

**IN THE SUPREME COURT OF FLORIDA**

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CASE NO. SC 05-1145

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**THE FLORIDA BAR**

**Complainant,**

**v.**

**WILLIAM SUMNER SCOTT**

**Respondent**

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RESPONDENT'S INITIAL BRIEF

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**v.**

**WILLIAM SUMNER SCOTT**

**Respondent**

**FBN 947822**

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**SCOTT BRIEF IN SUPPORT OF HIS PETITION FOR REVIEW OF THE  
AMENDED REFEREE REPORT**

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THE UNDERSIGNED, William Sumner Scott, Esquire, the Respondent, pro se, pursuant to Rules Regulating Florida Bar Rule 3-7.7(c)(1) and Rules of Appellate Procedure Rule 9.190(b)(3), without waiver of my pending Motion to Dismiss for the Statute of Limitations, hereby submits the following Initial Brief:

References to testimony are to the three Volume Transcript of the Hearing before the Referee held from June 18 to 20, 2007, that was docketed in this Court by amended entry on May 29, 2009 under the generic heading 06/26/09: (Transcripts & Misc. Pleadings filed) (1 Box of Records) and to the Transcript of the Hearing held before the Referee on April 28, 2009, on the Respondent's Motion for Dismissal for lapse of the Statute of Limitations docketed in this Court on May 11, 2009. The Appendix was filed in this Court on September 16, 2008.

## **STATEMENT OF THE CASE AND FACTS**

### **NATURE OF THE CASE**

Article V, Section 15 of the Florida Constitution grants original jurisdiction to the Florida Supreme Court to administer and regulate the practice of law before the Courts of the State of Florida. This case concerns my right to practice law and, therefore, this Court has jurisdiction.

### **STATEMENT OF THE CASE**

On or before July 26, 1998, the US Commodity Futures Trading Commission (the "CFTC"), the US Federal Bureau of Investigation (the "FBI"),

and the US attorney (“USAG”) obtained the aid of Florida Statewide Prosecutor’s office to investigate forex brokerage within the State of Florida. This case concerns the fraud by Steven A. Frankel, Esquire, a member of the Florida Bar, in furtherance of a sting in Weston, Florida commenced under the supervision of the FBI. As a slap back to my attempts to have Frankel pay 100% restitution to the innocent sting customers, Frankel brought these Bar charges against me.

Barry R. Davidson, Esquire, also a member of the Florida Bar, who had been appointed a Federal Receiver, charged fees and costs to the innocent customers for unrelated work. And, Judge Donald M. Middlebrooks of the USDC for the Southern District of Florida approved the wrongful payments to Davidson. To stop my attempts to obtain full restitution for the innocent customers that most likely would have lead to the conclusion that the approval of the Davidson fees was improper, Judge Middlebrooks found conflicts between Frankel and me to disqualify me from representation of the innocent customers.

Judge Middlebrooks’ approval of the Davidson fees and costs was affirmed on appeal by Judges Gerald B. Tjoflat, Stanley F. Birch, Jr., and Emmett R. Cox of the US 11<sup>th</sup> Circuit Court of Appeals.

A ruling from this Court that I never made a false statement nor represented Frankel will justify a Petition on behalf of the innocent customers to reopen the Federal cases to the end that they obtain the 100% restitution they deserve or, in

the alternative, this Court could rule that my obligation to provide justice to the innocent customers is superior to the enforcement of Bar Rules against me.

Another alternative available to this Court is to dismiss the Bar complaint against me because of the lapse of the statute of limitations.

### **COURSE OF THE PROCEEDINGS**

On January 15, 2003, Carlos Leon, Esquire, The Florida Bar Counsel originally assigned to collect and analyze the facts in this case, issued his letter, with a copy to me, to report to Steven A. Frankel, Esquire, a member of the Florida Bar, that his claims filed in this case against me had no merit.

On June 27, 2005, The Florida Bar, in response to the Frankel appeal to the Florida Bar Disciplinary Committee, filed a complaint with this Court to allege that I had violated Bar Rules 4-4.1(a) TRUTHFULLNESS IN STATEMENTS TO OTHERS (in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law to a third person); 4-8.4(c) MISCONDUCT (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); 4-1.7(a) REPRESENTING ADVERSE INTERESTS (A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client); Rule 4-1.9(a) CONFLICT OF INTEREST; FORMER CLIENT (a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially



related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation); and Rule 4-1.16(a)(1) DECLINING OR TERMINATING REPRESENTATION (A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if: the representation will result in violation of the Rules of Professional Conduct or law).

On January 26, 2006, the Bar filed an Amended Complaint with the Referee in substantially the same form as the original complaint. See Appendix Ex P-Amd K, sans exhibits. The Exhibits to the original and amended complaint were the same and are attached to the original complaint on file at Docket entry dated January 26, 2006, which is the first docket entry in this case.

On February 8, 2006, I filed my Response to the Bar Amended Complaint with the Referee that included as Affirmative Defense XI, the lapse of the Six Year Statute of Limitations.

On June 18, 2007, without entry of an opinion of findings of fact or conclusions of law, the Referee, Miami-Dade County Circuit Court Judge Norman Gerstein, denied my Motion to Dismiss the Bar Complaint for the lapse of the Statute of Limitations.

On August 21, 2007, the Referee filed his original Report to recommend that I be found guilty of the above cited Conflict of Interest Rule violations and, further, that I be suspended for 18 months and pay the Bar costs.

On August 27, 2007, I filed a Motion to Dismiss to this Court for failure of the Bar to bring its complaint within the six year statute of limitations or, in the alternative, the Referee's Report be remanded to the Referee to justify his recommendations. 8-27-07 docket entry.

On September 19, 2007, I filed my Petition for Review of the Referee's Report of August 21, 2007. 9-27-07 docket entry.

On January 30, 2009, this Court Denied my Motion to Dismiss this case for lapse of the Statute of Limitations, vacated the Report of Referee filed on August 27, 2007 and Remanded this case to the Referee for further proceedings. The Supreme Court remand order required the Referee to identify the specific facts that support each rule violation and explain why those facts constitute a violation. 1-30-07 docket entry.

On or about March 3, 2009, the Bar caused the three volume transcript of the hearing held before the Referee from June 18 to 20, 2007, to be filed with the Referee.

