IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

WILLIAM SUMNER SCOTT

Respondent.
_____/

Supreme Court Case
No. SC05-1145

The Florida Bar File
No. 2003-70,488(11J)

THE FLORIDA BAR'S ANSWER/CROSS-INITIAL BRIEF

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SYMBOLS AND REFERENCES

For the purposes of this brief, William Sumner Scott will be referred to as "Respondent", The Florida Bar will be referred to as "The Florida Bar" or "the Bar" and the referee will be referred to as the "Referee". Additionally, the Rules Regulating The Florida Bar will be referred to as the "Rules" and the Florida Standards for Imposing Lawyer Sanctions will be referred to as the "Standards".

References to the Appendix will be set forth as "A." followed by the sequence number and the corresponding page number(s), if applicable. Finally, documents introduced into evidence by The Florida Bar will be designated "TFB Ex." followed by the corresponding exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

The Bar is unable to accept Respondent's Statement of the Case and of the Facts as it fails to present the facts in a complete and non-argumentative manner. Florida Appellate Practice requires that "facts be stated fairly and accurately. All of the relevant facts should be included, not just those facts that support the argument of the party writing the brief." Padovano, *Florida Appellate Practice,* §16.17 (1997).

On June 27, 2005, The Florida Bar filed its Complaint against Respondent. The Honorable Wendell M. Graham was appointed as Referee. Thereafter, on November 21, 2005, Respondent filed a Motion for Recusal/Disqualification of Judge Graham. On January 26, 2006, The Bar filed its Amended Complaint. Thereafter, Judge Graham recused himself, and on April 5, 2006, the Honorable Judge Norman Gerstein was appointed Referee. Various motions followed.

On November 13, 2006, Respondent filed his Response to The Bar's Amended Complaint, which included the lapse of the statute of limitations as an affirmative defense.[1] Following motion practice and discovery, the final hearing took place on June 18, 19, and 20, 2007, July 10, 2007 and August 15, 2007. On August 21, 2007, the Referee filed his Report of Referee with this Court. In his Report, the Referee concluded that Respondent had engaged in prohibited conflicts

[1] This defense was denied by the Referee on June 18, 2007.

of interest, but did not find that Respondent had made any misrepresentations that would be "actionable" by The Bar. Ultimately, the Referee recommended that Respondent be suspended for a period of fifteen (15) months.[2]

On August 24, 2007, Respondent filed a Motion to Dismiss Because of the Statute of Limitations, or in the Alternative, To Strike the Referee's Report. Thereafter, on September 29, 2008, this Court denied Respondent's Motion to Dismiss Because of the Statute of Limitations, but granted Respondent's Motion to Strike the Referee's Report and remanded the case to the Referee for further proceedings. The Court specifically directed the Referee to file an amended report identifying the specific facts supporting each rule violation and explaining why those facts constituted a violation. The Referee filed his Amended Report on May 29, 2009. The Amended Report included additional findings of misconduct and rule violations, and consequently, the Referee recommended a suspension term of eighteen (18) months.[3] Respondent now challenges the factual findings made by

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[2] The Referee had initially recommended that Respondent be suspended for a period of eighteen (18) months. Nevertheless, he subsequently modified this recommendation in favor of a shorter suspension based on Respondent's age and the absence of any prior discipline.

[3] In his initial Report of Referee, the Referee had found that Respondent engaged in significant conflicts of interest, and specifically found Respondent to be in violation of Rules 4-1.7(a) (representing adverse interests), 4-1.9(a) (conflict of interest; former client), and 4-1.16(a)(1) (declining or terminating representation) of the Rules Regulating the Florida Bar. In his Amended Report, the Referee found that Respondent had also engaged in conduct involving dishonesty, in

the Referee, and The Bar challenges the recommended discipline.

The Florida Bar presented Steven A. Frankel ("Frankel"), the Complainant, as its first witness at trial. Frankel is an attorney licensed to practice in Florida and in New York. (TR. at 69.) In June or July 1998, he responded to an advertisement seeking an investor to open up a Forex Brokerage Company,[4] which he saw in a newspaper. (TR. at 24; 69-70.) The advertisement had been placed by a man by the name of Richard Maseri ("Maseri"). (TR. at 69.) Frankel became interested in investing in this venture, although he admitted that he had no prior experience with brokerage business, either as an investor or as an attorney. (TR. at 70.)

He then decided to enter into a shareholder agreement with Maseri, and the two of them held numerous negotiations and discussions to that end. (TR. at 71.) During the course of negotiations and discussions, Maseri was represented by Respondent. (TR. at 71.) Respondent had previously represented Maseri and his company, Private Research, Inc. ("Private Research"), in a proceeding brought by the Commodities Futures Trading Commission ("CFTC") in the U.S. District Court for the Southern District of Florida in *CFTC v. Maseri, et al*, Case No. 95-6970-CIV-DAVIS (the "CFTC case"), a suit alleging fraud and violations of

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violation of Rules 4-4.1(a) (truthfulness in statements to others) and 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules Regulating the Florida Bar.

[4] Frankel defined a Forex Brokerage Company as a "currency exchange brokerage company." (TR. at 70.)

commodities trading laws. (TR. at 14; 391.)

The initial draft of the shareholder agreement was drafted by Frankel, but Respondent reviewed it prior to it being signed in its final form. (TR. at 72.) In or about August 4, 1998, Frankel met with Respondent and Maseri for the first time for the purpose of executing the shareholder agreement for the new venture, which became known as International Currency Exchange Corporation ("ICEC"). (TR. at 73.) Frankel candidly admitted that, prior to that meeting, he had not conducted any investigation as to Maseri's background. (TR. at 72.) According to Frankel, when he previously met with Maseri, Maseri showed him certain documents and articles that "really wowed" him, and therefore, Frankel simply believed Maseri. (TR. at 72.)

Frankel and Respondent arrived at the meeting prior to Maseri, and Frankel questioned Respondent regarding Maseri's background and reputation. (TR. at 28; 73.) Respondent indicated that he had known Maseri for a number of years, and that he had first met Maseri when he opened a brokerage account with Maseri. (TR. at 74.). In response to Frankel's inquiries, Respondent further indicated that Maseri "had never lied to [him], that he was an honest man, [and] that he had never lost any money with him." (TR. at 74.) According to Frankel, these assurances "generally left [him] feeling very good about [Maseri]." (TR. at 74.) Respondent failed to disclose anything negative about Maseri. (TR. at 74.) Specifically,

Respondent failed to disclose any information about Maseri's prior criminal history pertaining to embezzlement in the 1980's and the issuance of a bad check for $40,000, and he also failed to disclose that Maseri was the subject of a pending federal court injunction in connection with the CFTC case.[5] (TR. at 28-29; 75; 102; 107.) Frankel felt comfortable going through with the venture, and consequently, during the same August 4, 1998 meeting, he signed the final shareholder agreement with Maseri. (TR. at 75.)

Paragraph 2.2.1 of the shareholder agreement provided that:

> The operations of the corporation are limited to those permitted within the legal guidelines established by the 9th Circuit case of *CFTC v. Frankwell*, 95-16977, issued October 29, 1996 in a corporation, [Maseri] will not be registered under the commodity exchange act or any securities.
>
> (TR. at 79.)

[5] Specifically, on October 25, 1995, the U.S. District Court issued consent orders of preliminary injunction against Private Research and Maseri, which prohibited them, as well as those entities or persons in active concert or participation with them, from contracting for the sale of any commodity, and from acting, directly or indirectly, as commodities trading advisors or commodities pooling operators without being registered as such or to engage in any fraudulent activities while acting as a CTA or CPO. (TR. at 21.) Maseri, on behalf of Private Research, and Respondent, both signed the consent orders as to Private Research and Maseri, and the certificates of service indicate that they were served on Respondent. (TR. at 22.) Thereafter, on October 14, 1997, the federal court entered an Omnibus Order granting summary judgment against both Maseri and Private Research. (TR. at 22.) The same Order required Maseri to show cause why he should not be held in contempt for violating earlier court orders that prohibited him from transferring his assets or property. (TR. at 22.) The certificate of service again indicates that a copy of the Order was served on Respondent. (TR. at 23.)

According to Frankel, he understood this paragraph to suggest that the company would be required to operate under the guidelines of the 9th Circuit case. (TR. at 79.) Frankel further indicated that he did not understand this paragraph to provide that the company would only be permitted to operate in the State of California or anywhere within the 9th Circuit, but that it would not be permitted to transact business in the State of Florida. (TR. at 80.) Respondent failed to inform Frankel that the company would in fact not be permitted to have its principal place of business in Florida.[6] (TR. at 80.)

In addition to this provision, the shareholder agreement provided that Maseri would serve as president and secretary treasurer for the company. (TR. at 80.) Paragraph 4.1.2 was a personal services agreement that had been incorporated into the final draft of the agreement by Frankel. (TR. at 80.) It had also previously been reviewed by Respondent, and it was signed on August 4, 1998, during the initial meeting, without any objection from Maseri or Respondent. (TR. at 81.) Under the terms of the agreement, Maseri and Frankel each became fifty percent (50%) owners of the company, and Maseri became responsible for the management of the company's bank account, as well as its day-to-day operations.

