IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-1145

THE FLORIDA BAR

Complainant,

v.

WILLIAM SUMNER SCOTT

Respondent

_____/

RESPONDENT'S AMENDED REPLY/CROSS ANSWER BRIEF

William Sumner Scott
FBN 947822
36 NW 6th Avenue, 409
Miami, FL 33128

(305) 796-3176
Facsimile (305) 961-9949
wscott@wscottlaw.com

Respondent, Pro Se

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

THE FLORIDA BAR

Complainant, **SC Case Number 05-1145**

vs.

WILLIAM SUMNER SCOTT

Respondent FBN 947822

SCOTT AMENDED REPLY/CROSS ANSWER BRIEF

NOW COMES William Sumner Scott, the Respondent, pro se, to file my Amended Reply/Cross Answer Brief as follows:

TABLE OF CONTENTS

POINT I

A disciplinary Complaint must be filed by the Florida Bar within Six (6) years from the time the matter giving rise to the Complaint is discovered by the Bar complaining witness.

POINT II

The obligation upon an attorney in the representation of his client is to be truthful. The attorney acting in the service of his client is not responsible for the indications that his truthful answers convey to a third party. In the event the attorney learns of a possible misrepresentation by his client to a third party, the attorney's obligation is to withdraw from the representation of that client.

POINT III

Before a duty is imposed upon an attorney to refrain from claims against a party, that party must have been a client or have another relationship that imposes an obligation upon the attorney to not take an adverse interest and the alleged client must not have waived the potential conflict of interest at issue.

POINT IV

A respondent in a Bar Disciplinary action will be permitted to explain the bias of an ancillary Court that motivated the entry of an Order to disqualify the respondent to serve as the attorney for litigants in a case before that ancillary Court.

POINT V

When an attorney learns of injury to members of the public, it is incumbent upon the attorney, as an officer of the Court, to do his/her best to provide justice to the public.

POINT VI

Should my behavior be commended in the representation of my clients while the Bar complaining witness is sanctioned for his behavior?

TABLE OF CITATIONS

Cases

Laws, Rules and Regulations

SCOTT RESPONSE STATEMENT OF FACTS

1. I represented only Private Research, Inc. in the Case of CFTC v Maseri, et al, Case No. 95-6970-CIV-DAVIS (the CFTC case). Tom Tew, Esquire, represented Maseri. I merely gave the opening statement on behalf of all Defendants. Mr. Tew was present during that statement and had sole responsibility for representation of Maseri. T, Vol III, P 390, L 3 to L14. Ref. Amd R. P 3, 1st P, last line.
2. Frankel conducted no investigation of Maseri. T, Vol I, P 72, L 14 to 16.
3. a. The Bar has asserted by the use of quotation marks that my response indicated to Frankel that Maseri " had never lied to [sic Scott], that he was an honest man, [and] he had never lost money with him." Bar response page 4, middle of last paragraph citing T, Vol 1, P 74, L 11 to 15.

   b. On February 22, 1999, Frankel provided a statement under oath attended by Scott Dressler, Broward County State Attorney, and Sheriff's office Detective John Calabro, on loan to the Federal/ Florida task force investigating foreign currency telemarketing in Florida, and Gary S. Phillips, Frankel's attorney. In that statement Frankel explained events on August 4, 1998, as follows:

   Frankel:

"One of the things I did do at that meeting (sic August 4, 1998) was confront Mr. Scott directly and ask him how long he knew Mr. Maseri and what his relationship was with Mr. Maseri.

Question:

Can you answer those as you go along ? What did he (sic Scott) tell you?

Frankel:

"He (sic Scott) told me that he knew Mr. Maseri for about ten years.

Question:

Do you know if that in fact was true.

Frankel:

"I don't know if that's true. That's what he told me."

Question:

"What else did he tell you?"

Frankel:

"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 was his total response to me." [1]

Read into the record in this case, P 249 L 20 to P250, L 9; Excerpt of P 18 of Frankel statement of February 22, 1999, admitted as Ex I.

[1] The transcript has the end quotation mark misplaced and the last sentence misquoted. As evidenced by Exhibit I, the location of the end quotation should be after Frankel said: And that was his total response to me".

Question: Do you have any knowledge that I knew Maseri differently than for ten years and that he never lied to me?

Frankel: No.

Vol II, P 250, L 23 to P 251, L 1.

4. a. The Bar contends that Frankel did not understand that his business could only operate within the 9th Circuit. Bar Response, P 6, carry-over paragraph.

b. Page 48 of Frankel's statement to Broward County, Florida, law enforcement on February 22, 1999, was read into the record as follows:

Question:

"Did you ask Mr. Maseri to incorporate in Florida?

Frankel:

"Yes."

Question:

"What was the outcome of that?"

Frankel:

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

Read into the record in this case, Vol II, P 222, L 12 to 18; Excerpt of P 48 of Frankel statement of February 22, 1999, admitted as Ex K.

5. a. The Bar response contends the Maseri personal services agreement was signed on August 4, 1998, without any objection from me. Bar Response Page 6, first full paragraph.

   b. I was not present when the personal services agreement was signed. As Maseri and I testified, Maseri and Frankel withheld the personal services agreement from me after my explanation to Frankel and Maseri that Maseri could not sign it. Vol III, P 373, L 4 to L 13; P 375, L 23 to L 25; P 389 L22 to P 390 L2; P 391, L 19 to P 392, L22.