On April 25, 2009, I filed a Motion to Dismiss this case for lapse of the Statute of Limitations with the Referee.

On April 28, 2009, the Referee ruled that this Court's denial of my Motion to Dismiss for the Statute of Limitations by its January 30, 2009, remand order was dispositive of the issue. SL Vol I, P 21, L 18 to P 23, L 10. (Transcript of 4-28-09 hearing docket entry 5-11-09).

On April 30, 2009, I filed my Petition for Review of the Denial of my Motion to Dismiss for the Statute of Limitations to this Court. That Motion is pending.

On May 11, 2009, I filed the transcript of the proceedings before the Referee that considered by Motion to Dismiss for lapse of the Statute of Limitations. Vol SL 1.

On May 22, 2009, the Referee issued his Amended Report.

The three volume transcript of the hearing held before the referee has been docketed by this Court's Clerk under the generic entry (AMENDED) W/E-MAIL (06/26/09: TRANSCRIPTS & MISC. PLEADINGS FILED) (1 BOX OF RECORD). 5-29-09 docket entry.

On June 15, 2009, I filed my Motion to cause the Clerk to docket the three volume set of the hearing transcript separately. That Motion is Pending.

On June 24, 2009, I filed my Petition for Review of all issues related to the case.

On July 1, 2009, the Bar filed its Petition for Review of the penalty.

## **THE RECORD**

The Record consists of:

- A. Three volumes transcript of the hearing held before the Referee from June 18 to 20, 2007, hereinafter Vol, I, II, and III. See box of materials from the Referee docketed in this Court on 5-29-09; and
- B. A one volume transcript of the hearing held on April 28, 2009, to consider my Motion to Dismiss for the Statute of Limitations docketed with this Court on May 11, 2009, hereinafter Vol SL.

## **FACTS**

1. In 1998, my experience included over 30 years law practice in the regulation of securities and futures operation; my prior law practice was in three states other than Florida; my licenses include registration as a stockbroker and registered commodity sales person and supervisor for both activities. Scott, Vol III, P 386, L 12 to P 387, L 10.
2. This case involves the corruption of Florida Law enforcement's participation in a sting commonly known as International Currency Exchange Corporation ("ICEC") initiated at the request of the US Commodity Futures Trading Commission – Enforcement Division (the "CFTC") and conducted under the supervision of the US Federal Bureau of Investigation (the "FBI") and the US Attorney's Miami office. Calabro T, Vol I, P 164, L 23 to P 165 L 1

3. Steven A. Frankel, Esquire, a member of the Florida Bar and Richard E. Maseri initiated the sting. Frankel, Vol I, P 75, L 18 to P 76, L 5. Appendix Ex FF.
4. The sting resulted in the theft of ICEC customer deposits by Barry E. Davidson, Esquire, a Receiver appointed in a Federal case that did not concern ICEC until former USDC for the Southern District Chief Judge Edward B. Davis transferred the ICEC customer deposits to Davidson. Respondent's Ex O.
5. Subsequently, USDC for the Southern District Judge Donald M. Middlebrooks allowed Davidson to be paid from the ICEC deposits for work that did not concern ICEC.
6. When I attempted to cause Frankel to provide 100% restitution to my ICEC depositor clients, Frankel asserted, and Middlebrooks found, conflicts of interests between Frankel and me that resulted in my disqualification as the ICEC customers' attorney.
7. On my disqualification, the ICEC customers were without funds or organizational ability to obtain substitute legal counsel.<sup>1</sup>
8. On July 25, 1998, Richard E. Maseri retained me to review a stockholders agreement that Steven A. Frankel, Esquire, ("Frankel") a member of the Florida Bar, had prepared to form International Currency Exchange Corporation ("ICEC"), a forex currency brokerage with Frankel and Maseri 50% owners.

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<sup>1</sup> I accepted the ICEC case on a contingent fee basis. Disqualification prevented me from aiding ICEC and its customers to find substitute counsel.

9. Sometime before August 4, 1998, Frankel told me he would act as his own attorney. Frankel T, Vol I, P 199, L 2 to L 5.
10. ICEC business purpose was to solicit brokerage accounts from the public where ICEC, Maseri and Frankel would claim exemption from registration under the CEAct. In addition, ICEC would operate pursuant to the guidelines announced in CFTC v Frankwell, 99 F.3d 299 (9<sup>th</sup> Cir. 1996). Scott, Vol III, P 388, L 15-19; Agreement of August 4, 1998, Ex FF.
11. Upon review, I recommended how the business had to operate to allow the business and its principals to be unregistered as follows:
  - a. Page 3, paragraph 2.2.1, that the business must operate within the guidelines announced in the case of CFTC v Frankwell, et al, 99 F.3d 299 (9<sup>th</sup> Cir. 1996) Scott, Vol III, P 425, L 18, to P 426, L 15, Appendix Ex FF, page 3, paragraph 2.2.1.
  - b. All sales to the public must be made from an office located within the 9<sup>th</sup> Circuit; the accounts had to have been segregated in the name of each customer; and no power of attorney could be obtained from any customer. Scott T, Vol III, P 395, L 12 to P 396, L 19; Appendix Ex 7.
12. On July 29, 2008, Frankel sent me a memo to state:

- a. at paragraph 1: “Unless you can provide me with very good reasons to incorporate in California, I would like to stay with a Florida corporation.” Appendix Ex 45, paragraph 1.
- b. in paragraph 4 that he would act as his own attorney. Appendix Ex 45, paragraph 4.
- c. In response, I personally explained to Frankel that ICEC had to do more than merely be incorporated in California but it also had to have its sales office and all customer contact from within the 9<sup>th</sup> Circuit. Scott, Vol III, P 395, L 12 to P 396, L 7.

13. Frankel fully understood my explanation that the operation had to be within the 9<sup>th</sup> Circuit as demonstrated by his testimony in a prior proceeding that was read into the record in this case as follows:

A. (sic Q) Did you ask Maseri to incorporate in Florida?

A. Yes

Q. What was the outcome of that?

A. Well, he informed me that Mr. Scott had informed him that we should form a California corp. The reason being is that California had litigated with the CFTC and could run currency exchange in their jurisdiction on an unregulated basis. And, since that litigation had not yet occurred in Florida, we would be better off with a California corporation.

