IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC07-363
THE FLORIDA BAR FILE NO. 2006-70,923(11B)

THE FLORIDA BAR,

Complainant/Cross-Respondent,

v.

JEFFREY MARC HERMAN,

Respondent/Cross-Complainant.

ANSWER BRIEF OF RESPONDENT AND CROSS-INITIAL BRIEF ON THE MERITS IN SUPPORT OF CROSS-PETITION FOR REVIEW OF REPORT OF REFEREE

ON REVIEW FROM THE HONORABLE ANTONIO ARZOLA, REFEREE

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS .....iv, v, vi, vii, viii

STATEMENT OF THE CASE AND FACTS 1

I. PROCEDURAL BACKGROUND 1

II. SUMMARY OF THE RELEVANT FACTS 3

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. STANDARD OF REVIEW 8

II. NEITHER RULE 4-1.7(a)(1-2) NOR RULE 4-1.8(a) REQUIRES AN ATTORNEY TO DISCLOSE HIS OWNERSHIP INTEREST IN A COMPANY THAT COMPETES WITH A CLIENT COMPANY WHILE HE SIMULTANEOUSLY REPRESENTS HIS COMPANY AND HIS CLIENT COMPANY IN UNRELATED LEGAL MATTERS WHERE THE COMPANIES' LEGAL INTERESTS ARE NOT ADVERSE TO EACH OTHER [RESPONDENT/ CROSS-COMPLAINANT'S CROSS-APPEAL].....9

A. Rule 4-1.7(a)(1-2) Did Not Require Disclosure or Waiver 10

B. Rule 4-1.8(a) Did Not Require Disclosure or Waiver 15

III. RULE 4-8.4 DOES NOT APPLY WHERE A LAWYER'S CONDUCT FALLS WITHIN THE PURVIEW OF A MORE SPECIFIC RULE AND IS NOT IN VIOLATION OF THAT MORE SPECIFIC RULE [RESPONDENT/CROSS-COMPLAINANT'S CROSS-APPEAL].....19

TABLE OF CONTENTS
(Continued)

Page

A. Because Mr. Herman Did Not Violate Rules 4-1.7(a)(1-2) or 4-1.8(a), He Did Not Violate Rule 4-8.4(a) 19

B. Rule 4-8.4(c) is Not Applicable to Mr. Herman's Conduct 20

IV. A NINETY DAY SUSPENSION IS NOT WARRANTED WHERE THE LAWYER'S CONDUCT IS CONSISTENT WITH HIS REASONABLE INTERPRETATION OF THE CONFLICT OF INTEREST RULES [COMPLAINANT/ CROSS-RESPONDENT'S APPEAL AND RESPONDENT/CROSS-COMPLAINANT'S CROSS-APPEAL] 22

A. A Public Reprimand Would be the Applicable Sanction, if any 24

B. *The Florida Bar v. Rodriguez* Decision is Completely Inapposite 26

C. Proper Application of Aggravating and Mitigating Factors Requires a Much Lesser Sanction, if Any 29

1. Character or Reputation 29

2. Full and Free Disclosure to Disciplinary Board 30

3. Dishonest or Selfish Motive 31

4. Actual Harm 31

5. Refusal to Acknowledge Wrongful Nature of Conduct 33

CONCLUSION 36

TABLE OF CONTENTS
(Continued)

Page

CERTIFICATE OF SERVICE 37

CERTIFICATE OF COMPLIANCE 37

TABLE OF CITATIONS

Page

Cases

Cook v. State
381 So. 2d 1368, 1369 (Fla. 1980) 32

CPI Mfg. Co., Inc. v. Industrias St. Jack's, S.A. De C.V.
870 So. 2d 89, 92-93 (Fla. 3d DCA 2003) 16

Gretz v. Florida Unemployment Appeals Com'n
572 So. 2d 1384 (Fla. 1991) 17

Heart of Adoptions, Inc. v. J.A.
963 So. 2d 189, 198-99 (Fla. 2007).....17

McGregor v. Provident Trust Co. of Phil.
162 So. 2d 323 (Fla. 1935) 16

People v. Barbieri
61 P. 3d 488 (Colo. 2000).....16

The Florida Bar v. Black
602 So. 2d 1298 (Fla. 1992) 17

The Florida Bar v. Brown
2008 WL 150402 (Fla. 2008) 13

The Florida Bar v. Brownstein
953 So. 2d 502, 510 (Fla. 2007) 8

The Florida Bar v. Corbin
701 So. 2d 334, 337 n.2 (Fla. 1997) 34

The Florida Bar v. Cosnow
797 So. 2d 1255 (Fla. 2001) 13

The Florida Bar v. Cox
718 So. 2d 788 (Fla. 1998) 14

TABLE OF CITATIONS
(Continued)

