Mr. St. Louis should be disbarred in light of the cover-up which lasted for years, during which he lied to the Bar twice during the disciplinary process and then lied to a circuit judge who asked him about it – a total of three lies. This cumulative misconduct mandates disbarment.

A. THE RECOMMENDED DISCIPLINE IS NOT SUPPORTED BY THE EXISTING CASE LAW.

Respondent and his partners are cases of first impression for this Court's review of Rule 4-5.6(b) (Restriction on the Right to Practice). The only Bar discipline cases concerning Rule 4-5.6(b) are two cases from other jurisdictions which involve secret side agreements.[1]

In the case of In re: Brandt, 331 Or. 113, 10 P. 3D 906 (Or. 2000), the respondent associated as co-counsel a lawyer named Griffin in the representation of 49 tool distributors against the manufacturer of the tools. Respondent entered into a settlement agreement and also a side agreement whereby he was retained by the manufacturer for the sum of $10,000.00 and $175.00 per hour to act as legal counsel and provide legal services to the manufacturer. Respondent also made a misrepresentation to his client and to the Bar by letter response to Bar Counsel. Brandt had prior discipline consisting of a letter of admonishment. The Supreme Court of Oregon imposed upon Brandt a suspension for 13 months. Griffin, who had no prior discipline, received a 12 month suspension. This case involves misconduct that is far more egregious than that involved in Brandt.

1 There is one case in which sanctions were imposed upon lawyers by the United States District Court, S.D. Florida, for entering into a secret side agreement. Adams v. Bellsouth Telecommunications, Inc., 2001 WL 34032759 (S.D. Fla. 2001).

In the case of In re: Hager, 812 A. 2d 904 (D.C. 2002), respondent and a lawyer named Traficonte represented 50 clients in claims against the manufacturer of head-lice shampoo. They entered into a settlement agreement with the manufacturer of the shampoo without the knowledge of any of their clients, which restricted their right to practice, provided that the case would be dropped and that the terms would remain confidential even from the clients with the exception of 4 matters, and that the clients would receive refunds, and that the manufacturer would pay Traficonte and respondent $225,000.00. Traficonte negotiated the secret agreement, but he kept Hager informed. Hager made a deceitful statement to one client. The District of Columbia Court of Appeals imposed a one-year suspension. The disgorgement of the fee was deferred until time of reinstatement. This case is far more egregious than Hager.

Respondent's conduct in this case involved a pattern of intentional deceit and lying over a period of years. This Court has recently observed that lying under oath and submitting false evidence to support his denials, is alone sufficient to permit disbarment. The Florida Bar v. Senton, 2004 WL 1944453 (Fla. 2004). Although none of Respondent's three lies were under oath, there were three of them. These three lies by themselves require the disbarment of Mr. St. Louis.

The Supreme Court of Florida has disbarred an attorney for the single act of lying to a grievance committee in violation of Rule 4-8.1(a). The Florida Bar v. Budnitz, 690 So.2d 1239 (Fla. 1997).

False testimony in the judicial process deserves the harshest penalty. The Florida Bar v. Rightmeyer, 616 So.2d 953 (Fla. 1993). In another case, an 18 month suspension was imposed for lying to a Grievance Committee and asking a friend to back him up in that statement. The Florida Bar v. Langford, 126 So.2d 538 (Fla. 1961). Other cases of lying have imposed lesser terms of suspension or public reprimand. See, e.g. The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983).

B. THE RECOMMENDED DISCIPLINE DOES NOT COMPORT WITH THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS.

There are four general factors that should be considered prior to imposing discipline, (a) the duty violated, (b) the lawyer's mental state, (c) the potential or actual injury caused by the lawyer's misconduct, and (d) the existence of aggravating or mitigating factors. Standard 3.0.

Concerning the lies, the potentially applicable standard is 5.11(f), which is set forth below:

5.11 Disbarment is appropriate when: (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

The referee found that Respondent engaged in conduct that involved three misrepresentations (RR, 29, 35, 36). The conduct clearly reflects on his fitness to practice law, and was intentional, as the statements to Elena Evans and Judge Wilson

were known by Respondent to be false at the time he made them as was the omission to show Joan Fowler the secret side agreement because he knew he had created a misapprehension and failed to correct it.