Frankel, Vol II, P 222, L 1 to L 18; Appendix Ex K.

14. Frankel fully understood that all customer accounts had to be segregated and held in the name of the customer by his answer given in a prior record quoted in the record of this case as follows:

A. We were going to create a situation where everybody had their own separate account and no money could flow in the company except to be paid by the clearing house as a commission.

Frankel T, Vol II, P 223, L 8 to 25; Appendix Ex J.

15. On August 4, 1998, Frankel had a conversation with me. Frankel provided a statement on February 22, 1999, to the Broward County, Florida Prosecutor to report the conversation that was read into the record as follows.

“One of the things I (sic Frankel) did do at that meeting was confront Mr. Scott directly and ask him how long he knew Mr. Maseri and what his relationship was with Mr. Maseri. Can you answer those as you go along -- he told me that he knew Mr. Maseri for about ten years. I asked him do you know if that in fact was true. I don't know if that's true. That's what he told me. What else did he tell you? I asked him what he knew about Mr. Maseri, and if he knew anything detrimental about Mr. Maseri. His response to me was that Mr. Maseri, that he had tricked (sic traded), he being Mr. Scott, had traded currency with Mr. Maseri and that Mr. Maseri had never lied to him. And that is the total response.”

Frankel T, Vol II, P 249, L 22 to P 250, L 9; Resp Ex I.

16. On August 4, 1998, upon my completion of the review of the stockholders agreement and my special retainer limited to preparation of the customer



account forms, in the presence of Frankel and Maseri; I withdrew from the representation of Maseri. Scott, Vol III, P 439 L 5 to P 441, L 2.

17. On August 4, 1998, Frankel and Maseri formed ICEC, California. Frankel, Vol I, P 75, L 18 to P 76, L 5. Appendix Ex FF.

18. On August 5, 1998, I declined to serve as general counsel for ICEC. Respondent's Ex E. Scott, Vol III P 440 L 12-19.

19. On August 8, 1998, Frankel and Maseri signed a Stockholders Agreement to form ICEC, Nevada on substantially the same terms as ICEC, California. Ex GG. Frankel T, Vol II, P 313, L 1 to 3; Maseri, T, Vol III, P 378, L17-22.

20. On August 11, 1998, I delivered the ICEC customer agreement forms with a Newport Beach, CA sales office address to Maseri by email. Maseri T, Vol III, P 346, L 18 to 20; Petitioner's Ex 1-b.

21. Without my knowledge or involvement, Maseri edited the ICEC customer account forms to move the sales office from Newport Beach, California to Weston, Florida. Maseri T, Vol III, P 347, L 1 to 16; Scott T, Vol III, P 396, L 8-16.

22. Frankel participated in the decision to move ICEC from Newport Beach, California to Weston, Florida and assisted in the negotiation of the lease for the Weston, FL office. Frankel T, Vol III, P 238, L 16 to L 25.

23. Frankel visited the Weston, FL office once or twice every week. Frankel T, Vol II, P 261, L 15-25; Exhibit Q. Or, every few weeks. Frankel T, Vol II, P 288, L 12 to L 16.
24. On August 26, 1998, ICEC paid \$5,000 to Suicide Blonde Productions, Inc., a company Frankel controlled. Frankel T, Vol II, P 252, L 15, to P 253, L 3. Appendix Ex L.
25. Frankel and Maseri intentionally operated ICEC as a fraud in Florida and in violation of the CEAct by deposit of the customer money in a single account in the name of ICEC rather than operate within the 9<sup>th</sup> Circuit with deposits in the name of each individual customer as required by their stockholder agreement to operate within the Frankwell guidelines. Scott T, Vol III, P 395, L 3 to P 397, L 10; P 425, L 23 to P 426, L 9; Petitioners Ex 1-A and 1-C.
26. On November 5, 1998, Barry R. Davidson was appointed Receiver in the case of *CFTC v Maseri, et al*, (sic the “AIM” case) at USDC case number 95-6970. Respondent’s Ex O.
27. On November 25, 1998, Maseri telephoned to retain me on behalf of ICEC to use my best efforts to release the ICEC accounts at Prudential that had been frozen. Scott T, Vol III, P 395, L 3-8.
28. I had no notice prior to November 27, 1998, that ICEC operated its sales office from Weston, FL. Scott T, Vol III, P 452 L 8-11.

29. On November 30, 1998, ICEC retained me by written agreement to protect ICEC and its customers' deposits. Appendix Ex R.

30. On December 6, 1998, I confronted Maseri and Frankel with a list of the violations of the CEAct and the Frankwell guidelines that ICEC had committed under their supervision and control. Scott T, Vol III, P 409, L 21 to P 410, L 3.

a. As a result of their intentional operation of ICEC in violation of the CEAct and their failure to follow the Frankwell guidelines, I explained to Frankel and Maseri that if the ICEC customers received full restitution of their deposits, I would take no further action against them on behalf of the ICEC customers. Scott T, Vol III, P 400, L 3 to 8.

b. I further told Frankel and Maseri that should the money on deposit be insufficient to make full restitution to the ICEC customers, and should Frankel and Maseri refuse to make up the difference, I would bring an action against both of them on behalf of the ICEC customers. They both acknowledged that they understood and accepted my explanation and waived all conflicts of interest to induce me to proceed. Scott T, Vol III, P 400, L 9-19; Frankel waiver, Ex 17.

31. On December 7, 1998, in response to the ICEC and Receiver conflicting claims to the ICEC accounts at Prudential, Prudential interpleaded the deposits by filing an action in the United States District Court for the Southern District of

Florida (the “USDC”) styled *Prudential v CFTC, et al*, at case number 98-8891.

Appendix Ex II.