[6] The shareholder agreement actually lists an address in Coral Gables, Florida as the address for the company, and it does not list any address in California or elsewhere in the 9th Circuit. (TR. at 79.)

(TR. at 82.)

During the same August 4, 1998 meeting, Frankel tendered a check in the amount of $185,000 to Maseri. (TR. at 82.) The first $180,000 represented a loan to ICEC, and the remaining $5,000 represented an additional contribution that was subsequently returned to Frankel. (TR. at 82-83, 90.) The parties also agreed to retain Respondent as attorney for the corporation. (TR. at 83.) The retainer letter, dated August 3, 1998, was executed on the letterhead of The Scott Law Firm, and it was signed by both Frankel and Maseri.[7] (TR. at 83.)

On or about August 8, 1998, Frankel entered into a second shareholder agreement with Maseri. (TR. at 86-87.) Frankel testified that the second shareholder agreement had been executed because he and Maseri had formed a Nevada Corporation, and also because they wanted to have the company documents notarized. (TR. at 86-87.) Frankel further testified that Respondent advised him and Maseri of the need to form a company within the 9th Circuit in order to comply with the requirements of the 9th Circuit decision in *CFTC v. Frankwell*, and that Respondent suggested the State of Nevada since it is "more lenient tax-wise" than California. (TR. at 87.)

[7] Pursuant to this engagement letter, Respondent was to prepare customer agreements and documents for the new company. (TR. at 84.) Like the shareholder agreement, the engagement letter listed an address in Coral Gables, Florida as the company address. Similarly, the customer agreement forms listed an address in Weston, Florida as the company address. (TR. at 83-85.)

Following the company's incorporation, ICEC leased office space in Weston, Florida. (TR. at 87.) The day-to-day operations of the company were run by Maseri, who also opened the company's bank account and signed all the checks and deposit slips. (TR. at 88.) Frankel personally did not have any signatory authority over the company's bank account. (TR. at 88.) On or about December 15, 1998, Frankel learned that the Weston office had been raided by law enforcement officers.[8] (TR. at 89.) Prior to that time, Frankel had no indication that the company was being run in any unlawful manner. (TR. at 89.) Frankel spoke to Maseri following these events, and Maseri told him not to worry and suggested that Frankel speak with Respondent. (TR. at 91.) Frankel then contacted Respondent, who informed him that ICEC's funds had been frozen as a result of a CFTC judgment that was entered against Maseri, but assured him that there "really wasn't a problem," as the judgment applied only to Maseri's personal funds and not to any ICEC funds.[9] (TR. at 92.) As a result of the entry of final judgment in the CFTC case, Maseri's assets had gone into receivership. (TR. at

[8] Frankel testified that he first learned about the raid when he attempted to contact Mr. Luger, the company's general manager, and/or Maseri, in order to obtain a check for the $5,000 that represented the initial return of his investment. (TR. at 90.) After a number of failed attempts to contact Luger or Maseri, Respondent decided to visit the office, and when he arrived, he noticed that it was surrounded by police and reporters. (TR. at 90.)

[9] The final judgment against Maseri in the CFTC case was entered on November 6, 1998. (TR. at 30.)

31.) The receiver had notified Prudential Securities ("Prudential"), one of the holders of ICEC's assets, that Maseri's assets were to be turned over to satisfy the November 6, 1998 judgment against him. (TR. at 31.) Consequently, Prudential had notified ICEC that all of their assets would be frozen until released by the U.S. District Court in the CFTC case. (TR. at 31.)

On or about November 26, 1998, Maseri hired Respondent to represent ICEC with regard to the Prudential freeze. (TR. at 108.) Maseri informed Frankel that since he was also a lender to the corporation, Respondent would ultimately be representing him as well in securing a release of the frozen funds. (TR. at 109.) Thereafter, on or about December 18, 1998, Frankel, individually, entered into a retainer agreement with Respondent, whereby Respondent agreed "… to attempt to have the accounts which hold your funds at Prudential released."[10] (TR. at 109-110; A2.; TFB Ex. 8.) In addition, on December 21, 1998, Frankel signed an Addendum to Retainer Agreement with Respondent. (TR. at 111-112; A3.; TFB Ex. 9.) The Addendum was drafted by Respondent, but Frankel revised the document to indicate that Respondent would be representing "… Frankel, not as Director, but as lender to ICEC…." (TR. at 112; A3.; TFB Ex. 9.)

During the time period between the date when Respondent first learned of

[10] The same retainer agreement provided that Respondent's representation of ICEC had been terminated on December 12, 1998, following a difference of opinion as to whether the business should continue or liquidate. (TFB. Ex. 17.)

the raid on December 15, 1998 and the date he signed the Addendum on December 21, 1998, Frankel was unaware that any ICEC funds had been misappropriated. (TR. at 113.) Subsequently, Frankel learned from Respondent that Maseri had resigned as president of ICEC, and that he had been replaced by one Jorge Velazquez ("Velazquez"). (TR. at 114.) On November 30, 1998, Velazquez, on behalf of ICEC, agreed to the continued representation of ICEC by Respondent, with regard to the Prudential freeze. (TR. at 115.) Shortly thereafter, Velazquez resigned as president for the company. (TR. at 116.) According to Frankel, Respondent was then left with no apparent authority to continue acting on behalf of the company. (TR. at 116-117.)

On or about December 7, 1998, Prudential filed an interpleader action against CFTC in order to resolve conflicting claims it had received from both the CFTC and the ICEC investors. (TR. at 122.) In connection with that case, Respondent filed a Petition for Emergency Relief on behalf of ICEC, which included a cross-claim against Prudential on behalf of Frankel and the other ICEC investors. (TR. at 123.) Although Frankel had ratified the initial agreement with Velazquez authorizing Respondent to represent the company in an attempt to seek the release of the frozen funds, he testified that he had not authorized the filing of this particular document. (TR. at 123.) On February 12 and 19, 1999, counsel for Prudential wrote Respondent objecting to his dual representation of ICEC and its

investors on the basis of conflict of interest.[11] (TR. at 36.) Thereafter, on March 17, 1999, the U.S District Court dismissed the cross-claim, and further directed Respondent not to request relief on behalf of persons he did not represent. (TR. at 127.)

Following the entry of the U.S. District Court's Order dismissing the cross-claim, on March 23, 1999, Respondent filed a Request for Reconsideration on behalf of ICEC and its investors. (TR. at 128.) This claim was subsequently denied by the court. (TR. at 128.) Frankel again testified that he had never authorized the filing of this claim. (TR. at 128.) During the course of the Prudential interpleader action, Respondent also filed several motions on behalf of individual ICEC investors, including Investcan, Ltd., Roger Lennon, and The Lennon Trust, which alleged that Maseri and ICEC, his former clients, had operated unlawfully.[12] Ultimately, the motions were all denied by the U.S. District Court. (TR. at 129-133; TFB Ex. 26.)

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[11] Respondent replied to this correspondent denying any conflict of interest. (TR. at 36; TFB. Ex. 21.)

[12] Specifically, Respondent filed an answer and counterclaim on behalf of ICEC investors Investcan, Ltd. and Gagne on February 9, 1999. (TR. at 129, TFB Ex. 24.) Thereafter, on April 23, 1999, Respondent filed a first amended counterclaim on behalf of Investcan, Ltd. (TR. at 131; TFB Ex. 25.) Finally, Respondent filed a counter-claim on behalf of ICEC investors Roger Lennon and The Lennon Trust. (TR. at 132-133.)

In addition to the Prudential account, ICEC assets were maintained in accounts at Donaldson, Luftkin & Jenrette ("DLJ"), which were controlled by Dreyfus Services Corporation ("Dreyfus"). (TR. at 133.) Like Prudential, Dreyfus filed an interpleader action after receiving conflicting claims from the CFTC and the ICEC investors.[13] (TR. at 133.) Respondent filed a counterclaim against Dreyfus, and a third party complaint against DLJ, on behalf of ICEC investor Moresea. (TR. at 134; TFB Ex. 27.) These claims alleged that ICIC had not conducted business in a lawful manner. (TR. at 134; TFB Ex. 27.) The claims were subsequently dismissed. (TR. at 134).

The Courts in the Prudential and Dreyfus interpleader actions ultimately ordered the ICEC funds to be turned over to the receiver. (TR. at 135.) As a result, both of the interpleader actions were dismissed. (TR. at 135.) More than a year later, on January 18, 2002, Respondent sought to reopen the Prudential interpleader case by filing a cross-claim against Frankel on behalf of ICEC and all of its individual investors. (TR. at 136; TFB Ex. 30.) The claim against Frankel alleged breach of contract, legal malpractice, and fraud. (TR. at 136; TFB Ex. 30.) It further alleged that Frankel had failed to fulfill his duties as general counsel and tax counsel of ICEC, and that he had failed to properly supervise ICEC's activities. (TR. at 138.) Frankel testified that he was never appointed counsel for the

[13] *Dreyfus Service Corp. v. ICEC, et al*, Case No. 99-CV-6151.

company and that he never had any supervisory responsibilities over ICEC. (TR. at 138.) On or about February 4, 2002, the Court denied the Motion to Reopen, and on that same date, Respondent filed a motion on behalf of ICEC and all persons who opened an account with ICEC. (TR. at 138-139; TFB Ex. 31, 32).