6. a. The Bar asserts that I was retained as the attorney for the business they formed. Bar Response Page 7, 1st paragraph.

   b. My retainer was limited to the preparation of the new account forms. Ex 9.

7. a. The Bar asserts that the new account forms used a Weston, FL address. Bar Response, Page 7, footnote 7.

   b. The new account form prepared by me and sent to Maseri and Frankel by email had the business located in Newport Beach, CA address. Vol III, P 346, L 18 to 347, L 16; P 396, L 4 to L 12; P 451, L 2 to L 9.

8. a. The Bar asserts that I was Frankel's tax attorney to suggest the change to a Nevada Corporation. Bar Response, P 7, last line.

   b. I had nothing to do with the formation of ICEC Nevada. Vol I, P 27, L22 to 25; P 87 L 5 to 10;

9. a. The Bar asserts that on December 15, 1998, Frankel learned that the Weston office had been raided by law enforcement officers. Prior to that time, Frankel had no indication that the company was being run in any unlawful manner. Bar Response, P 8, 1st paragraph.

b. On July 29, 2008, Frankel sent me a memo to state:

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.

in paragraph 4 that he would act as his own attorney. Appendix Ex 45, paragraph 4.

My explanation to Frankel in response to paragraph 1 above that the business had to operate from California while Frankel served as his own attorney pursuant to paragraph 4 established Frankel's knowledge that he knew the business was operating in violation of the Commodity Exchange Act, 7 USC 1, et seq from sometime prior to November 25, 1998, when, as a 50% owner of ICEC and member of the Florida Bar, he participated in the move of the business from Newport Beach, CA to Weston, FL and allowed the business to put all of the business customer money in a single business account at Prudential Securities, Inc. with Maseri as the sole signatory.

In response to Frankel's first paragraph in his July 29, 1998, memo to me, at Maseri's direction, I explained to Frankel that, to be unregistered, all ICEC sales to the public must be made from an office located within the 9th Circuit; the customer brokerage accounts had to be segregated in the name of each customer; and no power of attorney could be obtained from any customer. Scott, Vol III, P 395, L 12 to P 396, L 7.

After my explanations to Maseri and Frankel, they agreed to form a California corporation and that they would establish a California sales office. Vol III, P 346, L 18 to P 347, L16; P 366 L 16 to P 367, L 4.

Frankel fully understood my explanation that the operation had to be within the 9th 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.

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:

"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.

10. Frankel contacted me on December 15, 1998, and I told him that the Commodity Futures Trading Commission (the "CFTC") had an injunction against Maseri that caused law enforcement to raid their business office. Vol I, P 92, L 9 to 13.

11.a. The Bar contends that upon the resignation of Velazquez, that I had no further authority to act as the attorney for ICEC and that Frankel had a right to approve specific pleadings. Bar Response, P 10, carry-over P, last line and 1st P, 3rd sentence.

b. Maseri and Frankel approved my retainer to obtain return of the deposits to ICEC. Once that consent was given for the benefit of the depositors, all direction as to pleadings filed and right to revoke my employment vested solely in the business depositors.

12. a. The Bar and the Referee contend that Prudential Securities, Inc. had the right to claim conflicts of interest against me. Ref Amended Report P 11, last sentence of carry-over paragraph and Bar response P 10, last paragraph .

b. There is no record evidence that Prudential was ever my client or otherwise had a right to claim conflicts of interest against me.

13. a. The Bar contends that the USDC for the Southern District disqualified me for violation of Rule 4-1.9 of the Rules Regulating the Florida Bar. Bar Response P 16, carry-over paragraph.

b. The USDC for the Southern District disqualified me because "it appears that I continued to represent Frankel". Ex 42.

14. a. The Bar contends that the Referee found that I had said that Maseri was an honest man. Bar Response, P 26, 1st paragraph.

b. The Referee found (1) that my answers indicated Maseri was an honest man but (2) that, if I did not specifically say that Maseri was an honest man, then no obligation to disclose Maseri's history existed. Referee Amd R, P 7, 1st full paragraph.

15. Barry R. Davidson, a member of the Florida Bar, was appointed Receiver to collect the assets of Richard E. Maseri in a USDC for the Southern District of Florida case unrelated to ICEC. Vol III, P 449, L 2 to L 8.

16. On or about January 29, 2002, Judge Donald M. Middlebrooks of the USDC for the Southern District of Florida issued an Order to approve the final distribution, including over $100.000 in legal fees and costs paid from the ICEC customer funds to Davidson for the search of Maseri Assets to pay claimants unrelated to the ICEC customers. Vol III, P 411, L 8 to 15.

17. My actions and motives were solely to obtain full restitution for the innocent ICEC depositors as evidenced by my following testimony:

> Q. Mr. Scott, I would like to show you a letter dated June 9th of 2005 that you wrote to Carlos Leon, former Bar Counsel in the Miami Branch of The Florida Bar.
> Can I direct your attention, please, to the highlighted paragraph? Would you read that to the Court, please?
>
> Scott: "Because Mr. Frankel is an attorney, he would participate as a 50 percent owner in the formation, sale of interest, and operation of ICEC from an office in Florida, after knowledge of my advice to Maseri, only under the protection of immunity from prosecution and civil responsibility."
>
> Q. Would you tell the Court, please, all of the people who are listed in the cc that you copied that letter to?
>
> Scott: Charlie Crist, Florida State Attorney; Michael J. Satz, Broward County State Attorney; John F. Hartnett (ph.) (sic Harkness), Executive Director of the Florida Bar; Alan Pastel (ph.)(sic Pascal), Bar Counsel, Florida Bar; Bernie Bogar (ph.)(sic Bober), Esquire, Public Defender for Maseri; Richard E. Maseri, 50 percent owner of ICEC; Steven A. Frankel, Esquire, 50 percent owner of ICEC; Maureen O'Donnell, Esquire (sic Donlan), Assistant U.S. Attorney; Sharon Brown Riska (ph.) (sic Brown-Hruska), Acting Chairman of the Commodity Futures Trading Commission; the Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida; Alberto Gonzalez, Esquire, U.S. Attorney General; William H. Donaldson, Chairman of

the Securities Exchange Commission; Guy M. Tunnel, Commissioner, Florida Department of Law Enforcement.