32. On December 15, 1998, the Sun-Sentinel Newspaper, South Florida Edition published an article to describe a raid on at least 10 Broward County telemarketing operations on Tuesday December 14, 1998, that included a raid on the ICEC, Weston, Florida office. Appendix Ex N. Frankel T, Vol II, P 329, L 15-16.
33. The telemarketing investigations, including ICEC, were under the supervision of the FBI and the US attorney. Calabro T, Vol I, P 164, L 23 to P 165 L 1.
34. On December 18, 1998, Frankel supplied me with written confirmation of his December 6, 1998, waiver of conflicts to allow me to represent ICEC and its customers against Frankel should that become necessary. Appendix Ex 17.
35. The December 18, 1998, waiver provided “After my explanation to you of the existence of potential conflicts of interests among the depositors, you have requested that our firm represent you in the limited capacity to attempt to have the accounts which hold your funds at Prudential released.” Appendix Ex 17.
36. At the signing of the December 18, 1998, waiver, Frankel told me that he had retained independent legal counsel to represent him. Scott T, V III, P 401, L 4-8; Appendix DD; Frankel T, Vol III, P 226, L 20 to P 227, L 16.

37. On December 21, 1998, Frankel signed and delivered an Addendum to the November 30, 1998, written ICEC retainer agreement to affirmatively state that “The Scott Law Firm, P.A. and William S. Scott have never represented Steven Frankel, individually . . .”. Appendix Ex 18; Ex R.
38. On January 15, 1999, Vail C. Gardner, Esquire, legal counsel to the Receiver, sent me a letter to report in the second sentence of the first paragraph: “The Receiver did receive a letter dated December 23, 1998 from Dennis J. Eisinger, counsel for Steven A. Frankel, regarding an alleged loan made by Mr. Frankel in the amount of \$180,000 to International Currency Exchange Corporation. (sic “ICEC”). Appendix Ex DD; Frankel T, Vol II, P 305, L 14 to P 307 L 1.
39. On January 15, 1999, over ICEC and certain of ICEC’s customer’s strenuous objection, Chief USDC Judge Edward B. Davis, entered an Order in the case of CFTC v Maseri, et al, at USDC number 95-6970 to add the ICEC assets that were interpleaded by Prudential at case number 98-8891 to the control of Barry R. Davidson, a receiver (the “Receiver”) appointed in the unrelated USDC case of CFTC v Maseri, et al, (the “AIM” case) at case number 95-6970. Scott T, Vol III, P 411, L 3 to 15; Docket number 187 in CFTC v Maseri, et al, case number 95-CV-6970 (sic the Maseri case).

40. On January 28, 1999, Prudential filed its Second Amended Complaint in Prudential v CFTC, et al, case number 98-CV-8891 to, among other things, add Frankel as a defendant. Appendix Ex I I; Ex 29 - Docket no. 16.
41. On March 1, 1999, Frankel signed his return of service of the Complaint filed by Prudential in USDC case 98-CV-8891. Appendix Ex 29 - Docket no. 73.
42. On or about May 1, 1999, Frankel defaulted in the Prudential case by his failure to file a responsive pleading. Appendix Ex 29, no pleading filed by Frankel.
43. On July 31, 2000, over ICEC and certain of its customer's strenuous objection, USDC Judge Donald M. Middlebrooks ("DMM") allowed the Receiver to charge fees and costs, including those that were unnecessary to the return of 100% restitution to the ICEC customers, from the ICEC assets. Docket number 291 in CFTC v Maseri, et al, at case number 95-CV-6970. Appendix Ex EE.
44. On December 30, 2001, Maseri supplied written confirmation of his December 6, 1998 waiver of conflicts to me. Appendix Ex V.
45. On July 3, 2002, because the ICEC assets were insufficient to make 100% restitution, certain ICEC customers filed a first amended complaint against Frankel and Maseri for the balance of their deposits in the USDC case of Investcan, et al, v Frankel, et al, at case number 02-60565. Appendix Ex 41.
46. On July 30, 2002, Frankel filed a Motion to disqualify me from representation of the ICEC customers in the USDC Investcan, et al, case. Appendix Ex 35.

47. On October 4, 2002, without reference to a hearing or other factual record, Federal Judge Middlebrooks granted the Frankel Motion to Disqualify me in USDC *Investcan, et al*, with the assertion that I appeared to have a conflict of interest because he found that I had represented Frankel after December 21, 1998. Appendix Ex 42.
48. The ICEC customers and I appealed the Judge Middlebrooks disqualification Order to the US Circuit Court of Appeals for the Eleventh Circuit.
49. On January 15, 2003, Carlos Leon, Esquire, (“Leon”), Bar Counsel originally assigned to this case, sent a letter to Steven A. Frankel, (“Frankel”), to tell him that none of his claims had merit. Appendix Ex Leon.
50. On March 28, 2003, by an unpublished opinion, the 11<sup>th</sup> Circuit Court of Appeals Judges Gerald B. Tjoflat, Stanley F. Birch, Jr., and Emmett R. Cox at case number 02-16312 BB, affirmed my disqualification, without oral argument or record evidence from the lower court, with a specific finding that I had violated Florida Bar Rule 4-1.9. Appendix Ex 43.
51. On June 25, 2005, The Bar filed its complaint against me to this Court that was assigned case number SC 05-1145. Supreme Court Docket, item 6-25-05.
52. A hearing before the Referee was conducted from June 18 through 20, 2007. Vol I through III.

53. On May 22, 2009, the Referee issued his Amended Report to recommend that I be suspended from the practice of law for 18 months and pay Bar costs. Docket entry May 29, 2009.

### **SUMMARY OF THE ARGUMENT**

Prior to 1996, the CFTC believed it had the right to regulate forex trading operations. The 9<sup>th</sup> Circuit ruled in CFTC v Frankwell, 99 F.3d 299 (9<sup>th</sup> Cir. 1996) that Commodity Exchange Act, 7 U.S.C. § 1 (the “CEAct”) did not extend to the regulation of forex currency trading. In response, the CFTC, in addition to an appeal, began investigations outside the 9<sup>th</sup> Circuit to collect evidence of forex trading fraud to present to the US Congress to support the CFTC request for an amendment to the CEAct to specifically include forex. The CFTC engaged the aid of the US Federal Bureau of Investigation (“FBI”) and the US attorney general. The FBI and the US attorney’s office established a forex telemarketing task force that included the Florida statewide prosecutor’s office. Detective John Calabro of the Broward County Sheriff’s office was asked to join the taskforce. Calabro T, Vol 1, P 164, L 23 to P 165, L 4.