Subsequent to the entry of the February 4, 2002 Order denying Respondent's Motion to Reopen, Respondent filed a motion on behalf of ICEC investors Thomas and Investcan, Ltd., seeking to add a cross-clam against Frankel (TR. at 140-141; TFB Ex. 30a.) Respondent also sought to file another claim on behalf of ICEC investor Investcan, Ltd., a Motion to Amend Response to add a cross-claim against Frankel. (TR. at 141-142; TFB Ex. 31.) Both of these motions were denied, and on February 13, 2002, Respondent filed a motion to reconsider re-opening the Prudential case on behalf of ICEC and all persons who opened an account with ICEC. (TR. at 142-143; TFB Ex. 32.)

Frankel retained Jed Frankel to represent him in regards to the claims that were being filed against him by Respondent. (TR. at 143.) On February 20, 2002, Jed Frankel wrote Respondent stating: "[d]espite prior correspondence to you, you appear determined to pursue claims against Steven [sic.] A. Frankel, your former client. We believe your continued involvement in this matter to be improper and in violation of the Rules of Professional Conduct." (TR. at 143-144; A4.; TFB Ex. 33.) Respondent replied on that same date, indicating that Frankel had never been

his client or a client of his firm. (TR. at 144-145; A5.; TFB Ex. 34.) Thereafter, on February 26, 2002, Frankel filed a Motion to Disqualify Respondent on the basis of conflict of interest. (TR. at 145; A6.; TFB Ex. 35.)

On May 24, 2002, the U.S. District Court denied Respondent's Motion for Reconsideration in the Prudential action. (TR at 150; A7.; TFB Ex. 36.) In its Order, the Court noted that:

> … there is a serious question as to ICEC's putative counsel's ability to represent ICEC in this matter … This raises conflict issues … The fact appears to be that at this date, [he] has represented Mr. Frankel in his individual capacity, in an attempt to get back monies [he] apparently now seeks on behalf of another client.
>
> (A7.; TFB Ex. 36.)

Frankel testified that there was substantial discussion on the Motion for Disqualification, but that the court ultimately considered the issue to be moot since it denied the Motion for Reconsideration. (TR. at 150.) Respondent then appealed this decision to the 11th Circuit Court of Appeals, which affirmed the U.S. District Court's decision. (TR. at 150.)

On January 29, 2002, the U.S. District Court issued an order discharging the receiver in the CFTC case and granting the receiver's final report of distribution. (TR. at 150.) Subsequent to the time that the receiver was discharged, Respondent continually continued to communicate with Frankel. (TR. at 151.) On February 19 and February 25, 2002, Respondent wrote to Frankel and Maseri urging them to

appeal the court's order of discharge and demanding a retainer for legal fees to represent ICEC in an appeal.[14] (TR. at 151-152; TFB Ex. 37, 38.) Respondent further indicated that no impasse of ICEC management existed, as both Frankel and Maseri had agreed for Respondent's firm to continue seeking recovery of the ICEC funds. (TR. at 152-153; TFB Ex. 38.)

On March 7, 2002, Respondent wrote to Gary Phillips, Frankel's attorney at the firm that was then representing him, indicating that ICEC customers were now paying his legal fees to continue the action on behalf of ICEC, and asking for the opportunity to also appeal the Order of Discharge on Frankel's behalf. (TR. at 153; TFB Ex. 39.) Respondent's efforts on behalf of ICEC investors were ultimately unsuccessful. (TR. at 154.)

On or about April 22, 2002, Respondent filed suit in federal court against Frankel and Maseri, asserting the rights of ICEC investors Investcan, Ltd., Thomas, and Moresea, to a return of their funds.[15] (TR. at 154.) Thereafter, on July 3, 2002, Respondent amended the complaint to allege that Frankel and Maseri

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[14] According to Frankel's testimony, Respondent informed him and Maseri that the receiver had not provided a sufficient accounting on $180,000. (TR. at 151.) Respondent further indicated that he had concluded his obligation to represent ICEC, but that he would be willing to continue representing Frankel and Maseri if they paid him a retainer of $10,000 within five days. (TR. at 151-152.) Thereafter, on February 25, 2002, Respondent sent a second letter to Frankel urging him to appeal the Order discharging the receiver. (TR. at 152.)

[15] *Investcan, et al v. Frankel, et al*, Case No. 02-60565.

had failed to take appropriate action to be certain that the business operated legally and thus defrauded plaintiffs of their money. (TR. at 154-156; TFB Ex. 41.) Frankel then moved to disqualify Respondent on the basis of this filing, and on October 4, 2002, the U.S. District Court disqualified Respondent on the ground of conflict of interest in violation of Rule 4-1.9 of the Rules Regulating The Florida Bar. (TR. at 156-157; A8.; TFB Ex. 42.) Respondent appealed the decision to the 11th Circuit Court of Appeals, which affirmed the decision of the U.S. District Court on March 28, 2003. (TR. at 157; A9.; TFB Ex. 43.)

Frankel further testified that in the course of these events, he personally filed suit against Respondent alleging fraud. (TR. at 158.) The basic allegations in this case were that, despite his knowledge with regard to Maseri's background, Respondent had "lied" to Frankel and induced him to enter into the agreement with Maseri, which Frankel would never have agreed to do had he known about Maseri's background. (TR. at 158.) Respondent counterclaimed against Frankel seeking attorney's fees for services he performed for the corporation. (TR. at 158-159.) In the course of the litigation, Frankel deposed Respondent in January, 2002, and according to Frankel, it was after this deposition that Respondent commenced the onslaught of filings against Frankel. (TR. at 159-160.)

Frankel testified that he ultimately lost "every penny" of his $180,000 loan

to the corporation.[16] (TR. at 160.) Further, that he sustained additional financial loss as a result of Respondent's actions because he was forced to retain counsel to defend him in the claims brought against him by Respondent and ultimately had to pay attorney's fees and costs. (TR. at 161.) Frankel's loss was not only financial, but also emotional. (TR. at 161.) This case, and the cases surrounding it, became his entire life, and they "impacted [him] greatly emotionally in many, many ways, financially and otherwise." (TR. at 161.) According to Frankel, sometime around June, 1999, immediately prior to the filing of his claim against Respondent, Respondent apologized to him for "allowing [him] to go forward with th[e] transactions and for failing to tell [him] what he knew." (TR. at 162.)

The Florida Bar's second witness was Detective John Calabro ("Calabro"). Calabro is a Detective with the Broward Sheriff's Office, and he has been a police officer for forty-seven (47) years. (TR. at 164.) In the Summer of 1998, Calabro was assigned to a special task force in connection with his duties at the Broward Sheriff's Office. (TR. at 164.) This assignment was with the Office of the Attorney General, and the purpose was to investigate telemarketing fraud. (TR. at 164.) As part of this task force, Calabro was assigned to investigate ICEC and

[16] Although Frankel did not recover any portion of his $180,000 loan to the company, he did recoup the $5,000 that represented his initial capital contribution to the venture. (TR. at 252.) Specifically, Frankel received a check from Maseri that was made payable to Suicide Blonde Productions, Inc. (TR. at 252.) This company was controlled by Frankel, although it is no longer in existence. (TR. at 253.)

Maseri. (TR. at 165.) In the course of this investigation, Calabro learned that ICEC was not licensed to operate in the State of Florida. (TR. at 165.) He also learned that Maseri was a convicted felon and that he was a principal of the company. (TR. at 166.) Calabro testified that, as part of his investigation, he subpoenaed the company's bank records,[17] and that in reviewing such records he noticed that there were flows of money to Maseri.[18] (TR. at 165-166.) He did not find any flows of money to Frankel, however. (TR. at 166.)

In addition to discovering that funds had been stolen, in reviewing the bank records Calabro uncovered that the funds that had been received from investors were not being maintained in segregated accounts, even though investors had been promised their funds would be maintained accordingly. (TR. at 168.) Further examination of the records revealed that Maseri had never purchased any funds or foreign currencies on the stock market. (TR. at 168.) According to Calabro, at that point in his investigation, he "was looking at a million some odd dollars that were totally stolen by this company." (TR. at 168.) Thereafter, a violation of probation, as well as charges of racketeering and thirty-six (36) counts of grand theft were

[17] Calabro testified that he subpoenaed records for three accounts, including the Prudential and the Dreyfus accounts. (TR. at 168.)

[18] In addition to discovering these flows of money to Maseri, Calabro discovered that Maseri had been negotiating checks at a check cashing store in Miami-Dade County (TR. at 167.) He later discovered that these checks had been made out by depositors and customers of ICEC, and that the funds had been stolen (TR at 168.)

filed against Maseri.[19] (TR. at 169.) Maseri was sentenced to a term in prison based on these charges.[20] (TR. at 169.)

Calabro also conducted a criminal investigation of Frankel. (TR. at 170.) He first contacted Frankel to inquire about the $185,000 check he had provided for the new venture, and Frankel visited the State Attorney's Office to provide a statement without making any objections. (TR. at 170.) Calabro found all of the information conveyed by Frankel to be consistent with his investigation, and no criminal charges were ever filed against Frankel. (TR. at 170.) Calabro further testified that he considered Frankel to have been a "victim" in the ICEC scam, and that as far as he knew, Frankel never recovered a penny of his investment.[21] (TR. at 170-171.) Frankel was not a member of Calabro's task force or of any other law enforcement investigation in Forex or commodities trading. (TR. at 171.)