Q. I would like to show you a letter dated March 21st, 2005, directed to Maureen O'Donnell, (sic Donlan) Assistant United States Attorney, written by you.
Would you please just read the three lines that are highlighted for the Court?

Scott: Briefly stated, Prudential and Steven Frankel participated in a sting to detect and prosecute fraudulent sales of Forex accounts in Florida.

Q. Would you tell the Court, please, who you copied this letter to, please?

Scott: Michael J. Satz, Broward County State Attorney; Bernie Bogar, (sic Bober) Public Defender for Richard E. Maseri.

Q. Do you have any remorse, Mr. Scott, for sending those two letters and others like them, attacking Mr. Frankel's reputation in the community?

Scott: I'm not sure I attacked his reputation in the community. I didn't send them to the newspaper and I haven't communicated them socially over a cocktail. I'm doing what I believe is my responsible job as an Officer of the Court and licensed attorney in Florida to bring to the attention of those who I think should take action against somebody who I think has committed a crime.

Now, to the extent that somebody might think that that damages his reputation, I didn't (sic do) stand on truth as a defense. I believe I have adequate grounds to write those letters, and I participated when it was formed on August 4th. I told them exactly what they had to do to operate a legal business. They didn't come close to doing it.

No, why would I have remorse? I don't understand where the remorse would come from. Why would that be generated within me for goodness sakes? I'm trying to consistently perform a job that I think should be done for the public, that they shouldn't be defrauded by

Government agents and their operatives simply because their intentions are good.

Vol III, P457, L 8 to 460 L 24; Ex 50 and 51.

ARGUMENT

POINT I

A Disciplinary Complaint must be filed by the Florida Bar within Six (6) years from the time the matter giving rise to the Complaint is discovered by the Bar complaining witness.

This Court is required to apply the literal meaning and past interpretations of the Rule by case law to the facts of this case rather than rewrite the Rule to conform to the Bar manufactured commencement measured by when the complaining witness filed his complaint with the Bar or by the time between when the complaining witness filed his complaint with the Bar and the Bar filed its complaint with this Court. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) [In interpreting a statute (sic Rule) courts must presume it means what it says and when the words are unambiguous, the judicial inquiry is complete.]

The test for the lapse of the opportunity for the Bar to file a disciplinary Complaint with this Court that complied with the Statute of Limitations Rule 3-7.16 is quite clear. The matter giving rise to the Complaint is the alleged wrongful action by the attorney. The time for the statute to commence to run was the date the Bar complaining witness learns of the alleged wrong committed by the

attorney. The six year limitation lapses upon the Bar's failure to file a complaint with this Court within six years from the date the complaining witness learned of the event. *Hearndon v Graham*, 767 So. 2d 1179 (Fla 2000). *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 Bar admits that the date of my alleged false statements was August 4, 1998 and that I told Frankel of Maseri's past problems on December 15, 1998. Bar Response Pages 4 and 8; See also Vol I, P 92, L 9 to 13.

My letter dated December 18, 1998, that was accepted and agreed to by Frankel specifically says that I explained the potential conflicts among the depositors to Frankel. Accordingly, by December 18, 1998, Frankel was on notice of all of matters related to his Bar claims against me.

The Bar correctly states in its response that its complaint was filed with this Court on June 27, 2005. Bar Response, page 1.

The Bar asserts that the time to measure the six years begins when the complaining witness files his complaint with the Bar. This assertion requires a remedial reading lesson for all of us who believe that the "matter giving rise to the inquiry or complaint is discovered" applies to the complaining witness, not when the Bar learns of the matter.

The Rule appears unambiguous to me.

The Rule also appeared quite clear to this Court when it decided *Fla Bar v Barrett*, 897 So. 2d 1269 (Fla 2005). In that case, Barrett argued that the reference to Molly Glass in the Bar complaint against him was impermissible since that claim was barred by the six-year statute of limitations provided in Rule Regulating the Florida Bar 3-7.16(a). This Court ruled Barrett's argument was incorrect. The time for the statute to begin to run is measured from the date the alleged wrong is committed against the complaining witness. And, because the Molly Glass wrong occurred in 1994, Rule 3-7.16 did not apply to Barrett because it was not adopted until 1995. See, also *Florida Bar v Walter*, 784 So. 2d 1085, 1086 (Fla. 2001) which also measured time from the date the complaining witness learned of the matters.

The Bar also made an attempt to bring into play in this case the "reasonable test" that was in effect prior to the adoption of Rule 3-7.16. There is no reasonable test applicable to this case as all actions occurred in 1998, after the adoption of Rule 3-7.16 in 1995. That rule makes no reference to a reasonable test. The standard is absolute, either the Complaint was filed within six years of when the alleged client became aware of the alleged wrongs or it was not. Certainly, more than six years lapsed from December 18, 1998 to June 27, 2005.