In July, 1998, while I was legal counsel to Richard E. Maseri, (“Maseri”) a 50% owner of ICEC, I told Maseri and Steven A. Frankel, Esquire, (“Frankel”), the other 50% ICEC owner, that for them to operate ICEC while ICEC, Maseri and Frankel were unregistered under the CEAct, all ICEC customer contact had to be



from an office within the 9<sup>th</sup> circuit. In response to that advice, in August 1998, Maseri and Frankel established the ICEC office in Newport Beach, CA.

Without my knowledge, Maseri and Frankel moved ICEC from California to Weston, Florida. Frankel, a member of the Florida Bar and its complaining witness in this case, engaged in a criminal conspiracy with Maseri when he participated in the decision to move ICEC from Newport Beach, California, where it could be operated legally, to Weston, Florida, where its legal operation would be subject to attack by the US Commodity Futures Trading Commission (the “CFTC”). See *CFTC v Frankwell*, 99 F.3d 299 (9<sup>th</sup> Cir. 1996) for the legal positions of the CFTC and the forex industry in regard to the application of the CEAct to forex trading in 1998 when ICEC was formed.

After moving ICEC to Florida, ICEC solicited public customers to open deposit accounts to trade forex currency. ICEC also was intentionally operated in violation of the Commodity Exchange Act, 7 U. S. C. § 1 (the “CEAct”) by placing all of the customer money in an account in the name of ICEC rather than in segregated accounts in the name of the ICEC customers.

Maseri had been the defendant in a case before the USDC for the Southern District of Florida known as *CFTC v Maseri*, et al, case number 95-CV-6970 (the “Maseri case). In November, 1998, Barry R. Davidson, Esquire, (“Davidson”) a member of the Florida Bar, was appointed the Receiver in the Maseri case to locate

and collect the assets of Maseri to pay creditors Maseri defrauded in that case.

That past wrongful act by Maseri had nothing to do with the operation of ICEC.

Davidson sent a notice to Prudential Securities, Inc. (“Prudential”) where the ICEC accounts were located to claim possession of all accounts over which Maseri had the power to sign. Maseri had power to sign the ICEC accounts. Upon receipt of the notice from Davidson, Prudential froze the ICEC accounts.

Upon notice that Prudential had frozen the ICEC accounts, Maseri called me to ask that I use my best efforts to get the ICEC accounts released from the freeze. In response to the conflicting claims from ICEC and Davidson, Prudential interpleaded the ICEC accounts to the USDC for the Southern District of Florida at case number action 98-CV-8891 *Prudential Securities, Inc. v CFTC*, et al, (the ICEC case).

Prior to my appearance in the Prudential case for ICEC, I explained the potential conflicts among the ICEC depositors and had the agreement from Maseri and Frankel that the customers would have priority over any claim by ICEC or Frankel for return of any portion of the ICEC equity or repayment of any loans to ICEC. See November 30, 1998, ICEC agreement with Addendum of December 21, 1998, signed by Frankel. App Ex R. The written confirmation of his waiver signed by Maseri on December 1, 2001. App Ex V. And, the waiver of conflicts signed by Frankel on December 18, 1998. App Ex 17.

I have never represented Frankel. Ex R, Addendum.

There is not one scintilla of evidence that I have ever represented Frankel or Prudential at anytime. In regard to Frankel, the December 18, 1998, waiver specifically states that after explanation to Frankel I will attempt to have the accounts (sic in the name of ICEC) which hold your funds at Prudential released. To be certain that this waiver was not construed as a retainer, I included in the December 21, 1998, Addendum the written acknowledgement from Frankel that I had never been his attorney. Judges Middlebrooks, Tjoflat, Birch, Cox misconstrued these written agreements. Judge Gerstein, the Referee assigned to this case, made no discussion of these agreements in his report other than to call them retainers.

I appeared in the ICEC case to tell the court that the money on deposit was sufficient to return all of the deposits to the customers without the need of a receiver. Over the strenuous objections of ICEC, Judge Edward B. Davis, the then Chief Judge for the USDC for the Southern District of Florida transferred ICEC to be administered by Davidson in the unrelated Maseri case.

Judge Davis retired and the Maseri and ICEC cases were transferred to Judge Donald M. Middlebrooks. Judge Middlebrooks dismissed the ICEC case with an order that represented that all parties agreed to the dismissal. ICEC and its customers I represented never agreed to the dismissal.

Subsequently, Judge Middlebrooks approved the fee and cost statements of Davidson that included work not related to ICEC that were paid from the ICEC accounts. Upon determination of the deficiency from 100% restitution to the ICEC customers, I used my best efforts to obtain recovery from the perpetrators, including Frankel and Prudential. Frankel filed this bogus Bar case as a slap back for my efforts to achieve justice for the ICEC customers.

Arlene Sankel, Esquire, Bar Counsel and Judge Norman Gerstein, the Referee, have extensive law enforcement experience. Why they have caused an Amended Referee Report that fails to discuss the material issues presented by this case is unknown to me. Having said that, my best explanation is that they wish to avoid the retribution that too often comes to members of the legal profession who expose high level government dysfunction. See: *The Politics of Truth* by Joseph Wilson, Carroll & Graf imprint of Avalon Publishing Group, Inc., NY, NY, 2004; *The Canary in the Coalmine* by Jesselyn Radack, Self Published, Wash, DC, 2006. For fear of retribution that forced anonymous report of government crimes, see the behavior of the number two ranking member of the FBI: *A G-Man's Life* by W. Mark Felt ("Deep Throat"), Perseus Books Group, Cambridge, MA, 2006.

The FBI did not want its involvement publicized. Calabro T, Vol II, P 181, L 2 to 6. The purpose was to eliminate press coverage of the involvement of the CFTC. See Res. Ex N.

The purpose of no publicity of CFTC involvement was to make the CFTC testimony to Congress to add forex appear credible. By amendment in 2001, Congress specifically added forex to the CEAct to overcome the Frankwell decision.

This case provides the opportunity to this Court to pierce the code of silence that protects government dysfunction by finding of no misrepresentation or representation by me of Frankel. That finding will justify the reopen of the Federal cases to obtain 100% restitution for the innocent ICEC customers. That will also send a signal that the legal system intends those with knowledge of government misconduct to come forward to seek justice. For support of that result, see Northwestern Law Professor Steven Lubert, *The Importance of Being Honest*, New York University Press, 2008.