Following the raid of ICEC's offices, Respondent contacted Calabro. (TR. at 172.) Respondent indicated that he represented certain ICEC investors, and asked Calabro to speak to the receiver so that the frozen funds could be released.

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[19] Maseri was ultimately convicted on nineteen (19) of these charges. (TR. at 354.)

[20] Calabro further testified that separate charges were subsequently filed against Maseri in Palm Beach County (TR. at 170.)

[21] The investigation also revealed that Frankel had not had any involvement in the day-to-day operations of the company, and this information was subsequently confirmed by several people related to the enterprise, whom Calabro interviewed in the course of his investigation, as well as by Maseri himself. (TR. at 193.)

(TR. at 172.) Calabro responded that the funds had been frozen pursuant to a federal court order, and that there was nothing he could do to secure their release. (TR. at 172.) When Calabro inquired whom Respondent was representing, Respondent first indicated that he was representing Maseri, but then indicated that he was no longer representing Maseri and that he was representing the company and its investors. (TR. at 173.) Calabro suggested that there appeared to be a conflict. (TR. at 173.) In response, Respondent indicated that he had obtained releases from the various parties. (TR. at 173.) Although Calabro does not know whether Respondent was aware that funds had been misappropriated by Maseri when he first spoke with him, he subsequently informed Respondent that funds were missing and that criminal charges were going to be filed against Maseri. (TR. at 174.)

Respondent called Richard Maseri as its witness. According to Maseri, he first met Respondent more than fifteen (15) years ago. (TR. at 370.) Since that time, Respondent served as attorney for Maseri on numerous occasions, including the formation of the new venture with Frankel.[22] (TR. at 370.) On August 4, 1998, when Respondent, Frankel, and Maseri met for the first time, Maseri recalls that he arrived subsequent to Respondent and Frankel. (TR. at 372.) According to

[22] Maseri testified that he had used Frankel's United States Corporation Company account number to handle incorporation activities for ICEC, and further testified that the incorporation fees were billed to Frankel directly. (TR. at 342.)

Maseri he did not engage in any conversation with Respondent outside the presence of Frankel. (TR. at 373.) On that same date, August 4, 1998, Maseri signed a personal services agreement with Frankel. (TR. at 378.) He subsequently signed a second personal services agreement on August 8, 1998. (TR. at 378.) In addition to these two personal services agreements, Maseri testified that he and Frankel signed an engagement letter with Respondent during the initial August 4, 1998 meeting. (TR. at 377.) As part of this engagement, Respondent provided Maseri with account forms and supervisory procedures for the company. (TR. at 377.) Respondent also prepared draft customer service agreements, which were then provided to Maseri. (TR. at 381.) Maseri reviewed these agreements and made a number of changes, including changing the company address from a Newport Beach, California address to the Weston, Florida address. (TR. at 381.) He also changed the governing law from that of the State of California to that of the State of Nevada.[23] (TR. at 381.)

Following the testimony of Maseri, Respondent provided his own testimony.

[23] In the course of his testimony, Maseri admitted that he had been convicted of a felony on four occasions. (TR. at 353.) Two of these convictions were in Miami-Dade County, one was in Broward County, and the fourth was in Palm Beach County. (TR. at 353.) Maseri further admitted that he had held a number of trading licenses, but that these licenses had all been revoked in connection with some disciplinary proceeding, and that he had been terminated from employment with brokerage or commodities trading offices as a result of the failure to disclose a prior criminal conviction or something of that nature. (TR. at 355-356.)

Respondent is licensed to practice law in the States of Florida, Illinois, Pennsylvania and New Jersey, although his practice is currently limited to the State of Florida. (TR. at 385.) Respondent was educated in Chicago. Early on in his career, he became involved in the commodities business, and he has since then represented clients in the securities and commodities business, although he does not hold himself out as an expert in these areas. (TR. at 385.) Respondent also holds various brokerage licenses. (TR. at 386.)

On or about June 25, 1998, Respondent received a call from Maseri, who indicated that he was engaged in negotiations with a man by the name of Frankel to form a Forex business. (TR. at 388.) Respondent had met Maseri sometime between 1988 and 1990, when he responded to an advertisement seeking investors. (TR. at 388.) Respondent testified that he had invested with Maseri and lost money, but that he believed Maseri "did everything the way he was supposed to." (TR. at 389.) Maseri would retain Respondent from time to time to review certain documents.[24] (TR. at 389.) Among these documents, Maseri asked Respondent to review the initial draft of the shareholder agreement for the new venture, ICEC, which had been prepared by Frankel. (TR. at 389.) According to Respondent, this

[24] When the CFTC case was filed against Maseri, Respondent testified that he initially suggested Maseri retain another attorney to represent him, but that he subsequently agreed to represent Maseri's company, Private Research, at no compensation to him, in order to protect investors who, like him, had invested money with Maseri. (TR. at 391.)

draft was “amateurish” and it suggested that Frankel had no experience with commodities business, and therefore, at Maseri’s request, Respondent made some revisions. (TR. at 389.) Specifically, Respondent informed Maseri that the personal services agreement should be removed from the shareholder agreement, as it would be in violation of the injunction that had been entered against Maseri in the CFTC case. (TR. at 389-390.)

Respondent testified that Frankel refused to delete the personal services agreement from the final draft of the shareholder agreement, and that he never saw such agreement included in the final draft of the shareholder agreement. (TR. at 392.) The final shareholder agreement was signed on August 4, 1998, and a second agreement was signed on August 8, 1998 to form ICEC, Nevada, on substantially the same terms. (TR. at 313.) Respondent claims that he resigned from his representation of Maseri immediately after the August 4, 1998 meeting, but admits that he signed a limited engagement letter with Maseri and Frankel, whereby he agreed to prepare the company’s account forms for a fee of $7,500. (TR. at 394.)

On or about November 25, 1998, Respondent received a call from Maseri informing him that the ICEC account at Prudential had been frozen. (TR. at 395.) Respondent agreed to attempt to have the funds released. (TR. at 395.) Respondent has asserted that sometime around December 6, 1998, he determined

that the entire scheme had been fraudulent from the beginning. (TR. at 395.) According to Respondent, he informed Maseri that in order for the new venture to comply with the requirements of the decision of the 9th Circuit Court in *Frankwell*, it not only had to have an office within the 9th Circuit, but it also needed to operate within the 9th Circuit. (TR. at 396.) He also informed Maseri that the company would be required to operate with segregated accounts. (TR. at 396.) Respondent further testified that Maseri had conveyed this information to Frankel, and that both Maseri and Frankel assured him that the company would operate from an office in Newport Beach, California. (TR. at 396.)

Respondent has continuously asserted that he was not aware that the company was actually operating from an office in Weston, Florida and that it was not operating with segregated accounts. (TR. at 396.) Further, he has asserted that he did not become aware of this information until after the time Maseri informed him about the Prudential freeze. (TR. at 396-397.) It has been Respondent's opinion that the entire scheme was "a fraud and a cover-up from day one, never intended to be operated as a legal business," that Maseri and Frankel asked him how the business should be set-up, that he informed them how it should be properly established, but that they failed to follow any of his instructions."[25] (TR.

[25] According to Respondent, on or about December 6, 1998, he confronted Maseri and Frankel and informed them that he would desist from taking any further action against them on behalf of ICEC investors if they paid full restitution to the

at 398.)

Respondent has also repeatedly denied that Frankel was ever his client, but he admits that he entered into an agreement with Frankel on December 18, 1998, and that in a deposition taken on September 9, 2004 in connection with the case of *Frankel v. Scott,* he testified that Frankel had been his client at least for a brief period of time.[26] (TR. at 401, 447.) In the course of the same proceeding, Respondent sent a letter to Maureen O'Donnell, Assistant United States Attorney, where Respondent expressed his belief that Prudential and Frankel had "participated in a sting to detect and prosecute fraudulent sales of Forex accounts in Florida."[27] (TR. at 459; TFB Ex. 50.) Thereafter, on June 9, 2005, as part of The Bar's disciplinary investigation, Respondent sent a similar letter to Carlos Leon, former Bar Counsel in the Miami Branch of The Florida Bar, where he copied thirteen other individuals, including then Florida State Attorney Charlie

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investors. (TR. at 400.) On the other hand, should they refuse to provide restitution, he would bring an action against them. (TR. at 400.) He further indicated that both Maseri and Frankel understood this and waived any potential conflict of interest. (TR. at 400.)

[26] In another deposition that was taken on January 10, 2004, in connection with the same case, Respondent had similarly testified that Frankel had been his client, at least for a brief period of time, but at the final hearing he claimed that he was retracting such prior testimony. (TR. at 445.)

[27] The Broward County State Attorney, Michael J. Satz, and the Public Defender for Richard E. Maseri, Bernie Bogar, were also copied on this letter.

Crist and the Executive Director of the Florida Bar.[28] (TR. at 457-458.) When asked whether he had any remorse for sending these letters, which may have damaged Frankel's reputation in the community, Respondent indicated that he did not "understand where the remorse would come from," and that he merely wrote the letters for the good of the public. (TR. at 460.)