After the Bar response was filed, this Court entered its Order of September 25, 2009 to permit me to bring my Statute of Limitations issue in my brief. That

subsequent Order overcame the Bar assertion that the prior denial of my Statute of Limitations defense on January 30, 2009 prevents consideration of that defense.

My laches defense was presented in my Answer but not preserved in my initial brief and, therefore, should not have been mentioned by the Bar in its Response. Having said that, in footnote 32 on page 32 of its Response Brief, the Bar makes the claim that the delay in this case was caused by my assertion of the lapse of the Statute of Limitations. The case proceeded on the same time schedule as it would have had that defense not been asserted as no stay was sought or granted in this case.

Although my right to practice law is a privilege, once my license to practice is granted, I became an officer of this Court. That status is vested and entitled to protection of due process of law.

A denial of a Statute of Limitations defense on grounds not available or defined prior to the facts that established the defense would be a violation of procedural and substantive due process afforded to me by Article I, section 9 of the Florida Constitution and Amendments 5 and 14 of the United States Constitution. *Wiley v Roof,* 641 So. 2d 66,68 (Fla 1994); *Boynton v State*, 64 So.2d 536, 552 (Fla 1953); *Loncher v Thomas*, 517 U.S. 314, 116 S. Ct. 1293, 134 L.Ed. 2d 440 (1996).

I have a fundamental right to be free from any Bar complaint once the six year statute of limitations has run. *Dinh v. Rust International Corp.*, 974 F.2d 500 (4th Cir. 1992) [the statute of repose had created substantive rights that *could not* be legislatively destroyed once vested without violation of Article I, Section 10, Clause 1 of the Federal Constitution, which provides that '[n]o state shall pass any … ex post facto law.']

Throughout the history of the United States, the various states and Federal government have established that statute of limitations that were set were to be honored to be sure that claims do not contravene the Due Process Clause because to do so would offend the principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Albright v. Oliver*, 510 U.S. 266, 282 (1994) (Kennedy J. and Thomas J., concurring.)

For this Court to rewrite Bar Rule 3-7.16 after the facts of this case have been established to measure time from what had been previously irrelevant events would be a contravention of historical practice that dates back to the common law in England that shows a general repugnance towards retrospective legislation in general. *See Dash v. Van Kleeck*, 7 Johns 477 (1811.) ["There has not been, perhaps a distinguished jurist or elementary writer, within the last two centuries, who has not had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with statutes of limitation. Since the country's

earliest days the meaning of these statutes has been unambiguous. When the statute of limitation has expired, so too has the cause of action. So clear has this rule been that throughout the country's history it has only been disputed on rare occasions."]

See *Hart Moore v. State*, 43 N.J.L. 203 (1881) ["Until the fixed period has arrived, the statute is a mere regulation of the remedy, and, like other such regulations, subject to legislative control; but afterwards, it is a defense, not of grace, but of right; not contingent, but absolute and vested; and, like other such defenses, not to be taken away by legislative enactment."].

See *Adams v. Woods*, 6 U.S. 336 (1805)["This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years …"].

Indeed, in only a limited line of civil cases has the statute of limitations been deemed subject to retroactivity and only where the underlying right was conclusively shown not to have been destroyed. *See* *Campbell v. Holt*, 115 U.S. 620 (1885). "The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125.

POINT II

The obligation upon an attorney in the representation of his client is to be truthful. The attorney acting in the service of his

> client is not responsible for the indications that his truthful answers convey to a third party. In the event, the attorney learns of a possible misrepresentation by his client to a third party, the attorney's obligation is to withdraw from the representation of that client.

My legal practice centers upon the formation and operation of investment businesses engaged in the brokerage and sale of securities and futures. In those industries, the exposure to allegations of regulatory and criminal violations committed by clients and blame of loss of money by depositors upon brokers is constant.

It has been my experience that past criminal convictions or regulatory history do not equate to a projection of future dishonest conduct. In the ten years I represented Maseri, his announced goal was to engage in honest business practices. His announced goal to me in his proposed deal with Frankel was no exception.

Unknown to me at the time the business was formed, Maseri and Frankel intended to expose the business customers to Federal CFTC claims of law violations that could cause the customers to lose their ICEC deposits.

That intent is evidenced by the decision to move ICEC from California to Florida that was made by Maseri and Frankel equally as 50% owners of ICEC after they knew that move would expose ICEC and them to the claim that they operated

a brokerage business without proper registrations. In addition to the Bar Response quote from the ICEC agreement that Maseri would be unregistered, the same agreement also provides that Frankel and ICEC would also be unregistered and all three, according to my opinion announced and accepted by them before the operation commenced, had to be registered with the CFTC to engage as a forex broker in Florida. The obligation to be CFTC registered did not extend to forex operations within the 9th Circuit. See *CFTC v Frankwell, et al,* 99 F.3d 299 (9th Cir. 1996).

Maseri has past adverse criminal and regulatory history while Frankel has none. Ergo, because they both participated in the same illegal act, i.e., the move of ICEC to Florida, past adverse history is not the test of future behavior.

And, it is my belief that past adverse history should not bar a person from seeking honest endeavors. The Referee found that the forex brokerage business that Maseri and Frankel told me they would operate would not violate the USDC for the Southern District of Florida injunction against Maseri engaging in the commodity business without registration. Ref Amd R P 4, footnote 2. And, in my opinion, which has not been contradicted, it would have also been in legal compliance pursuant to *Frankwell.*

The Referee and the Bar would have this court believe that I was obligated to tell Frankel of Maseri's past to prevent him from engaging in an honest business.