Concerning the secret side agreement, the potentially applicable standards are 7.1 and 7.2, which are set forth below:

7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Regarding Standard 7.1 and 7.2, the key distinctions between disbarment and suspension are 1) whether the conduct was intentionally engaged in with the intent to obtain a benefit and 2) whether the injury or potential injury to the client, the public or the legal system was "serious".

This conduct was intentional on the part of Respondent. The referee found that Mr. St. Louis knew of Rule 4-5.6(b) in July 1996, a month before he signed the secret deal with Dupont. (RR, 15). On August 7, 1996, when Respondent signed the secret document, he was aware at that time that Rule 4-5.6(b) prohibited the offering or making

of such an agreement. (RR, 22). Respondent intentionally did not tell the clients about the secret side agreement even when specific inquiry was made by Mr. Ossinsky. (RR, 25). Respondent knew, at the time he made the statement to Elena Evans, Bar Counsel, that it was false. (RR, 29). Respondent knew that he had created a misapprehension in the mind of Joan Fowler, Bar Counsel. (RR, 32, 34). Respondent also knew that the statements he made to Judge Wilson were false. (RR, 36). The lies were a result of a protracted, intentional cover-up of his misconduct in entering into the secret side agreement. (RR, 37). As this Court has held, when an attorney affirmatively engages in conduct he or she knows to be improper, more severe discipline is warranted. The Florida Bar v. Wolfe, 759 So.2d 639, 645 (Fla. 2000).

This misconduct was with the intent to obtain a benefit for himself and Dupont. The referee found that his exercise of his independent professional judgment was limited by his own interest in keeping the secret side agreement a secret, even from his own clients. (RR, 20). By not disclosing the secret side agreement, Respondent was protecting FRF&S interest in $6,445,000.00, his own interest in his share of that fee (approximately $2,277,663.00) and Dupont's economic interests in not having it disclosed to the world that it had paid a law firm in violation of Rule 4-5.6(b). (RR, 26, 27).

Respondent has caused serious or potentially serious injury to a client, the public, or the legal system. Although the referee found no actual harm to clients or third parties (RR, 47), there was obviously potential serious harm to them. There was indeed actual

harm to the clients in that they were denied information relevant to settlement decisions and denied their right to the exclusive loyalty of Respondent. (TR, VI, 612). The referee did not make any findings concerning harm to the legal system. The misconduct resulted in the worst possible harm to the legal system, as shown by the testimony of the client, John Patrick McIntire, who, as a result of this experience, now feels that whenever he hires a lawyer, he must hire another lawyer to check on the first one! (TR, II, 186, 187). That scenario is odious and cannot be tolerated. It is severe harm to the legal system and reduces our profession to an image of untrustworthy scoundrels. Mr. St. Louis' conduct certainly falls within Standard 7.1 and not 7.2. Disbarment is the appropriate discipline and not suspension in light of the three subsequent lies.

The standards should then be calibrated by a consideration of aggravating and mitigating factors as set out in Standards 9.2 and 9.3.

The referee found that, in aggravation, Mr. St. Louis had a dishonest motive, as the misrepresentations were dishonest, that he submitted false statements during the disciplinary process, as there were two instances of misrepresentation to The Florida Bar during the disciplinary process, and he had substantial experience in the practice of law. The referee found that, in mitigation, Mr. St. Louis had an absence of a prior disciplinary record, inexperience in mass tort litigation, many character witnesses and remorse as to the effect this has had on his family and for having violated the rules.

The referee found that the primary evildoers here were James Shomper and Patrick Lee and that was a significant reason for lessening the punishment. (RR, 45). The Florida Bar disagrees. Mr. Shomper and Mr. Lee did not keep the agreement secret from their client (the most egregious part of the secret side agreement) and did not lie three times about it. Their conduct was far less egregious than that of Respondent.