The Referee filed his Amended Report on May 29, 2009. In his Amended Report, the Referee modified his prior determination that Respondent had not engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and found that Respondent's representation to Frankel that Maseri was "an honest man," in conjunction with his failure to disclose the public, non-confidential information which he knew about Maseri, constituted conduct involving dishonesty. Furthermore, the Referee affirmed his prior determination that Respondent's dual representation of ICEC and its individual investors, as well as his actions in filing claims on behalf of individual ICEC investors against his former clients, Maseri and Frankel, constituted significant conflicts of interest. Consequently, the Referee recommended a suspension term of eighteen (18)

[28] The other individuals copied on this letter were Michael J. Satz, Broward County State Attorney; Alan Pastel, Bar Counsel; Bernie Bogar, Public Defender for Ricahrd E. Maseri; Steven A. Frankel; Maureen O'Donnell, Assistant United States Attorney; Sharon Brown Riska, Acting Chairman of the Commodity Futures Trading Commission; the Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida; Alberto Gonzalez, United States Attorney General; William H. Donaldson, Chairman of the Securities Exchange Commission; Guy M. Tunnel, Commissioner for the Florida Department of Law Enforcement. (TR. at 457-458.)

months.[29]

On June 24, 2009, Respondent served his petition for review, challenging the findings made by the Referee. The Bar served its notice of appeal on June 25, 2009, in which it challenges the disciplinary sanction recommended by the Referee, in light of the factual findings. The Florida Bar's Answer/Cross-Initial Brief follows.

[29] In his initial Report of Referee, the Referee found that Respondent had engaged in substantial conflicts of interest, and specifically found Respondent to be in violation of Rules 4-1.7(a) (representing adverse interests), 4-1.9(a) (conflict of interest; former client), and 4-1.16(a)(1) (declining or terminating representation) of the Rules Regulating The Florida Bar. In his Amended Report, the Referee found that Respondent had also engaged in conduct involving dishonesty, in violation of Rule 4-4.1(a) (truthfulness in statements to others) and 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules Regulating The Florida Bar.

SUMMARY OF THE ARGUMENT

This case involves two areas of alleged misconduct: dishonesty and conflict of interest. Respondent agreed to represent his client, Richard Maseri, in connection with a new commodities trading venture with Steven Frankel. Despite being aware of Maseri's prior criminal convictions and the existence of federal court orders preventing him from engaging in commodities trading, Respondent failed to disclose such material information to Frankel, and accordingly facilitated the perpetration of a fraud by Maseri, his client. Thereafter, Respondent agreed to represent the new venture, ICEC, in an attempt to secure release of the funds that had been frozen by Prudential and Dreyfus as a result of the criminal acts of his then former client, Maseri.

Respondent then continued to engage in a pattern of misconduct and ethical violations by undertaking to represent both ICEC and its individual investors, including Frankel. To further aggravate matters, Respondent commenced an onslaught of litigation against ICEC, Maseri, and Frankel, his former clients, asserting that they had engaged in unlawful and fraudulent conduct. Despite being placed on notice by Prudential, Frankel, and the U.S. District Court that his actions raised serious conflict issues, Respondent continued to engage in the same pattern of misconduct and was ultimately disqualified by the U.S. District Court, with the affirmance of the 11th Circuit Court of Appeals, on the basis of conflict of interest.

These same issues of dishonesty and conflict of interest were raised before the Referee, who ultimately concluded that Respondent had engaged in both conduct involving dishonesty and significant conflicts of interests. Despite these findings, the Referee concluded that an eighteen (18) month suspension was the appropriate sanction. It is the position of The Florida Bar that the recommended discipline is entirely inadequate, and that Florida's Standards for Imposing Lawyer Sanctions and this Court's own case law more strongly support the imposition of a three (3) year suspension.

ARGUMENT

I. THE TIME OF LIMITATION FOR THE FILING OF A COMPLAINT WITH THE FLORIDA BAR IS SIX (6) YEARS FROM THE TIME THE MATTER GIVING RISE TO THE COMPLAINT IS OR SHOULD HAVE BEEN DISCOVERED, AND THE REFEREE PROPERLY DENIED RESPONDENT'S MOTION TO DISMISS FOR LAPSE OF THE STATUTE OF LIMITATIONS.

According to Rule 3-7.16 of the Rules Regulating the Florida Bar "[i]nquiries raised or complaints presented by or to The Florida Bar under these rules shall be commenced within 6 years from the time the matter giving rise to the inquiry or complaint is discovered or, with due diligence, should have been discovered." This grievance was filed with The Florida Bar in or about October, 2002. The Bar filed its complaint with this Court in or about June, 2005. Accordingly, the requirements of Rule 3-7.16 have been satisfied. Furthermore, this Court specifically denied Respondent's Motion to Dismiss the case for Lapse of the Statute of Limitations on January 30, 2009, when it entered its Order remanding the case to the Referee for further proceedings.

Cases where this Court has dismissed disciplinary proceedings on the basis of an undue delay by The Bar under Rule 3-7.16 or its predecessors include only those cases where the Court determined that there had been an "unreasonable" delay.[30] For example, in *The Florida Bar v. Walter*, 784 So.2d 1085 (Fla. 2001),

[30] Prior to the adoption of Rule 3-7.16, this Court applied the "reasonableness" test

this Court determined that the seven (7) year interim between an attorney's misrepresentations to The Bar and the filing of The Bar's complaint was unreasonable, as it would be unjust or unfair to require the attorney to respond to The Bar's charges after such period of time, even if The Bar had diligently sought to obtain contradictory statements from an out-of-state witness during the intervening years.

In the instant case, Rule 3-7.16 specifically provides for a six (6) year time limitation within which it is proper to file a complaint. Frankel filed his grievance with The Bar in 2002, and The Bar filed its complaint with this Court in 2005. Accordingly, the requirements of Rule 3-7.16 have been satisfied.[31]

Respondent argues that the six (6) year time of limitation begins to run on the date that the attorney advises the client of his alleged misconduct. In this case, Respondent argues that the time began to run on the date that he advised Frankel of the potential conflict of interest with respect to the conflict of interest claim, and on the date of the alleged misrepresentations with respect to the misrepresentation

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that was set out in *The Florida Bar v. Lipman*, 497 So.2d 1165 (Fla. 1986) in order to determine the time limitations within which The Bar was permitted to file a complaint.

[31] Even assuming, *arguendo*, that we were to apply the "reasonableness" standard applied prior to the enactment of Rule 3-7.16, The Bar filed its complaint only three years after Frankel filed his grievance with The Bar, and The Bar has diligently prosecuted the matter since the initial filing of its complaint, suggesting that there has been no "unreasonable" delay in prosecuting by The Bar.

claim. Even assuming that this reading of Rule 3-7.16 is accurate, Frankel filed his grievance with The Bar in 2002, only four years after his initial meeting with Respondent in 1998, and therefore, Rule 3-7.16 has been satisfied. Most significantly, this Court specifically denied Respondent's Motion to Dismiss the case for Lapse of the Statute of Limitations on January 30, 2009. Respondent's argument that this case should be dismissed on the basis of the Statute of Limitations is accordingly yet another effort at presenting extraneous matters in an effort to further delay the proceedings.[32]

II. THE REFEREE PROPERLY CONCLUDED THAT RESPONDENT'S REPRESENTATIONS TO FRANKEL REGARDING MASERI'S CHARACTER, IN CONJUNCTION WITH THE FAILURE TO DISCLOSE THE PUBLIC, NON-CONFIDENTIAL INFORMATION HE KNEW ABOUT MASERI, CONSTITUTED CONDUCT INVOLVING DISHONESTY, IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT.

Respondent represented Maseri's company, Private Research, in a CFTC proceeding alleging fraud and violations of commodities trading laws. As a result,

[32] Respondent would also be precluded from asserting that laches is present, as this matter has been diligently prosecuted by The Bar. In fact, much of the delay that has occurred in prosecuting this case has occurred as a result of Respondent's own actions. Respondent first raised the argument that the case was time-barred by the Statute of Limitations in his initial response to The Bar's Amended Complaint. Thereafter, he raised the argument before the Referee via both a Motion to Dismiss and a Motion for Summary Judgment. Said motions were denied by the Referee, and on August 20, 2007, the Referee entered his Report of Referee. Despite the denial of these various motions, Respondent continued to request that the case be dismissed on the basis of the Statue of Limitations even after entry of the Report of Referee. He again asserts this claim on appeal.

Respondent was aware of and on notice of federal court orders prohibiting Maseri from engaging in essentially any commodities business without being registered or from engaging in any fraudulent activity while acting as a commodities trading advisor or pooling operator. Despite this knowledge, Respondent represented Maseri with regard to the preparation of corporate documents concerning a new commodities venture, ICEC, with Frankel.

It quickly became apparent to Respondent during his initial meeting with Frankel and Maseri, on August 4, 1998, that Frankel was unaware of Maseri's criminal history, or of the federal court orders prohibiting Maseri from engaging in commodities business. (TR. at 73-75, 102, 107.) Nevertheless, when questioned by Frankel about Maseri's background and reputation, Respondent failed to disclose the existence of the federal court orders or Maseri's criminal history of fraudulent commodities practices. Instead, Respondent replied that Maseri was an "honest man in the securities business and that [he] would have no difficulty working with him." (TR. at 74.) Respondent misled Frankel as to Maseri's character, and induced him to enter into the new venture.