What right is there to claim that a person with a past criminal record is anything but a presently honest man? Certainly, my intent to leave the impression that Maseri was an honest man is appropriate because Maseri is my client and I owe no duty to Frankel other than to tell him the truth. The truth on August 4, 1998, was that Maseri had never lied to me. Frankel's impression gained from my honest answer is not my responsibility, particularly since Frankel is an attorney who had elected to do no independent investigation. Maseri's past transgressions were a matter of public record.

In addition, Frankel represented in the stockholder agreement that his net worth, exclusive of home, automobile, and household furnishings, was $1,000,000. That made him an "accredited investor" under SEC Rules 501 to 506 of Regulation D, which in turn obligated him to do his own due diligence. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125, 126-27 (1953) [accredited investors are able to fend for themselves financially and intellectually].

This is particularly true in this case because Frankel is an attorney licensed to practice in New York and Florida.

Frankel admitted he did no due diligence.

He must fulfill his obligation to protect himself under the law before he may look to me to provide him information against the best interests of my client. Bar Rule 4-4.1 recognizes that my first duty is to my client – after I tell the truth, if it appears to me that my client owes a duty to speak, then my obligation is to withdraw from representation of the client.

Because Frankel signed the ICEC stockholder agreement, he is obligated to know and follow the ***Frankwell*** guidelines. And, because he is a lawyer, he is unable to claim he did not know what the guidelines were.

Having said that, he did know the business had to be operated in the 9th Circuit and that the customer accounts had to be in the name of the customer. As a 50% owner he was obligated to be certain that those guidelines were followed. He did not do that. There would have been no loss had the customer accounts been in the customer names and the operation within the 9th Circuit. Davidson was able to get possession of the customer accounts because they were put in a single ICEC account in Maseri's name. Frankel was obligated by the Stockholder Agreement and applicable law to be certain neither of those events occurred.

The Referee also held that because Maseri was on probation for writing a bad check and under an injunction that prohibited him from engaging in any business regulated by the CFTC, I had no right to form the opinion and specifically tell Frankel that Maseri was an honest man.

Assume that I did say that Maseri was an honest man to Frankel, my obligation to tell the truth includes my right to express my opinion that a former felon, now on parole and under a Federal injunction to not engage in a regulated business without regulation, is an honest man. Had I said that Maseri was an honest man, Frankel could not object because he had no evidence on August 4, 1998 that Maseri would do anything that was dishonest on that day or any other day in the future. Past transgressions, including current probation and injunction, can not result in a current finding that a person is dishonest in his attempt to operate an honest business within the terms allowed by the injunction.

On August 4, 1998, Maseri was expecting to close the investment by Frankel of $185,000 into a forex currency trading brokerage business where Maseri, Frankel, and their proposed business would not be registered with the Securities and Exchange Commission pursuant to the Securities and Exchange Act of 1934, 15 U. S. C. § 78a, et seq. or with the Commodity Futures Trading Commission (the CFTC") pursuant to the Commodity Exchange Act, 7 USC § 1, et seq. (the "CEAct").

As stated in the agreed facts, Maseri was under an injunction from a prior Federal case to not engage in CFTC regulated business. Ex 3. These circumstances put me on notice to be very careful in my dealings in the representation of Maseri in his proposed business with Frankel.

Frankel sent me a first draft of their proposed shareholder agreement without any requirement for Maseri to represent his litigation and regulatory history or any explanation of how they would legally operate a forex brokerage firm in Florida without registration under the CEAct. This put me on notice that Frankel did not know what he was doing.

Frankel sent a memo to me on July 29, 1998 to tell me no language as to attorney representation was necessary as I was representing Maseri and he was a practicing attorney in Florida. He testified on cross that he was acting as his own lawyer. Vol II, P 227, L 11 to L 16.

Frankel's questions about Maseri on August 4, 1998 were contrived by Frankel to set me up to take his losses should his agreement with Maseri prove unsuccessful at best, and a set-up that included Maseri, at worse. Maseri was going to close a $185,000 deal that was going to provide him with an honest living. Maseri arrived late at the meeting to give Frankel the opportunity to ask me questions. Would a man with Maseri's background be late to this meeting? Not hardly.

Frankel said his questions were: how long had I known Maseri; how did I know him; my answers, ten years;; I had a trading account with him that lost money, but he never lied to me. Frankel then testified that was all I said to him. The prior Frankel statement admitted into evidence is absolute that my answers

were limited to my personal experience with Maseri that were truthful – no opinion of his honesty was given. See Exhibit I.

And, a careful reading of the hearing transcript cited by the Referee will disclose that Frankel merely said that my answer that Maseri never lied to me indicated to Frankel that Maseri was an honest man. Indications are not part of the Florida Bar Rule 4-1.1 to require me to go against the best interests of my client.

Frankel failed to disclose in his prior statement or in the proceeding before the Referee in this case that he asked me a final question. He asked what I knew of Maseri's reputation as a businessman in Ft. Lauderdale. I answered that Frankel had to do his own due diligence to put him on notice that he may need to know additional information about Maseri. T, Vol III, P 437, L 17 to 20.

Florida Bar Rule 4-4.1 provides:

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 the fact that all of my answers were truthful, the Referee found the business I advised Maseri to form was perfectly honest. Accordingly, there could not have been any violation of Rule 4-4.1.