## **ARGUMENT**

### **POINT I**

I. Will the time to file a Bar Complaint within the six year statute of limitations for alleged conflict of interest and claimed misrepresentation begin to run from the date the attorney makes the alleged client aware that the attorney has an adverse position in regard to conflicts claims and the date of the alleged misrepresentation in regard to misrepresentation claims?

On February 8, 2006, I timely filed my Response to the Amended Bar Complaint which included an Affirmative Defense XI – Statute of Limitations at paragraph 175.

On June 18, 2007, my request for Reconsideration of the prior denial of my Motion to Dismiss for the lapse of the Statute of Limitations was denied without Order or Opinion to support the decision. Vol I, P 5, L 1 to P 11, L 23.

On April 28, 2009, the Referee denied my Motion to Dismiss for the lapse of the Statute of Limitations without entry of an Order or discussion in his Amended Report to this Court. Transcript SL Vol I, P 21, L 18 to P 23, L 10. (Transcript of 4-28-09 hearing filed at docket entry 5-11-09).

Claims made by the Bar must be brought within six years. Rule Regulating the Florida Bar 3-7.16(a). *Fla Bar Amendments to Rules Reg. Fla Bar*, 658 So. 2<sup>nd</sup> 930 (Fla 1995).

My alleged misstatement of fact was claimed to have been made by me on August 4, 1998. Amended Referee Report, Page 4.<sup>2</sup> In August, 1998, Frankel, a member of the Florida Bar, represented in the retainer from ICEC for me to prepare the customer account forms that he was afforded the opportunity to seek legal counsel of his choice. His choice of legal counsel was that he would represent himself. Bar Ex 9, Vol II, P 226, L 20 to P 227, L 16.

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<sup>2</sup> See my defense that I never made a misstatement to Frankel below.

The allegation of conflicts was the result of claimed representation of Frankel that occurred prior to December 21, 1998. On December 21, 1998, Frankel signed an addendum to state that I had never represented him; and Vail Gardner sent me a letter dated January 15, 1999, that refers to a letter she received dated December 23, 1998, to identify Dennis Eisinger, Esquire, as the attorney for Frankel. Appendix Ex 18, Ex DD and R; Frankel, Vol II, P 305, L14 to P 306 L 6.

A statute of limitations defense runs from the time the cause of action accrues which, in turn, is generally determined by the date when the last element constituting the cause of action occurs. *Hearndon v Graham*, 767 So. 2d 1179 (Fla 2000). Specifically, the beginning date for a statute of limitations to run on a Bar misrepresentation claims is the date of the alleged statement and on conflicts of interest claim is the date of notice by the attorney of the potential conflict and the intent of the attorney to represent interests that are in conflict with the alleged client. There are no statutory tolling provisions applicable to Bar claims of misrepresentation or conflicts of interest. *Fla Bar v Barrett*, 897 So. 2d 1269 (Fla 2005); *Fla Bar v Walter*, 784 So. 2d 1085 (Fla 2001); *Scott v Fla Bar*, SC 08-2227 (Fla12-8-08).

The party who seeks to escape the application of the statute of limitations bears the burden of proving circumstances that would toll the statute or demonstrate that the statute is not applicable to the facts. *Landers v Milton*, 370

So. 2d 368, 370 (Fla. 1979). No record facts are in this case to justify the denial of the dismissal of the Bar Complaint for failure to file within six years.

My license to practice law, although a privilege, once vested, is also a property right subject to divesture or suspension only upon satisfaction of due process of law. Sheiner v State, 82 So. 2d 657, 662-663 (Fla. 1955). The lack of discussion of my Statute of Limitations defense by the Referee in his Report or by this Court in its Order of January 30, 2009, is a denial of due process on this issue.

My alleged representation of Frankel began on December 18, 1998 when I presented him with notice of the conflicts among the depositors and that I would represent ICEC and the customers. Appendix Ex 17. The Bar Complaint was filed on June 27, 2005. SC 05-1145 - Florida Supreme Court docket item 1.

The filing of the Bar Complaint is beyond six years from the date my alleged wrongful actions. Once the defense of the statute of limitations has accrued, it is protected as a property right interest. Wood v Eli Lilly & Co., 701 So2d 344, 346 (Fla 1997); Wiley v Roof, 641 So. 2d 66, 68-69 (Fla. 1994); In Re Estate of Smith, 685 So. 2d 1206, 1210 (Fla 1966), cert. denied, 117 S.Ct.. 2434 (1997); Mason v Salinas, 643 So. 2d 1077, 1078 (Fla 1994).

A successful appeal based upon the toll of the statute of limitations renders all other issues moot. Haskins v City of Ft. Lauderdale, 898 So 2d 1120, 1123 (Fla 4<sup>th</sup> DCA 2005).



For the above reasons, the entire complaint must be dismissed for the lapse of the Statute of Limitations.

## POINT II

II. Are Bar Rules 4-4.1(a) and 4-8.4(c) satisfied when the attorney tells the truth and upon notice of an omission by the client that could be material, the attorney withdraws from representation of the client?

Frankel provided a statement on February 22, 1999, to the Broward County, Florida Prosecutor that was read into the record as follows.

“One of the things I (sic Frankel) did do at that meeting was confront Mr. Scott directly and ask him how long he knew Mr. Maseri and what his relationship was with Mr. Maseri. Can you answer those as you go along -- he told me that he knew Mr. Maseri for about ten years. I asked him do you know if that in fact was true. I don't know if that's true. That's what he told me. What else did he tell you? I asked him what he knew about Mr. Maseri, and if he knew anything detrimental about Mr. Maseri. His response to me was that Mr. Maseri, that he had tricked (sic traded), he being Mr. Scott, had traded currency with Mr. Maseri and that Mr. Maseri had never lied to him. And that is the total response.”

Frankel T, Vol II, P 249, L 22 to P 250, L 9; Resp Ex I.

Frankel does say the above is my total response to his questions. The Referee quoted language on pages 5 to 7 of his Amended Report provides what Frankel's impression was from what I said rather than report what I said.