The referee found that the many witnesses who attested to Mr. St. Louis's good character and reputation counterbalances the very egregious nature of the violations. The Florida Bar disagrees. At some point the egregious nature of the misconduct outweighs such mitigation and it greatly outweighs it here. The referee admits that his recommended discipline is very lenient, yet considers it adequate to deter this type of conduct. (RR, 45, 46). Only suspension for a term of years and forfeiture of prohibited fees will deter the greed of some mass tort litigators when this kind of money is dangled in front of them. The testimony of Mr. Hickey and Mr. McFarlain, (RR, 41, Fn15) who said that they would do the same thing by entering into this secret deal, should give this Court great concern about any lenient discipline, as that would encourage, rather than discourage, this type of behavior when the risk of being caught is weighed against the potential reward. For the secret deal alone, Mr. St. Louis, as the primary architect, should be suspended for three years. And, when the three subsequent lies of Respondent are added to his agreement to the despicable document, the sanction should be disbarment. How many lies does it take for a lawyer to be disbarred in Florida? The Florida Bar submits that

three lies mandate disbarment. Such lawyers should be removed from our ranks, as they are not fit to practice law. The only discipline severe enough to deter this type of behavior is disbarment. In recent years, this Court has moved towards stronger sanctions for attorney misconduct. The Florida Bar v. Rotstein, 835 So.2d 241, 245 (Fla. 2003). The Florida Bar urges that this Court now do the same regarding lying.

ISSUE II

THE REFEREE'S FAILURE TO FIND GUILT OF RULE 4-1.7(A) (REPRESENTING ADVERSE INTERESTS) IS CLEARLY ERRONEOUS.

The referee's fact findings are presumptively correct and should not be overturned unless clearly erroneous or lacking evidentiary support. The Florida Bar v. Vining, 707 So.2d 670, 672 (Fla. 1998)

However, the referee's determination that Respondent was not guilty of violating Rule 4-1.7(a) was a legal conclusion. The Supreme Court's scope of review in attorney disciplinary actions is broader for legal conclusions than it is for factual findings. The Florida Bar v. Joy, 679 So.2d 1165 (Fla. 1996).

Rule 4-1.7(a) reads as follows:

> (a) Representing Adverse Interests. A lawyer shall not represent a client if representation of that client will be directly adverse to the interests of another client unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and
> >
> > (2) each client consents after consultation.

The referee apparently believed that, since the language in the secret side agreement states that the work for Dupont is to commence at a later time, Respondent

was not representing Dupont at the time he was representing the 20 Benlate plaintiffs. However, Respondent was representing Dupont as shown by his actual conduct and the other contradictory findings in the Report of Referee.

In his report, the Referee found the following:

"The Engagement Agreement provides that the work for Dupont was to commence "upon completion of all activities on behalf of our existing Benlate clients." Because of that provision, I find that Respondent did not become an agent of Dupont, had no conflict of interest with his clients or Dupont, and did not violate Rule 4-1.7(a)."

While the referee's basis for the ruling does have some evidentiary support, as the secret side agreement does say that the work is to commence upon completion of all activities on behalf of our existing Benlate clients, that ruling is a clearly erroneous application of the law to the facts. The future commencement of the work does not resolve the issue and this clause obviously was inserted to try to get around the conflict violation. Dupont considered that there existed, as of August 7, 1996, an attorney-client relationship with FRF&S as a result of the secret agreement and Dupont specifically terminated that attorney-client relationship in a letter to Respondent dated September 18, 1997. (TFB Ex. 52). Respondent and Dupont, on August 7, 1966, mutually consented to the formation of a lawyer-client relationship. A common form of such manifestation is execution of a retainer agreement and payment of a retainer or engagement amount to the lawyer. See generally Restatement of Law Governing Lawyers (Third) (1998) § 3-14:

Formation of the Client Lawyer Relationship which reads in pertinent part: "A relationship of client and lawyer arises when (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person and…(a) the lawyer manifests to the person consent to do so…" See also Restatement of Agency (1957) § 31.1 which states "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." Dupont manifested consent to representation by Respondent and Respondent consented. Respondent was the agent of Dupont.

Respondent represented Benlate plaintiffs for two years after August 7, 1996, as an escrow agent (a fiduciary) administering the 10% holdback monies. (RR, 24).

The Referee further stated: "However, I find that Respondent did violate Rule 4-1.7(b). His exercise of his independent Professional Judgment was limited by his own interest in keeping the Engagement Agreement a secret even from his own clients." (RR, 20).