RULE 4-8.4 MISCONDUCT

A lawyer shall not:

> **(c)** engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;

As stated above, the Referee found that had Frankel and Maseri followed my advice on how the business should be formed and operated (i.e., operated from within the 9th Circuit with each depositor's money held in a segregated account the name of the depositor), they would have been in full compliance with the injunction against Maseri. Ref Am Report, page 4, Footnote 2. Accordingly, my conduct could not have violated Rule 4-8.4.

My answers were truthful without dishonesty, fraud, deceit, or misrepresentation and my actions did not aid Maseri to engage in a criminal or fraudulent act.

Frankel had no right to rely upon me in any event. I was Maseri's attorney, not his, and he represented his net worth was over one million dollars in the agreement with Maseri. That made Frankel an accredited investor. All accredited investors are deemed competent and required to conduct their own due diligence.

In addition, Frankel's losses were caused by his decision to move the business from the 9th Circuit to the 11th Circuit and put the money in Maseri's name rather than in segregated accounts in the name of each depositor.

POINT III

> Before a duty is imposed upon an attorney to refrain from claims against a party, that party must have been a client or have another relationship that imposes an obligation upon the attorney to not take an adverse interest and the alleged client must not have waived the potential conflict of interest at issue.

There was never any complaint made by the Bar or evidence presented at the hearing to assert that I owed a duty to Prudential Securities, Inc. Although Prudential did claim I had a conflict, it was never based upon any relationship I had with Prudential, but on Prudential's erroneous assertion that my attempts to get the ICEC funds back from Prudential created a conflict between Prudential, ICEC, and the ICEC depositors. No relationships were present that would support that claim.

Nor was there any claim by the ICEC or its depositors that my actions were in conflict with either of them. To the contrary, ICEC, Frankel, Maseri and the depositors who retained me agreed that I should use my best efforts to obtain return of the ICEC funds, first when they were in the hands of Prudential and again

when they were in the hands of the Maseri Receiver. There is no dispute on the record from ICEC, Maseri or the ICEC customers. ICEC, consistent with all investment clearing brokers, made no ownership or other claims against the depositors accounts. And, I never made any claim to Prudential or the Receiver that was in conflict with Frankel's position that ICEC was entitled to return of its deposits represented by the unused portion of Frankel's loan.

Frankel is the only Bar complaining witness. On December 18, 1998, Frankel waived the potential conflicts between the depositors to allow me to proceed to attempt to obtain release of the ICEC deposits. See Ex 17.

On December 21, 1998, to induce me to continue efforts and allow me to sue Frankel in the event the ICEC depositors did not get 100% restitution, Frankell signed an Addendum to confirm that I had never been his attorney.[2] See Ex 18.

Once the December 18 and 21, 1998 agreements from Frankel were obtained, only the ICEC customers, as third party beneficiaries had the legal right

[2] A claim of attorney client privilege was to be asserted by Frankel or me to protect the confidentiality of a meeting between Frankel, his attorney Gary Phillips and me regarding my assertion to Frankel that he was obligated to appear in the Prudential case. That claim of privilege was never exercised. And, it was never intended by Frankel or me to interfere with my right to sue Frankel. To the contrary, the meeting was to confirm my notice of my intent to sue him. At that time, Frankel believed the money at Prudential and Dreyfus plus the remainder of his loan would be sufficient to pay 100% restitution to the ICEC customers.

to terminate them. *Thompson v. Commercial Union Insurance Co*., 250 So. 2d 259, 264 (Fla. 1971), [Third Party rights are preserved by the common law].

The ICEC customers never made any claim to terminate the third party arrangement I made with Frankel to preserve their right to have me as their attorney in the event they did not receive 100% restitution.

The Referee and Bar Counsel believe that, by their not discussing Frankel's waiver and representation that I was never his attorney in the Amended Referee Report or the Bar Response, my defenses will disappear or be merged into the Order entered by USDC Judge for the Southern District of Florida, Donald M. Middlebrooks and the affirmance of that Order by the US Court of Appeals for the Eleventh Circuit.

For reasons discussed in this section and below, my defenses of waiver and no representation are good against Frankel.

POINT IV

A respondent in a Bar Disciplinary action will be permitted to explain the bias of an ancillary Court that motivated the entry of an Order to disqualify the respondent to serve as the attorney for litigants in a case before that ancillary Court.

This Court is solely responsible for interpretation and enforcement of its Rules as they relate to the practice of law in Florida. Within the scope of its

authority and responsibility in that regard, is the right to look behind an ancillary Court's conclusion that a Florida Bar member has committed a Bar Rule infraction to determine if in fact the infraction occurred.

It is without question that the Referee and this Court may consider ancillary decisions. See 90.201, Florida Statutes (2005), entitled "Matters which must be judicially noticed," provides that a court shall take judicial notice of: "Decisional, constitutional, and public statutory law and resolutions of the Florida Legislature and the Congress of the United States and *Fla Bar v Donald Tobkin*, 944 So. 2d 219.

It should be noted that Judge Middlebrooks disqualified me for an appearance of a Rule violation rather than a violation. Appearance of conflicts is a judgment call. My judgment was there was no conflicts with Frankel. No assertion has been made by Frankel or the Bar or by Judge Middlebrooks that my judgment was made in bad faith. To the contrary, I had the waiver of December 18, 1998, and the written representation by Frankel of December 21, 1998, that I had never been Frankel's attorney to support my judgment that there was no conflict to prevent my representation of the innocent ICEC depositors against Frankel. See App Ex 17 and 18.