Page

The Florida Bar v. Dunagan
731 So. 2d 1237 (Fla. 1999) 13

The Florida Bar v. Feige
596 So. 2d 433 (Fla. 1992) 23

The Florida Bar v. Fredericks
731 So. 2d 1249, 1254 (Fla. 1999) 9

The Florida Bar v. Germain
957 So. 2d 613 (Fla. 2007) 34, 35

The Florida Bar v. Insua
609 So. 2d 1313, 1314 (Fla. 1992) 21

The Florida Bar v. Joy
679 So. 2d 1165 (Fla. 1996) 13

The Florida Bar v. Karten
829 So. 2d 883, 889-90.....34

The Florida Bar v. Kramer
593 so. 2d 1040 (Fla. 1992).....17

The Florida Bar v. Laing
695 So. 2d 299, (Fla. 1997) 14

The Florida Bar v. Lipman
497 So. 2d 1165, 1168 (Fla. 1986) 34

The Florida Bar v. Marke
669 So. 2d 247 (Fla. 1996) 14

The Florida Bar v. Mastrilli
614 So. 2d 1081 (Fla. 1993) 23

TABLE OF CITATIONS
(Continued)

Page

The Florida Bar v. McAtee
674 So. 2d 734 (Fla.1996) 13

The Florida Bar v. Mogil
763 So. 2d 303, 312 (Fla. 2000) 33

The Florida Bar v. Nesmith
642 So. 2d 1357 (Fla. 1994) 18

The Florida Bar v. Neu
597 So. 2d 266, 269 (Fla. 1992) 20

The Florida Bar v. Nicnick
963 So. 2d 219, 222 (Fla. 2007) 33

The Florida Bar v. Norvell
685 So. 2d 1296 (Fla. 1996) 23

The Florida Bar v. Pape
918 So. 2d 240, 243 (Fla.2005),
cert. denied, 547 U.S. 1041, 126 S. Ct. 1632, 164 L. Ed. 2d 335 (2006) 9

The Florida Bar v. Rodriguez
959 So. 2d 150 (Fla. 2007) 13, 23, 26-28

The Florida Bar v. Sofo
673 So. 2d 1 (Fla. 1996) 14

The Florida Bar v. Springer
873 So. 2d 317, 321 (Fla. 2004) 9

TABLE OF CITATIONS
(Continued)

Page

Other Authorities

ABA Model Rules of Professional Conduct, Rule 8.4(c).....21

Fla. Stds. Imposing Law. Sancs., Preface.....24

Fla. Stds. Imposing Law. Sancs. 4.32.....24

Fla. Stds. Imposing Law. Sancs. 4.33.....25

Fla. Stds. Imposing Law. Sancs. 9.22(f).....31

Fla. Stds. Imposing Law. Sancs. 9.32(e).....30

Fla. Stds. Imposing Law. Sancs. 9.32(g).....29

Fla. Stds. Imposing Law. Sancs. 10.0.....32

Fla. Stds. Imposing Law. Sancs. 12.0.....32

Fla. Stds. Imposing Law. Sancs. 12.1(b).....32

R. Regulating Fla. Bar 3-4.1.....24

R. Regulating Fla. Bar 4-1.4.....28

R. Regulating Fla. Bar 4-1.5.....28

R. Regulating Fla. Bar 4-1.7.....1, 2, 6, 9-16, 19, 21-23, 26, 28, 35

R. Regulating Fla. Bar 4-1.8..... 1-3, 6, 9, 15, 17-18, 21-23, 28, 35

R. Regulating Fla. Bar 4-1.9.....28

TABLE OF CITATIONS
(Continued)