At trial, Frankel specifically testified that he had relied on Respondent's assertions that Maseri was an honest and reputable man, and indicated that, had he known about any of the federal court orders prohibiting Maseri from engaging in commodities trading business, he would not have gone through with this venture.

(TR. at 75, 107.) Notably, Respondent himself admitted at trial that he was aware of Maseri's criminal history even before the August 4, 1998 initial meeting with Frankel. (TR. at 389-390.)

Respondent argues that his actions do not amount to a violation of Rules 4-4.1(a) and 4-8.4(c) of the Rules Regulating The Florida Bar because upon discovering that his client, Maseri, had made an omission that could be material, he withdrew from the representation. This argument is without merit. First, Respondent attempts to disguise his own misconduct in misleading Frankel as to Maseri's history by suggesting that it was Maseri's responsibility alone to make such disclosures. Contrary to this assertion, Rule 4-4.1(a) imposes a duty on attorneys to "be truthful when dealing with others on a client's behalf." This Rule further provides that "[m]isprepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

Maseri's background, as the Referee noted, was not a confidential matter, and therefore, Respondent was required to disclose such information about Maseri in response to Frankel's specific questions regarding what Respondent knew about Maseri. Had he done so, a fraud might have been prevented. Even if Respondent had been instructed by Maseri to conceal such information, "an attorney may not hide behind a client's instructions in order to perpetrate a fraud against a third

party." *The Florida Bar v. Feige*, 596 So.2d 433, 435 (Fla. 1992). In a similar vein, this Court has previously noted that "[i]t is irrelevant whether or not the client subsequently is charged with a crime … this fact alone does not excuse attorneys from failing to honor their obligations to the public at large." *The Florida Bar v. Calvo*, 630 So.2d 548, 550 (Fla. 1993).

III. THE REFEREE PROPERLY CONCLUDED THAT RESPONDENT HAD ENGAGED IN SIGNIFICANT CONFLICTS OF INTEREST WHEN HE UNDERTOOK TO REPRESENT ICEC AND ITS INDIVIDUAL INVESTORS, WHETHER WITH OR WITHOUT ACTUAL AUTHORITY, AND SUBSEQUENTLY PROCEEDED TO FILE NUMEROUS CLAIMS AGAINST HIS FORMER CLIENTS ALLEGING UNLAWFUL CONDUCT.

"It is well settled that, except in exceptional circumstances …, an attorney may not represent conflicting interests in the same general transaction, no matter how well-meaning his motive or however slight such adverse interest may be." *The Florida Bar v. Moore*, 194 So.2d 264, 269 (Fla. 1966). An attorney represents conflicting interests when it becomes his duty to contend on behalf of a client for that which his duty to another client would require him to oppose. *Id.*

Respondent represented Maseri's company, Private Research, in connection with the CFTC proceeding alleging that Maseri and Private Research had defrauded customers, converted customer funds, and violated the registration provisions of the Commodity Exchange Act. Thereafter, Respondent represented Maseri in negotiations with Frankel concerning the new venture, ICEC, and on

August 4, 1998, he entered into an engagement agreement with Maseri and Frankel, whereby he agreed to represent ICEC. At trial, Respondent himself admitted that he had represented Maseri's company, Private Research, in connection with the CFTC proceeding, and he further admitted that he agreed to represent the new venture, ICEC, for a fee of $7,500.

Furthermore, following the entry of final judgment against Maseri in the CFTC action and the freezing of the ICEC funds, Respondent agreed to represent ICEC in an attempt to obtain a release of the frozen funds. Respondent's agreement to represent the company was subsequently ratified by Velazquez as new president of the company. As a result of this agreement, Respondent was now representing ICEC in an effort to obtain a release of the funds that had been frozen as a result of the criminal actions of his former client, Maseri, actions that Respondent was well aware of prior to the formation of ICEC.

Respondent continued to engage in a pattern of questionable conduct when he informed Frankel that, because he was now representing the company in an attempt to have the frozen funds released, he would ultimately be representing Frankel's interests, as lender to the company, as well. Furthermore, on December 18, 1998, Frankel, individually, entered into a retainer agreement with Respondent for the same purpose of seeking a release of the frozen funds. Notably, the same retainer agreement reflected that Respondent's representation of ICEC had

terminated on December 12, 1998. The December 18, 1998 engagement agreement was subsequently ratified by Frankel by means of an Addendum to Retainer Agreement, dated December 21, 1998, whereby Respondent agreed to represent "… Frankel, not as Director, but as lender to ICEC."

Respondent's dual representation of ICEC and its individual investors, including Frankel, constituted a clear conflict of interest in violation of the Rules Regulating the Florida Bar. This serious conflict of interest was further compounded by Respondent's subsequent actions. In or about December 1998, Velazquez, who had replaced Maseri as president and CEO of ICEC, resigned from this position, leaving Respondent with no apparent authority to continue representing the company. Despite the absence of any authority to continue representing the company, Respondent filed a Petition for Emergency Relief on behalf of ICEC, which included a cross-claim against Prudential on behalf of ICEC investors. Assuming, *arguendo,* that Respondent had any authority to continue representing the company after Velazquez' resignation, the conflict of interest between the corporation and the individual investors made the representation impermissible. In fact, in denying Respondent's Petition for Emergency Relief, and his subsequent Motion for Reconsideration, the U.S. District Court specifically instructed Respondent to desist from requesting relief on behalf of co-defendants he did not represent.

To further add insult to injury, Respondent continued to engage in this pattern of ethical violations during the course of the Prudential and Dreyfus interpleader actions by filing a myriad of motions on behalf of both the corporation and its individual investors, alleging that Maseri and ICEC, his former clients, had operated unlawfully. Similarly, in January, 2001, Respondent sought to reopen the Prudential interpleader action, which had been closed a year earlier, by filing an action against his former client, Frankel, alleging breach of contract, legal malpractice, and fraud. As a result of these actions, Frankel was forced to move to disqualify Respondent. Although the court did not rule on the Motion to Disqualify because it denied Respondent's Motion for Reconsideration, it specifically noted the apparent conflict of interest in Respondent attempting to recover monies on behalf of individual investors that he also sought to recover on behalf of the corporation.

Respondent continued to represent individual ICEC investors despite being placed on notice by Frankel's attorney, Jed Frankel, to desist from doing so. Not only did Respondent disregard Frankel's instructions to desist from such conduct, but in February, 2002, following the entry of the order of distribution in the CFTC case, Respondent wrote Maseri and Frankel encouraging them to appeal and even demanding a retainer for legal fees. These actions, again, despite Frankel's specific instructions to the contrary.

Based on this evidence, on October 4, 2002, the U.S. District Court disqualified Respondent on the basis of conflict of interest in violation of Rule 4-1.9 of the Rules Regulating The Florida Bar. This decision was subsequently affirmed by the 11th Circuit Court of Appeals. Respondent's misconduct in representing ICEC and its individual investors, whether with or without authority, as well as in filing claims asserting unlawful conduct by his former clients, constituted a clear violation of Rule 4-1.7(a), which precludes a lawyer from representing a client if the representation of that client will be directly adverse to the interests of another client, Rule 4-1.9(a), which precludes a lawyer who has formerly represented a client from representing another client in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, and Rule 4-1.16(a)(1), which provides that a lawyer shall not represent a client, or, if representation has commenced, will withdraw if the representation will result in violation of the Rules of Professional Conduct.

Respondent has continuously asserted that Frankel was never his client, and therefore, that his actions did not constitute an unauthorized conflict of interest. These allegations are unsupported by the specific facts in this case, which unambiguously establish that Respondent agreed to represent Frankel in an attempt to obtain a release of the frozen funds. In his Amended Report of Referee, the

Referee specifically concluded that Respondent's assertion that Frankel had never been his client was "without credibility given the two signed retainer agreements with Frankel dated December 18 and 21, 1998." (A1. at 14.) Moreover, Respondent himself admitted in his September 9, 2004 deposition that Frankel had been his client, at least for a brief period of time.

Assuming, *arguendo*, that there was a question as to whether or not the December 18 and 21, 1998 agreements constituted a formal engagement, this Court has recognized that, even where it may be possible to argue in certain cases that no violation existed up to a certain point in the representation, there can be no question that, as soon as an individual begins relying on an attorney for legal advice, and the attorney begins providing advice, a serious question of conflict of interests arises. *Moore*, 194 So.2d at 269. Respondent's assertion that he obtained releases from Maseri and Frankel as to any potential conflict of interest is without merit, as this Court has previously noted that some conflicts of interest are "so fundamental that [they cannot] be condoned by the client, even with full disclosure." *Feige*, 596 So.2d at 435.

IV. IN DETERMINING THAT RESPONDENT HAD ENGAGED IN SIGNIFICANT CONFLICTS OF INTEREST, THE REFEREE PROPERLY RELIED ON THE ORDER OF THE U.S. 11TH CIRCUIT COURT OF APPEALS DISQUALIFYING RESPONDENT ON THE BASIS OF A CONFLICT OF INTEREST.