The 11th Circuit finding of absolute violation was never presented as a question for review. Frankel and I differed over the appearance of conflict – neither of us contended Judge Middlebrooks was an absolute finding of conflict.

In addition to the conclusion that mere appearance of conflict that is subject to a good faith difference of opinion, Judge Middlebrooks finding of conflicts to disqualify me should be disregarded by this Court because Judge Middlebrooks had a personal bias to cover-up his approval of the fee and cost statements of Barry R. Davidson, a receiver to collect the assets of Richard E. Maseri to pay to claimants who had nothing to do with the ICEC customers.

In that regard, *Tobkin*, supra, is instructive.

Tobin urged this court to consider that fact that the appellate court had reversed the sanctions imposed as a defense to the Bar claim of his misconduct. This Court considered his defense. [3]

Accordingly, it is appropriate for this Court to consider my defense that Judge Middlebrooks was biased in his ruling that I apparently breached rule 4-1.9. And, if his opinion is to be disregarded for bias, then the 11th Circuit unpublished affirmance should also be disregarded.

---

[3] This court found that Tobkin's defense was meritless because the Fourth District initial reversal of its decision to grant a directed verdict was because there was no evidence that Tobkin's client had knowledge of or involvement in Tobkin's misconduct rather than no misconduct occurred.

This case began with a false crime report by Det. John Calabro of the Broward County, Florida, Sheriff's office, at the behest of the Department of Justice, Federal Bureau of Investigation and the US Attorney for the Southern District of Florida, to put Steven A. Frankel, Esquire, the bar complaining witness in this case, in victim status. That crime report was known to be false when it was accepted by T. Don Tenbrook, Esquire, assistant Florida State Attorney.

Under cover of his victim status, Frankel was never required to disclose that he was employed by Prudential Securities, Inc. to engage in a sting called International Currency Exchange Corporation ("ICEC") with my client, Richard Maseri ("Maseri").

Prudential Securities, Inc. ("Prudential") became involved in the sting by a deal between Richard Wagner, Esquire, Deputy Director, Division of Enforcement, Commodity Futures Trading Commission, Washington, DC (the "CFTC") and Robert Slotnick of Prudential Futures Division, NY, NY ("Prudential") whereby the CFTC would forgive a transgression committed by Prudential in exchange for an advance by Prudential of $185,000 to Frankel to establish the sting. Frankel, through a company he owned, was paid $5,000 for his services.

The fact that the sting was originated by the CFTC and Prudential was to be kept secret so that the CFTC could use the intentional frauds committed by Frankel

and Maseri in ICEC as examples to the US Congress of why the Commodity Exchange Act, 7 U.S.C. 1, et seq. should be amended to specifically include forex trading to overcome the adverse decision against the right of the CFTC to regulate forex by the case of *CFTC v Frankwell*, 99 F.3d 299 (9th Cir. 1996).

My advice to Maseri was to form an honest ICEC operation in Newport Beach, CA. Without my knowledge or participation, Frankel and Maseri formed a new ICEC in Nevada and moved that operation to Weston, FL where it did not have the protection of the *Frankwell* decision.

The deal made with Frankel to induce him to participate in the move of ICEC from CA to FL was that I would not be involved in the case after August 4, 1998. And, I was not involved until November 25, 1998, when Maseri double-crossed Frankel by retaining me to attempt to release the freeze of the ICEC accounts occasioned by the claim of Barry R. Davidson, Esquire, a member of the Florida Bar, who was appointed receiver by USDC Judge for the Southern District of Florida, Edward B. Davis, in a case unrelated to ICEC to collect Maseri's assets.

Although Frankel was named a defendant in the Prudential case that interpleaded the ICEC customer deposits to the Federal Court for the Southern District of Florida, Frankel elected to hide behind his victim status to claim he had no obligation to appear to protect the ICEC customers.

I entered my appearance on behalf of ICEC and certain of the investors and claimed to Judge Davis that they deserved class status protection. Judge Davis denied that motion.

Then I filed a complaint against Prudential that it participated in the fraud. Judge Davis granted the Prudential motion to dismiss.

In 1998, I had a legal practice that for over 30 years had centered on the presentation and defense of brokerage actions. I know how to draft a complaint that will withstand a motion to dismiss.

When I confronted Judge Davis that he was protecting the unrelated receiver and that Davidson would charge fees for unnecessary work against the ICEC depositors, Judge Davis said he would hold me in contempt of court should I project ulterior motives upon him or Davidson.

Upon Judge Davis' retirement, the ICEC cases and the unrelated Maseri case were assigned to USDC for the Southern District of Florida Judge Donald M. Middlebrooks, who ultimately allowed Davidson to bill legal fees and costs against the ICEC customers for work that did not concern them.

Although the CFTC was a party to both the Prudential and the unrelated Maseri case, it did nothing, in spite of my requests, to step in to protect the ICEC customers from the charge of over $100,000 in unnecessary legal fees and costs by Davidson that were approved by Judge Middlebrooks.

My objections and efforts to obtain full restitution from those responsible were met by the bogus claim by Frankel that was accepted by Judge Middlebrooks, that I had an apparent conflict of interests that prevented me from continued representation of the ICEC customers.

The Federal Court order was entered without a hearing to allow me to present evidence or cross examine Frankel.