Page

R. Regulating Fla. Bar 4-1.16 28

R. Regulating Fla. Bar 4-3.3 1

R. Regulating Fla. Bar 4-5.1 28

R. Regulating Fla. Bar 4-5.6 .....27, 28

R. Regulating Fla. Bar 4-8.4 ..... 1, 7, 19-22, 28, 35

Restatement (Third) of the Law Governing Lawyers § 5 cmt. c (2000) 21

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL BACKGROUND

On February 26, 2007, The Florida Bar ("TFB" or "The Bar") filed its Complaint against Respondent/Cross-Complainant, Jeffrey Marc Herman ("Mr. Herman"). (Box 1(B);[1] A-1[2]). In its Complaint, The Bar alleged violations of Florida Bar Rules 4-1.7(b) Conflict of Interest, Current Clients; 4-1.8(a) Conflict of Interest, Prohibited and other Transactions; 4-1.8(b) Conflict of Interest, Prohibited and Other Transactions (collectively the "Conflict Rules"); Rule 4-3.3(a) Candor Toward the Tribunal; and 4-8.4(c) Misconduct. (Box 1(B); A 1, at pp. 7-8). On March 19, 2007, Mr. Herman filed his Answer and Affirmative Defenses. (Box 1(B); A-2). On August 15 and 16, 2007, the Referee held a final hearing, with closing arguments taking place on August 22, 2007. (Box 1(A); A-3).

At the conclusion of the case, the Referee issued his report finding that The Bar had <u>not</u> met its burden of proof on its core allegations against Mr. Herman. (Box 1(A):19, 29). First, the Referee found "substantial doubts and inconsistencies" as to the major claim in The Bar's Complaint alleging Mr.

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[1] Citations to the record of the Bar proceedings, consistent with the Referee's report, refer to the "Box #," followed by a letter designation identifying the document and a page number where appropriate.

[2] References to the Appendix will be cited as "A."

Herman's wrongful solicitation of a client's employee. (Box 1(A):19). On this claim, the Referee specifically found that The Bar's "star witness" was not credible, and detailed at least fifteen (15) examples of that witness' "…deceit, dishonesty, misrepresentation and self-dealing." (Box 1(A):17-18).

Second, the Referee found that The Bar did not present credible evidence demonstrating that Mr. Herman used information relating to his representation of a client to the disadvantage of that client. (Box 1(A):25). On this claim, the Referee noted his belief that The Bar had extended Rule 4-1.8(b) beyond its plain meaning. (Box 1(A):25).

Third, the Referee also found that The Bar had not met its burden of proving its lack of candor charge by clear and convincing evidence. (Box 1(A):29). On this claim, the Referee noted that Mr. Herman had support in the record evidence for each of his statements or for his belief that the statements he made were true when he made them. (Box 1(A):28).

The only factual predicate giving rise to the Referee's limited finding of misconduct involves facts that were not even in dispute. Mr. Herman did not challenge the fact that there came a time when he owned a company that evolved into the same business as one of his clients and that he simultaneously represented both companies in unrelated matters. Mr. Herman respectfully submits, however, that his conduct was not, as a matter of law, in violation of Rules 4-1.7(a)(1-2),

Rule 4-1.8(a), Rule 4-8.4(a) or Rule 4-8.4(c) (hereinafter the "Rules"), as the Referee found.

In this appeal, Mr. Herman seeks review of the Referee's finding of guilt because his conduct remaining at issue does not constitute "misconduct" that triggers application of the Rules. Mr. Herman further seeks review of the Referee's recommended disciplinary measures given that, at worst, his conduct was in good faith and consistent with a reasonable interpretation of the Rules.

II. SUMMARY OF THE RELEVANT FACTS

Under the guise of seeking review of the sanction recommended by the Referee, The Bar effectively re-argues the version of the facts that the Referee rejected below. In its initial brief, The Bar presents a lengthy recitation of facts intended solely to skew this Court's perception of the relevant factual predicate upon which the recommended sanction rests. Contrary to the impression created by The Bar's brief, however, the Referee's finding of guilt is <u>not</u> premised on the numerous rejected factual allegations that The Bar argued, unsuccessfully, below.[3]

[3] In fact, the Referee found that Tom Bristow, The Bar's "star witness" on its solicitation case, was not credible. The Referee detailed at least fifteen (15) examples of "Bristow's deceit, dishonesty, misrepresentation and self-dealing." (Box 1(A):17-18). The Referee also noted that Bristow's motivation arose from the fact that Bristow and his wife were being sued by Mr. Herman as a result of Bristow's actions while employed by Mr. Herman's company, Nation Aviation. (Box 1(A):19). Thus, it was in Bristow's interest to align himself with the complainant in this case, Mr. Titus, to divert Mr. Herman's attention away from Bristow. (Box 1(A):19).