This Court has long recognized that bar disciplinary proceedings are quasi-

judicial in nature, rather than civil or criminal, and therefore, the Referee in a disciplinary proceeding is not bound by the technical rules of evidence. *The Florida Bar v. Rendina*, 583 So.2d 314 (Fla.1991). The Referee is free to consider *any* evidence that is relevant in resolving a factual question. *The Florida Bar v. Clement*, 662 So.2d 690 (Fla. 1995). This Court has further recognized that relevant evidence may include trial transcripts, as well as judgments from a civil proceeding. *The Florida Bar v. Rood*, 620 So.2d 1252, 1255 (Fla. 1993).

Respondent argues that it was improper for the Referee to rely on the decision of the 11th Circuit Court of Appeals disqualifying him on the basis of conflict of interest, in violation of Rule 4-1.9, as the Order was entered without a hearing or record, and it was not published. Respondent further argues that the initial Order of the U.S. District Court disqualifying him on the same basis lacked any factual support, and therefore, that both this Order and its subsequent affirmance by the 11th Circuit Court of Appeals were insufficient on their face. Contrary to Respondent's assertions, however, the Referee in a disciplinary proceeding is specifically authorized by this Court's precedent to rely on any evidence that he/she deems relevant, and therefore, it was proper for the Referee to rely on the Order of the U.S. District Court and the affirming opinion of the 11th Circuit Court of Appeals finding that Respondent had engaged in an unauthorized conflict of interest, in violation of Rule 4-1.9 of the Rules Regulating the Florida

Bar. Moreover, as reflected in the Amended Report of Referee, the Referee's findings of guilt on conflict of interest violations were not predicated on the federal court's finding alone, but on the facts in evidence as well.

V. AN ATTORNEY'S DUTY TO PROTECT THE INTERESTS OF THE PUBLIC DOES NOT OVERRIDE HIS/HER OBLIGATIONS TO COMPLY WITH THE RULES OF PROFESSIONAL CONDUCT.

As advocates, lawyers have "a duty to zealously represent [their] client[s] within the bounds of the law and rules of professional conduct." *Carnival Corp. v. Beverly*, 744 So.2d 489, 493 (Fla. 1st DCA 1999). Florida courts have recognized that "[t]he adversarial method of trial imposes dual and conflicting obligations on attorneys." *Id.* Similarly, the Rules of Professional Conduct recognize the lawyer's professional obligation to resolve these conflicting professional obligations. Preamble, Chapter 4, Rules Regulating The Florida Bar. While a lawyer's responsibilities as a representative of clients, officer of the legal system, and a public citizen are usually harmonious, difficult ethical problems may arise where a conflict exists between a lawyer's own sense of personal honor, including obligations to society and the legal profession. *Id.* According to the Rules, such conflicts must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules of Professional Conduct. *Id.*

Although "[a] lawyer should act with commitment and dedication to the

interests of the client and with zeal in advocacy upon the client's behalf," and therefore, "[a] lawyer … may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor," when professional judgment does not restrain a lawyer's zealous advocacy, the courts must act to assure that aggressive advocacy does not frustrate or disrupt the administration of judicial proceedings. *Carnival Corp.*, 744 So.2d at 494; Commentary, Rule 4-1.3 of the Rules Regulating The Florida Bar.

Respondent argues that his obligation to provide justice to the public overrides his obligation to comply with the Rules against misrepresentation and conflicts of interest. Although we recognize that an attorney generally owes a duty to provide justice to the public, this Court has long recognized that "[a]n attorney and client relationship is one of the closest and most personal and fiduciary in character that exists." *In re Estate of Marks*, 83 So.2d 853, 854 (Fla. 1955); *See also Forgione v. Dennis Pirtle Agency, Inc.*, 701 So.2d 557, 560 (Fla. 1997) (finding that the relationship between an attorney and his or her client is a fiduciary relationship of the very highest character). "There is no relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client." *Gerlach v. Donnelly*, 98 So.2d 493, 498 (Fla. 1957). The Rules are designed to ensure that attorneys maintain the trust and confidence that is placed upon them by their clients, and therefore, while it is true that attorneys

generally owe a duty to protect the interests of the public, an "attorney is required to exercise in all his [or her] dealings with [a] client a much higher standard." *Id.* Accordingly, Respondent may not argue that his obligation to provide justice to the public overrides his duty to comply with the higher standard he is held to as an attorney under the Rules of Professional Conduct. *Brass v. Reed*, 64 So.2d 646 (Fla. 1953).

VI. A THREE-YEAR SUSPENSION IS THE APPROPRIATE DISCIPLINE GIVEN THE REFEREE'S FINDING THAT RESPONDENT'S MISREPRESENTATIONS AND OMISSIONS AS TO MASERI'S CHARACTER CONSTITUTED CONDUCT INVOLVING DISHONESTY, AS WELL AS HIS FINDING THAT RESPONDENT ENGAGED IN SIGNIFICANT CONFLICTS OF INTEREST, ALL IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT.

This Court's scope of review over disciplinary recommendations is broader than that of findings of fact because it is this Court's responsibility to order the appropriate discipline. *The Florida Bar v. Anderson*, 538 So.2d 852 (Fla. 1989). *See also* art. V, §15, Fla. Const. "The Supreme Court shall have exclusive jurisdiction to regulate … the discipline of persons admitted [to the practice of law]." The Court usually will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Temmer*, 753 So.2d 555 (Fla. 1999). The Referee recommended an eighteen (18) month suspension. The recommended discipline has no reasonable basis on

existing case law, and a three (3) year suspension is the more appropriate sanction.

This case essentially comes down to two issues – dishonesty and conflict of interest. With respect to the first of these two issues, dishonesty, the undisputed evidence establishes that, on August 4, 1998, Respondent met with Maseri and Frankel for the purpose of commencing a new commodities trading venture. Respondent had known and represented Maseri for many years, and had represented Maseri's company in a case alleging fraud and violations of commodities trading laws. As a result, Respondent was well aware of Maseri's background, including his prior criminal convictions. Although there is conflicting testimony as to the events and discussions that transpired during the initial August 4, 1998 meeting, it is undisputed that Respondent and Frankel arrived at that meeting prior to Maseri. It is also undisputed that Respondent and Frankel engaged in a conversation at that time. During this conversation, Frankel inquired about Maseri's background in an attempt to learn what he could about his background and reputation.

In response to Frankel's inquiries, Respondent replied that he had known Maseri for many years, that he had never lied to him, and in essence, that Maseri was "an honest man." (TR. 74.) Frankel relied on these assurances and invested $180,000. (TR. 82, 107.) Although Respondent argues that Frankel, as an attorney, should have conducted his own investigation as to Maseri's background,

the fact is that, had Frankel known that the entire venture was a scheme, he would not have invested such a significant amount of capital. Respondent never disclosed that Maseri was a convicted felon, he never disclosed that Maseri had been terminated from every position he had held involving commodities business, and he never disclosed that Maseri was specifically prohibited under federal court orders from entering into this type of venture.[33] Even if Frankel was not Respondent's client at the time, Respondent was under a duty, as the Referee properly concluded, to not make a false statement to a third party, in violation of Rule 4-4.1(a) of the Rules Regulating The Florida Bar.[34]

With respect to the second issue presented in this case, conflict of interest, the undisputed evidence similarly establishes, as the Referee properly concluded, that Respondent engaged in significant conflicts of interest. During the course of the August 4, 1998 meeting, Respondent terminated his representation of Maseri and entered into a retainer agreement to represent ICEC. Although this representation was initially only for the purpose of drafting customer service agreements, sometime around November, 1998, Respondent was hired by ICEC to attempt to release the funds that had been frozen by Prudential as a result of the

[33] According to Respondent, the case law in the 9th Circuit would have permitted Maseri to conduct business within certain guidelines.

[34] The Referee concluded that Respondent would not have been required to disclose unfavorable information about Maseri had he not indicated that Maseri was an "honest man." (A1. at 7.)

fraudulent actions of Respondent's former client, Maseri. Shortly thereafter, Respondent entered into two agreements, dated December 18 and 21, 1998, whereby he agreed to represent Frankel individually, not as director, but as lender for the company.

Respondent's misconduct was only aggravated by his subsequent actions. In January, 1999, shortly after agreeing to represent Frankel individually, Respondent commenced filing a series of cross-claims against Prudential on behalf of investors he did not represent. As a result of such conduct, the U.S. District Court specifically instructed Respondent to desist from filing actions on behalf of persons he did not represent. Moreover, these actions alleged unlawful conduct by his former client, ICEC. More than a year after the Prudential interpleader action was dismissed, Respondent sought to reopen the case by filing an action on behalf of ICEC investors against Frankel, also his former client. The suit similarly alleged that Frankel had engaged in unlawful conduct. Respondent continued to engage in similar misconduct, despite being placed on notice by Prudential, by Frankel's new attorney, Jed Frankel, and by the May 24, 2002 Order of the U.S. District Court denying his Motion for Reconsideration in the Prudential interpleader action, that his actions raised significant conflicts issues and ethical concerns. Ultimately, Frankel was forced to move to disqualify Respondent, and on October 4, 2002, the U.S. District Court disqualified Respondent on the basis of Rule 4-1.9. This

decision was subsequently affirmed by the 11th Circuit Court of Appeals.