The Referee and the Bar have refused to consider the bias of Judge Middlebrooks but instead have relied upon his order to claim I violated the Bar Conflicts Rule. They did this without discussion of my defenses of waiver and Frankel's acknowledgement that I had never been his lawyer. In addition, ICEC and its customers had a vested third party beneficiary right to my efforts under my agreements of November 30, December 18 and 20, 1998, with ICEC and Frankel to allow me to attempt to get the ICEC customer deposits returned to them.

Under these circumstances, this Court is requested to look behind the Federal orders to conclude they were contrived to protect Judge Middlebrooks and Davidson from the obvious defense by Frankel that it was the payments to Davidson for work that did not concern the ICEC depositors that caused the depositors losses.

No conspiracy, merely stacked frauds.

POINT V

When an attorney learns of injury to members of the public, it is incumbent upon the attorney, as an officer of the Court, to do his/her best to provide justice to the public.

The need for legal protection for those who open investment accounts with brokers is well recognized. The laws designed to protect those persons are administered by specialists in the US Commodity Futures Trading Commission (the "CFTC"). Instead of protecting the ICEC customers, the CFTC went on a frolic of its own.

While ICEC and its depositors were compromised by the CFTC, Barry R. Davidson, a member of the Florida Bar, decided he would generate receiver and legal fees for his law firm and him for work that did not concern the ICEC or its customers/depositors.

Maseri made me an eyewitness.

He and Frankel put the fraud in motion. They are both personally liable for the ICEC customer losses. Particularly Frankel because he refused to appear in the Prudential case to explain why ICEC and its customers should be immediately paid from the brokerage accounts without the intervention of a receiver.

My first duty to the Court is to do my best to bring justice to the public. In furtherance of that duty I explained the potential conflicts among the depositors to

Frankel on December 6, 1998 and, thereafter, confirmed that notice in writing on December 18, 1998. Then on December 21, 1998, Frankel confirmed that I had never been his attorney. The Bar fails to mention this waiver and confirmation in its Response. One must have the attorney client relationship before the fiduciary and client relationship that will override the lawyer's duty to the public.

Frankel's participation in the move of ICEC from CA to FL plus his election to not appear in Prudential case to protect the ICEC customers estopped Frankel, a member of the Florida Bar, from asserting Bar Rules to prevent the ICEC customers from recovering from him.

POINT VI

Should my behavior be commended in the representation of my clients while the Bar complaining witness is sanctioned for his behavior?

No relationship existed between Frankel and me on August 4, 1998 that could possibly give Frankel the right to rely on me. My client was Maseri and Frankel, a member of the Florida Bar, was representing himself.

The Bar describes my honest answer that Maseri never lied to me as "in essence, that Maseri was an honest man." The applicable Rule makes no mention of "in essence" as the standard. The standard is to tell the truth. The truth on

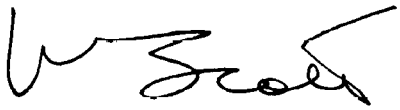
August 4, 1998 was that Maseri never lied to me. And, in context, he did nothing wrong with the brokerage account I had him trade. Standard fulfilled, no sanction.

The agreements of December 18 and 21, 1998 signed by Frankel speak for themselves. Neither the Referee nor the Bar discusses the December 18 agreement as a waiver or a statement from Frankel that I was never his attorney. The waiver is complete, and statement that I was never Frankel's lawyer is quite clear. The purpose of those agreements was known to Frankel when they were signed; i.e., to allow me to sue Frankel should the money in the ICEC accounts be insufficient to provide 100% restitution to the ICEC customers.

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; and (iii) there has never been any conflict between ICEC and its depositors; and (iv) I have never represented Prudential; and (v) Maseri waived all conflicts; and (vi) Frankel waived all conflicts; and (vii) once conflicts are waived, they can only be asserted in the future based upon my acceptance of representation or mutual agreement that included the ICEC customers; and (viii) I never agreed to represent Frankel at any time; and (ix) neither the ICEC customers nor I agreed to rescind

Frankel or Maseri's waiver of conflicts; and (x) my withdrawal of representation of Maseri upon notice of the Maseri withholding of information from Frankel satisfied the Bar Rule.

With costs assessed to the Bar.



William Sumner Scott
36 NW 6th Avenue, Suite
409 Miami, FL 33128

305 796-3176
Facsimile 305 961-9949
wscott@wscottlaw.com

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-1145

THE FLORIDA BAR

Complainant,

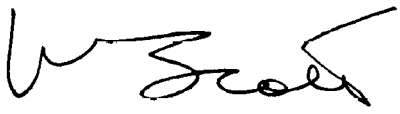
v.

WILLIAM SUMNER SCOTT

Respondent
/

Certificate of Service

On October 10, 2009, I hereby certify that the original and seven copies of the foregoing Respondent's Amended Reply/Cross Answer Brief were 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 323 99-2300 and to Arlene Sankel, Esquire, Florida Bar Counsel, 444 Brickell Avenue, Suite M-100, Miami, FL 33131.



William Sumner Scott
FBN 947822
36 NW 6th Avenue, Suite
409 Miami, FL 33128

(305) 796-3176
Facsimile (305) 961-9949
wscott@wscottlaw.com

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-1145

THE FLORIDA BAR

Complainant,

v.

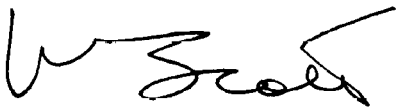
WILLIAM SUMNER SCOTT

Respondent

_____/

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.



William Sumner Scott
36 NW 6th Avenue, Suite 409
Miami, FL 33128

305 796-3176
Facsimile 305 961-9949
wscott@wscottlaw.com