Rather, it is based on a very specific and discrete factual predicate that should be the sole focus of this Court's inquiry. Indeed, the Referee specifically found that Mr. Herman did not commit many of the violations alleged by The Bar, and limited his finding to the allegations involving the conflict of interest rules on the basis of limited and uncontested facts. These facts are set forth below.

In June 1998, Mr. Herman incorporated a startup company called Nation Aviation, Inc. ("Nation Aviation"). (Box 1(A):7). Nation Aviation began operations in the Summer of 1998. (Box 1(A):8). The relevant documentation for Nation Aviation for 1998 "overwhelmingly evidences Nation Aviation's business as an aircraft leasing company." (Box 1(A):21). This documentation shows that Nation Aviation was intending to run and did in fact run an aircraft leasing company, and not a sale of parts company from its formation through the end of 1998. (Box 1(A):21).

In January 1999, Mr. Herman's co-investors in Nation Aviation asked for a return of their investment. (Box 1(A):9). Mr. Herman returned their investments in January 1999[4] and he was left as the only monetary investor in Nation Aviation. (Box 1(A):9). At this point, Mr. Herman could have lost his investment, but,

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On this point, the Referee specifically found that Bristow succeeded in doing exactly that. (Box 1(A):19).

[4] Although the Report of the Referee reads "January 2007," this must be a scrivener's error as the testimony is clear that the return of the co-investors' investment occurred in January 1999.

instead, he allowed the company to continue in business, this time exclusively as a seller and lessor of aircraft parts. (Box 1(A):9). Choosing the new direction placed Nation Aviation in the same business as his client, Aero Controls, in the aviation spare parts market. (Box 1(A):10). Aero Controls is owned by the complainant in this case, Mr. John Titus ("Mr. Titus"). (Box 1(A):5).

Mr. Herman chose to compete in the same business industry as his client, Aero Controls. (Box 1(A):10). During this time, from January 1999 through August 1999, Mr. Herman continued to represent Aero Controls. (Box 1(A):9-11). Mr. Herman represented both Aero Controls and Nation Aviation while Nation Aviation competed with Aero Controls. (Box 1(A):24). Mr. Herman's continued representation of Aero Controls in various different legal matters during this time period was unrelated to his representation of Nation Aviation. (Box 1(A):10-11).

Mr. Herman's reputation is that of being a very fine attorney. (Box 1(A):16). He is the type of attorney who leaves a lasting impression not only with his clients, but also with the parties opposing him. (Box 1(A):16). Mr. Herman was approached by parties seeking representation after Mr. Herman had represented their opponent in legal matters. (Box 1(A):16-17). In fact, this is precisely how Mr. Titus met and hired Mr. Herman. (Box 1(A):17).

Mr. Herman always knew what to do in those situations. (Box 1(A):17). Knowing that he had a client to whom he owed a duty of loyalty, there were various instances where Mr. Herman sought out his client to obtain a waiver in order to represent the former opposing party. (Box 1(A):17). Mr. Titus himself agreed to one such waiver after Mr. Herman called him indicating that Air Kazakhstan was seeking to hire him. (Box 1(A):17).

SUMMARY OF THE ARGUMENT

Contrary to the Referee's legal conclusions, an attorney's ownership interest in a business that may be in competition with an existing client's business and the simultaneous representation of both businesses in unrelated matters does not trigger the disclosure requirements in Rules 4-1.7(a)(1-2) and 4-1.8(a) (the "Conflict Rules"). Thus, the pure legal issue on review is whether or not, in January 1999 – when Nation Aviation first entered into the spare parts business – the Conflict Rules required, at that time, disclosure by Mr. Herman of his ownership interest in a newly competing company and a "waiver" of this "business" conflict. In fact, they did not.

In the absence of a direct conflict, the Comment to Rule 4-1.7 makes clear that the duty of loyalty does not require a waiver where the attorney merely represents two businesses in the same industry. There is nothing in the Conflict Rules or any case authority that requires a different result when an attorney has an

ownership interest in a competing business *that has no direct conflict with the existing client's representation.* Under the Conflict Rules' plain language, a direct conflict occurs where the parties are adverse to each other in a litigation or transactional matter. To be sure, in such situation, there is an actual risk of compromising the attorney's independent professional judgment, *i.e*., the duty of loyalty to one of his clients. But if there is no such conflict, there can be no risk. Moreover, applying the Conflict Rules as broadly as the Referee has done here creates a punishable offense for which there is no reasonable notice in the Conflict Rules.