Frankel's membership in the Florida Bar holds him to the highest standard of communication, conduct and knowledge. My answers to him regarding Maseri

were truthful. At no time did I say that Maseri was an honest man. My intent to do no harm to my client Maseri was twisted by Frankel's testimony into a misrepresentation based on Frankel's impression. The Referee was careful in his Amended Report to say that if I did not specifically say that Maseri was "an honest man" then I had no duty to disclose any adverse information about Maseri to Frankel. Frankel, on cross, was forced to admit that my statement ended with Maseri never lied to me; i.e. I never said Maseri was an honest man. Res Ex I, Vol II, P 249, L 15 to P 250, L 9.

The applicable Bar Rule is instructive.

**Bar Rule 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

In addition to telling Frankel only the truth, the business explained to me by Maseri and Frankel was to operate a forex brokerage legally within the 9<sup>th</sup> Circuit. Nothing in Maseri's background was material to the operation of ICEC as an honest business. In an abundance of caution, I resigned from the Maseri representation in the presence of Frankel on August 4, 1998. The retainer signed

that date was for me to prepare the new account forms for ICEC for its Newport, CA office, not to work for either Frankel or Maseri.

Maseri's background became material when Frankel and Maseri elected to move ICEC from California within the 9<sup>th</sup> Circuit where it was protected by the Frankwell decision to Florida, where it was not. Then to add exposure to the innocent customers they solicited, they deposited customer account money in an ICEC account at Prudential with Maseri as the signatory rather than in segregated accounts in the name of the customer with the customer as the signatory. Their actions were criminal. They were committed without my knowledge or participation.

Frankel should have been indicted for his criminal conduct in the operation of ICEC. However, Detective John Calabro of the Broward County Sheriff Department and T. Don TenBrook, Esquire, of the Broward County State Attorney's office, after full knowledge of Frankel's participation in the decision to move ICEC from California to Florida and the placement of the ICEC customer accounts in a single account at Prudential in the name of ICEC, elected to file a crime report without any explanation of Frankel's duty to supervise and his participation in the decisions to intentionally operate ICEC in violation of the CEAct. Instead Frankel was classified a victim. Vol I, Calabro T, P 170, L 25 to P 171, L 2.

Frankel's victim status gave him cover to not appear in the Prudential case where he was named a Defendant to defend the rights of the innocent ICEC customers he helped scam. In addition, the ICEC customers were not protected by the CFTC or the Federal Court from the fees and charges of Davidson for work in the Maseri case that did not involve ICEC or its customers.

My protests on behalf of ICEC and its customers were met with the unsupported finding by Judge Middlebrooks that I violated Rule 4-1.9 that was affirmed by the 11<sup>th</sup> Circuit and Frankel's Bar claims against me and an Amended Referee Report that fails to discuss the material facts of this case.

### POINT III

III. Do Bar Rules 4-1.7(a), 4-1.9(a), and 4-1.16(a)(1) require that the attorney have previously represented the party claiming conflict.

Retainer of an attorney is governed by contract law. An attorney, like all others, is legally permitted to limit the scope of his representation of a client and to obtain waivers of conflicts in advance of representation whenever appropriate.

*Florida Bar v Dunagan*, 731 So.2d 1237.

Frankel represented to me both verbally and by writing made on July 29, 1998 that he would act as his own attorney in regard to ICEC. Frankel T, Vol II, P 226, L 20 to P 227, L 16; Bar Ex 9; App Ex C, paragraph 4.

In this case, as a matter of law, the signature of Frankel to the December 18, 1998 letter from me wherein he acknowledges the explanation of the potential conflicts among the depositors (sic the customers are entitled to full restitution while Frankel as an owner/operator of ICEC, is not) is sufficient waiver to preserve my right to represent the other ICEC depositors adverse to Frankel. Bar Ex 17.

It is important to note that the deposits were in ICEC's name and not Frankel's, individually. My client was always ICEC and not Frankel. In addition, as stated above, Frankel is an attorney who had represented that he would act as his own legal counsel. He knew that all of my actions from inception of my retainer by ICEC on November 25, 1998, were on behalf of ICEC and its depositors, and no one else. Petitioner's Ex 16 and 17.

It should be noted that the Referee did not cite any fact that would support Frankel's contention that I was ever his lawyer. There are no facts or documents in the Record before this Court to support the Frankel or Prudential claim that I was ever their attorney. Appendix Ex. 16. 17 and 18.

The Court is asked to take judicial notice that in the brokerage industry, the broker has no ownership or other interest in the customer accounts. For the broker to attempt to obtain return of the customer accounts carried in its name at another broker can never create a conflict between the broker in whose name the account is carried and the customer. Accordingly, there was no conflict of interest between

ICEC and its customers when ICEC attempted to have Prudential or the Receiver return possession of the ICEC customer accounts.

Further, Frankel and Maseri, as owners of ICEC had agreed that the ICEC customers had preference over the ICEC deposits to any claims that ICEC may have had. Bar Ex 17. No claim was made by the Bar during the hearing that there was a conflict between ICEC and its customers. Upon transfer of ICEC to the control of Davidson, the only objective left was 100% restitution to the ICEC customers.

On December 21, 1998, Frankel provided me with a written Addendum to affirmatively state that I had never been his attorney. Appendix Ex R; Ex 18.

Contrary to the Order of October 4, 2002, entered by USDC for the So District Judge Middlebrooks without evidentiary hearing that was affirmed by US 11<sup>th</sup> Circuit Judges Gerald B. Tjoflat, Stanley F. Birch, Jr., and Emmett R. Cox, without oral argument, I never represented Frankel, individually. There are no facts or documents in the record before the Court in any of the Federal cases to support the Frankel or Prudential claim that I was ever their attorney. Appendix Ex. 16. 17 and 18.

The Referee Amended Report made no attempt to interpret the December 18 and 21, 1998 documents other than to call them retainers. Taken together, or

analyzed separately, they are clearly waivers from Frankel to allow me to represent ICEC and its customers' interests adverse to Frankel.

On December 6, 1998, I told Frankel and Maseri that they both must find lawyers to represent them because if the ICEC funds on deposit were inadequate to make 100% restitution and they refused to make the payment necessary, I would file suit against them to collect the difference. They both verbally agreed to that condition to induce me to accept the ICEC representation to use my best efforts to obtain a release of the ICEC funds from Prudential. Scott T, Vol III, L 3 to P 403 to L 15.