Although this Court has not addressed a case that is exactly analogous to the instant case, a review of the cases where this Court has addressed similar issues to those presented strongly supports the conclusion that a three (3) year suspension would be the most appropriate sanction in this case. In *Feige, supra*, an attorney represented the former wife in a dissolution proceeding. The former wife had previously divorced her husband and was receiving monthly alimony payments, which were made directly to the attorney by the former husband. According to the terms of the marital settlement agreement, these payments were to terminate either upon the wife's death or upon her remarriage. Some time thereafter, the wife remarried. Not only did the attorney perform the marriage ceremony, but he continued to accept the alimony payments on his client's behalf, without ever informing the former husband that the wife had remarried.

Upon learning of the remarriage, the former husband filed suit against both the former wife and the attorney. Notably, the Court in those proceedings concluded that it would be impermissible for the attorney to represent the former wife in a proceeding in which he was also a co-defendant, even if there had been a consent to the conflict of interest. Based on these facts, the Court ultimately determined that the attorney should be suspended from the practice of law for a period of two (2) years.

The decision in *Feige* is strongly analogous to the instant case for a number of reasons. First, both cases involved conflicts of interest, which the courts determined could not be condoned, even with full disclosure. Second, just as in *Feige*, Respondent assisted his client in perpetrating a fraud by failing to disclose material information to the affected third party. While it may be argued that a marriage ceremony, in contrast to certain information about Maseri's background, was not confidential information, it can also be argued, as the Referee properly concluded, that the CFTC proceeding was not confidential information, and therefore, that Respondent was under an obligation to disclose the existence of such proceeding and the federal injunctions against Maseri to Frankel.[35] (A1. at 7.)

In a second case, *Calvo*, supra, this Court held that disbarment was appropriate for an attorney's reckless misconduct with regard to securities offering, which was severely aggravated by the great potential of harm to the public at large. The attorney in that case represented individuals involved in the sale of federally regulated securities. In the course of this representation, the attorney failed to disclose to potential investors, as he was required to under securities law, that his

[35] The attorney in *Feige* alleged that he had failed to disclose the marriage to the former husband because his client had instructed him to not disclose such information, as she had allegedly already informed her former husband of the marriage. Despite this argument, this Court concluded that the attorney could not simply "hide behind a client's instructions in order to perpetrate a fraud against a third party." *Feige*, 596 So.2d at 435.

clients, the principals in these transactions, had been federally indicted. He similarly failed to disclose that his clients had secured "flash loans" in order to give the impression that they in fact had the necessary funds for the venture, as well as failed to disclose that the closing had occurred past the required deadline and without all the necessary filings.

Much like the attorney in *Calvo*, Respondent failed to disclose material, non-confidential information that he knew and was fully aware of to an affected third party. By failing to disclose such information, Respondent not only facilitated his client's perpetration of a fraud, but also acted in complete disregard of any potential harm to the public at large. Notably, this Court felt that the motivation of the attorney in *Calvo* in assisting his clients to perpetrate a fraud was the financial gain that his law firm received from the representation. Specifically, the law firm received $15,000 in legal fees. In this case, Respondent himself testified that he had received $7,500 when he initially agreed to represent ICEC. (TR. 394.) The Court in *Calvo* also noted that the seriousness of the violation was reflected in the corporation's then defunct status and the substantial losses that were incurred by the investors. Similarly, the corporation that was formed in this case, ICEC, is no longer in existence, and the many investors, including Frankel, sustained severe financial losses as a result of the fraudulent scheme.[36]

[36] The attorney in *Calvo*, unlike Respondent, had a prior disciplinary record.

In addition to the above-cited cases, there are a number of other cases where this Court has been willing to suspend an attorney for engaging in conduct involving dishonesty, conflicts of interest, or both. With respect to an attorney who engages in unauthorized conflicts of interest, the decision in *The Florida Bar v. Wilson*, 714 So.2d 381 (Fla. 1998), is instructive. In that case, the Court suspended an attorney who, *inter alia*, engaged in an unauthorized conflict of interest, for a period of one (1) year. The attorney had agreed to represent the wife in a dissolution proceeding, after he had previously represented both the wife and the husband in an unrelated declaratory judgment action. The case is particularly relevant to the instant case because the Court determined that a one (1) year suspension was appropriate, *despite the absence of any prior history*. In determining that a one (1) year suspension, and not a shorter suspension, was appropriate, this Court indicated that "accumulative misconduct" is a relevant factor when determining the appropriate level of discipline, and therefore, the Court will generally impose a greater sanction for cumulative misconduct. *Id.* at 384. In this case, Respondent engaged in a long and cumulative pattern of misconduct, and therefore, a compelling argument can be made that a longer suspension term is appropriate. Moreover, there are additional findings with regard to dishonesty.

Nevertheless, the sanction that was imposed in *Calvo* was disbarment, whereas The Bar is only seeking a three (3) suspension in the instant case.

In another case, *The Florida Bar v. Mastrilli*, 614 So.2d 1081 (Fla. 1993), the Court held that a six (6) month suspension was appropriate for an attorney's misconduct in filing suit against his former client on behalf of a second client in a matter for which the attorney had been initially retained by both clients. In finding that suspension was appropriate, the Court noted that the attorney undertook to represent both clients, even though he knew or should have known that their interests were adverse.

Similarly, in *The Florida Bar v. Dunagan*, 731 So.2d 1237 (Fla. 1999), the Court imposed a ninety-one (91) day suspension on an attorney who represented the husband in a dissolution proceeding, after he had previously represented both the husband and the wife jointly in connection with various business matters. Notably, the Court noted that the wife's failure to object to the representation could not be considered "consent after consultation." In this case, Frankel specifically objected to the dual representation, but as the decision in *Dunagan* suggests, even if he had failed to affirmatively object, Respondent's conduct in representing both ICEC and the individual investors, and in filing claims against his former clients, would be considered a significant conflict of interest.

In addition to those cases where this Court has been willing to suspend an attorney who engages in unauthorized conflicts of interest, this Court has previously determined that suspension is appropriate for an attorney's misconduct

in failing to disclose material information or engaging in conduct involving dishonesty. For example, in *The Florida Bar v. Hmielewski*, 702 So.2d 818 (Fla. 1997), this Court determined that a three (3) year suspension was appropriate for making deliberate misrepresentations in a medical malpractice action. The Court noted that such conduct was in violation of several rules, including those rules prohibiting unlawful or dishonest conduct, false statements to third persons while representing a client, and conduct involving dishonesty, fraud, deceit, or misrepresentation. In this case, Respondent has similarly been charged with violations of these rules, among others. Although the misconduct in *Hmielewski* involved the making of false statements or misrepresentations to a tribunal, what is most significant is that the Court noted that a three (3) year suspension was appropriate, despite the presence of significant mitigating factors.[37]

In another case, *The Florida Bar v. Love*, 123 So.2d 333 (Fla. 1960), an attorney was charged with misconduct after he knowingly permitted the performance of a bigamous marriage by withholding information that he had a duty to disclose. Specifically, the attorney represented one of the parties to the marriage, whom he knew was already married. Based on this evidence, this Court concluded that a one (1) year suspension was the appropriate sanction.

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[37] Furthermore, while Respondent's conduct in the instant case may not have involved the making of false statements or misrepresentations to a tribunal, he engaged in a number of additional ethical violations over a lengthy period of time, and therefore, a three (3) suspension would be equally appropriate.

The conclusion that a three (3) year suspension would be the most appropriate sanction based on the extensive findings in this case is further supported by Florida's Standards for Imposing Lawyer Sanctions. Specifically, Standard 4.32 provides that:

> Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Similarly, Standard 7.2 provides that:

> 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.

Here, there is no question that Respondent knew of the conflict of interest, as it was specifically brought to his attention on numerous occasions. Furthermore, his conduct throughout the representation of ICEC, the various ICEC investors, and Frankel, was not only in clear violation of his duty as a professional, but also resulted in severe injury to his clients.

Although the Referee properly concluded that Respondent had engaged in conduct involving dishonesty and in significant conflicts of interest, he ultimately recommended that Respondent be suspended for a period of only eighteen (18) months. This recommendation is inconsistent with this Court's case law and with the specific findings in this case.

In light of the Referee's extensive findings, the cumulative nature of Respondent's misconduct, and this Court's own case law, the Referee's recommended eighteen (18) month suspension is simply not appropriate. Although the Referee's disciplinary recommendation in a disciplinary proceeding is presumptively correct, it should not be followed when it is "clearly off the mark." *The Florida Bar v. Vining*, 707 So.2d 670 (Fla. 1998).

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's recommendation of discipline is too lenient and that Respondent should receive a three (3) year suspension.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer/Cross-Initial Brief were sent via U.S. Priority Mail to the Honorable Thomas D. Hall, Clerk, Supreme Court Building, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and a true and correct copy was sent via U.S. Priority Mail to William Sumner Scott, Respondent, at his record bar address, 36 N.W. 6th Avenue, Apartment 409, Miami, Florida 33128; and a true and correct copy was sent via regular mail to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399 on this _____ day of August, 2009.

_____
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Chief Branch Discipline Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that the Answer/Cross-Initial Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

_____
ARLENE KALISH SANKEL
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