If Respondent was so limited by his own interest in keeping the agreement a secret from his own clients, then how can it be said that he had no directly adverse conflict of interest with those clients? The referee has made conflicting rulings.

The public policy rationale for Rule 4-5.6(b) by the ABA includes that these covenants create an inevitable conflict of interest between the lawyer's current clients and

any future clients (emphasis added). (TR, VI, 602). Respondent became an agent of Dupont when he signed the secret side agreement, as it created an attorney-client relationship between Respondent and Dupont (TR, VI, 618, 619). In any event, the language stating that representation will commence in the future does not cure the fact that (1) such engagement was undertaken at a time when "all activities on behalf of [FRF&S's] existing Benlate clients had not yet been completed, thus making Respondent an agent of parties on both sides at the same time. Even if the conflict were consentable, the clients never consented to it. However, this conflict was non-consentable. (TFB Ex. 54, 24). (ABA Comm. On Professional Ethics and Grievances, Formal Op. 371 (1993).

After executing the secret side agreement, Respondent had divided loyalties. (TR, VI, 620). On August 10, 1996, Respondent's law firm received the $6,445,000.00 from Dupont (RR, 20). Dupont was his adversary. He was representing 20 clients to settle lawsuits and claims against Dupont. During the week following the settlement, Respondent then traveled around the state meeting with the firm's Benlate clients and urging them to accept the settlements. He also told some of the clients that, if they didn't accept, the firm would withdraw as their lawyers. (RR, 23). This is coercion to settle. (TFB Ex. 54, 17). FRF&S had already been paid the $6,445,000.00 at the time Respondent was convincing some of them to settle with Dupont. The client, Dwight Purvis, signed his authorization to settle on August 13, 1996, after the money had arrived by wire transfer (TFB Ex. 13). Respondent was representing Dupont's best interests, not

those of his clients. Respondent even refused, when asked by Mr. Ossinsky and the Gilleys, to disclose to them anything about the secret side agreement and told them only to take the amount offered or to get another attorney and to take nothing. (RR, 25). Respondent certainly wasn't looking after the best interests of his clients, the Gilleys. This incident clearly shows the fact that Respondent was actually representing Dupont's and his own best interest.

The referee further found that:

"By not disclosing the Engagement Agreement, Respondent was protecting FRF&S's interest in $6,445,000.00, his own interest in his share of that fee (approximately $2,277,633.00) and Dupont's economic interests in not having it disclosed to the world that it had paid a law firm in violation of Rule 4-5.6(b) of the Rules of Professional Conduct." (RR, 27)." Respondent was in fact representing Dupont's interests.

Respondent was clearly representing Dupont and himself. He had signed engagement agreements with all 20 Benlate clients. The interests of Dupont and the Benlate clients were adverse and respondent was representing both at the same time, regardless of the contrary language contained in the secret document. The referee's failure to find guilt of Rule 4-1.7(a) was clearly erroneous. This Court should find Respondent guilty of violating Rule 4-1.7(a). If this Court does so, then Respondent's misconduct is even more egregious.

CONCLUSION

The Court should affirm the referee's findings regarding guilt, but find Respondent also guilty of a violation of Rule 4-1.7(a), and should impose the sanctions of disbarment, forfeiture of the prohibited fee of $2,277,663.00 as recommended by the referee's 10 year payment plan, and to pay the costs incurred by The Florida Bar in the amount of $72,318.37.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding Supreme Court Case No. SC04-49, TFB File No. 2001-00,356(8B) has been mailed by certified mail # 7004 1160 0004 5673 6563, return receipt requested, to Roland Raymond St. Louis Jr., Respondent, whose record Bar address is The Colonnade Suite R-60, 2333 Ponce De Leon Boulevard, Coral Gables, Florida 33134-5422, and a true and correct copy has been mailed by certified mail # 7004 1160 0004 5673 6549, return receipt requested, to John James McGuirk, Counsel for Respondent, at his record Bar address of 201 Alhambra Circle, Suite 711, Coral Gables, Florida 33134-5108, on this _____ day of _____, 2005.

_____

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Copy provided to:
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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of September 13, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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James A. G. Davey, Jr., Bar Counsel