Maseri confirmed his verbal waiver on December 30, 2001. See App Ex V.

The four agreements, Frankel's representation that he would be his own attorney in July, his December 6 verbal waiver, his confirmation of the December 6 waiver by written acceptance of my letter of December 18, 1998, and his Addendum of December 19, 2009, prove I was aware of and concerned for my defense of any claim of conflicts of interest from Frankel. The issues presented by waiver of conflicts present questions of law that are to be reviewed by this Court de novo. The three written agreements, plus the absence of any discussion of them and the December 6 verbal agreement, are more convincing than the conclusions posed by the Referee.

## POINT IV

IV. May a collateral attack upon Federal court orders relied upon by the Referee be made?

Because the Referee recited the entry of Federal Court Orders that concluded that I violated Bar Rule 4-1.9, it is appropriate for me to explain the circumstances surrounding their entry.

No hearing or record was created by the USDC in regard to Frankel's alleged conflicts of interest. No oral argument was granted to me by the 11<sup>th</sup> Circuit. An unpublished 11<sup>th</sup> Circuit opinion is not available for consideration by either the Referee or this Court.

The finding by the Federal Court was in line with the prior wrongful grant of a Motion to Dismiss of the ICEC claims against Prudential, Dreyfus, and Frankel to cover-up the involvement of the CFTC in the ICEC scam.

The Referee points to no facts on the record to support that I represented Frankel on October 4, 2002, or any other date. Judge Middlebrooks order of October 4, 2002, is insufficient on its face because it, like the Amended Referee Report, fails to cite any facts of my representation of Frankel after December 21, 1998, or at any other time. The Affirmance by the 11<sup>th</sup> Circuit fails for the reason that the Middlebrooks order fails.



The USDC Order of disqualification must be disregarded because of the bias of Judge Middlebrooks to protect review of his approval of payment of the Receiver fees and costs that were unnecessary to the prompt return of the ICEC deposits to the ICEC customers. That bias extends to the Eleventh Circuit Opinion.

#### POINT V

VI. Will the attorney obligation to provide justice to the public override Florida Bar rules against misrepresentation and conflicts of interest?

I am positive that Frankel intentionally moved ICEC from within the 9<sup>th</sup> Circuit to Florida and rather than maintain separate customer accounts in the name of each customer, he failed to supervise to be certain that the customer accounts were not co-mingled into a single ICEC account in violation of the CEAct.

Appendix Ex K.

The Referee ruled that had the ICEC operation remained within the 9<sup>th</sup> Circuit with segregated customer accounts as I had advised Frankel before the ICEC business commenced, ICEC would have been perfectly legal. See Ref Amd Report, May 22, 2009, P 13, footnote 13.

No right to claim misrepresentation or extension of a conflicts of interest right extends to Frankel in these circumstances. *Kneale v Williams*, 30 So. 2d 284, 287 (Fla 1947).

The Florida evidence code provides:

(4) There is no lawyer-client privilege under this section when:

(a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud. §90.502, Fla. Stat. (1987).

The application of the statute and the above cited rule of law to the facts of this case prevent Frankel from asserting a conflicts of interest claim against me because it is undisputed that I told Frankel he had to operate ICEC within the 9<sup>th</sup> Circuit to not be registered under the CEAct pursuant to the Frankwell exception. Frankel disregarded this obligation to expose the innocent ICEC customers to loss when he moved ICEC from the protection of the 9<sup>th</sup> Circuit Frankwell opinion to the 11<sup>th</sup> Circuit. Frankel T, Vol III, P 238, L 16 to L 25.

Frankel's fraud against the ICEC customers prevents his assertion of conflicts of interest against me. Lawyers in Florida are to keep the public interests first. Confidentiality and conflicts of interest take second place to the attorney's obligation to protect the public. *Florida Bar v Calvo*, 630 So. 2d 548, 550 (Fla 1994).

To apply that rule to the facts of this case, in addition to the authority to use my best efforts to obtain return of the ICEC deposits granted by ICEC on November 30, 1998, and the Frankel Addendum of December 21, 1998, I was

obligated, once I learned that Frankel operated ICEC in intentional violation of the CEAct, to use my best efforts to protect the innocent ICEC customers he defrauded. Fla.Bar Code of Prof. Resp. D..R. 4-101(D) 1985; R. Regulating the Fla. Bar 4-1.6(b).

### CONCLUSION

Under normal circumstances, judicial opinions deserve great weight. However, in this case, the Federal USDC for the Southern District order that disqualified me was entered with bias to protect the overpayments to Davidson.

WHEREFORE, The Bar Complaint must be dismissed for the lapse of the Statute of Limitations or, in the alternative, (i) all of my statements to Frankel were true; and (ii) I have never been legal counsel to Frankel; or, in the alternative, Frankel's frauds against the ICEC customers eliminated his right to claim misrepresentation and conflicts of interest pursuant to Bar rules against me.

With costs assessed to the Bar.



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**IN THE SUPREME COURT OF FLORIDA**

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CASE NO. SC 05-1145

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**THE FLORIDA BAR**

**Complainant,**

**v.**

**WILLIAM SUMNER SCOTT**

**Respondent**

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**Certificate of Service**

On July 14, 2009, I hereby certify that the original and seven copies of the foregoing Respondent's Initial Brief was filed by first class mail, postage prepaid with the Hon. Thomas Hall, Clerk, 500 S. Duval St., Tallahassee, FL 32399 and a copy, by the same method, to Kenneth Lawrence Marvin, Esquire, Director – Lawyer Regulation, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300 and to Arlene Sankel, Esquire, Florida Bar Counsel, 444 Brickell Avenue, Suite M-100, Miami, FL 33131.



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**IN THE SUPREME COURT OF FLORIDA**

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CASE NO. SC 05-1145

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**THE FLORIDA BAR**

**Complainant,**

**v.**

**WILLIAM SUMNER SCOTT**

**Respondent**

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**Certificate of Compliance**

I hereby certify that the foregoing brief has been computer generated and printed on opaque, white, unglossed 8 1/2-by-11 inch paper. The lettering is black, in distinct type, double-spaced, with margins no less than 1 inch, and in Times New Roman 14-point font.



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