The more general "catch-all" Rule 4-8.4 is equally inapplicable. Subsection (a) only applies if there is a violation of another Rule --in this case, the Conflict Rules. Since there is no violation of the Conflict Rules, subsection (a) does not apply. Subsection (b) is inapplicable for a different reason. This general "misconduct" provision is not available where, as here, the conduct at issue falls within the purview of a more specific Rule (*i.e*., the Conflict Rules).

Even if this Court were to find that there is some basis to invoke the Conflict Rules on the factual predicate presently before it, the plain language in the Conflict Rules, and the commentary thereto can reasonably be construed as not requiring disclosure or waiver, and therefore, not providing fair notice to Mr. Herman – or The Bar in general – that failure to make such disclosure or secure such a waiver

would result in the severe disciplinary measures proposed here by the Referee. Because Mr. Herman's reading is reasonable and consistent with the language of the Conflict Rules, there should not be a finding of a violation. But even assuming, *arguendo*, that this Court were to agree that there was a violation of the Conflict Rules, the sanction imposed should reflect the fact Mr. Herman's reading of the Conflict Rules is reasonable, and, therefore, any such sanction should be *de minimis*. Mr. Herman respectfully submits that a reprimand is the most severe sanction warranted if this Court were to favor The Bar's interpretation that the Conflict Rules must be read as broadly as the Referee has here.

ARGUMENT

I. STANDARD OF REVIEW

As to the Referee's recommendation of guilt, the instant appeal is subject to a *de novo* standard of review. Neither party has filed a petition for review of the Referee's findings of fact. Rather, the issue is whether or not the relevant undisputed facts trigger the application of the conflict of interest rules and related sanctions. Thus, where, as here, "…there are no genuine issues of material fact and the only disagreement is whether the undisputed facts constitute unethical conduct, the referee's findings present a question of law that the Court reviews de novo." *The Florida Bar v. Brownstein*, 953 So. 2d 502, 510 (Fla. 2007) (*citing*

The Florida Bar v. Pape, 918 So. 2d 240, 243 (Fla.2005), *cert. denied*, 547 U.S. 1041, 126 S.Ct. 1632, 164 L.Ed.2d 335 (2006).

As to the Referee's recommended discipline, this Court's scope of review is broader than that afforded to the Referee's findings of fact. *The Florida Bar v. Springer*, 873 So. 2d 317, 321 (Fla. 2004) (citations omitted). The Referee's recommended discipline must have a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *Id*.; *see also The Florida Bar v. Fredericks*, 731 So. 2d 1249, 1254 (Fla. 1999).

II. NEITHER RULE 4-1.7(a)(1-2) NOR RULE 4-1.8(a) REQUIRES AN ATTORNEY TO DISCLOSE HIS OWNERSHIP INTEREST IN A COMPANY THAT COMPETES WITH A CLIENT COMPANY WHILE HE SIMULTANEOUSLY REPRESENTS HIS COMPANY AND HIS CLIENT COMPANY IN UNRELATED LEGAL MATTERS WHERE THE COMPANIES' LEGAL INTERESTS ARE NOT ADVERSE TO EACH OTHER [RESPONDENT/CROSS-COMPLAINANT'S CROSS-APPEAL]

The Referee's finding of misconduct hinges on the notion that Mr. Herman's ownership interest in Nation Aviation, while he acted as counsel for Aero Controls and Nation Aviation in unrelated legal matters where the companies were not adverse to each other, constitutes a "conflict" requiring disclosure and the client's consent under Rules 4-1.7(a)(1-2) and 4-1.8(a). (Box 1(A):29). The relevant provisions cited by the Referee in support of his conclusion do not support such a broad reading, and, in fact, they provide ample basis for Mr. Herman's analysis that there was no conflict requiring disclosure.

A. Rule 4-1.7(a)(1-2) Did Not Require Disclosure or Waiver

A reasonable interpretation of the relevant language of Rule 4-1.7(a)(1-2) supports the conclusion that there was no conflict regarding disclosure on the facts here present. Specifically, the general conflict rule set forth in subsection (a)(1-2) is as follows:

> (a) **Representing Adverse Interests**. Except as provided in subdivision (b), a lawyer shall not represent a client if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (Emphasis added).

Thus, by its own terms, Rule 4-1.7(a)(1) requires the undertaking of a legal representation that is directly adverse to a client's interest. No such directly adverse representation is present here.

As a threshold matter, it is worth noting that the undersigned have not found any authority for the proposition that an attorney's ownership interest in a company that is in direct competition with a client's business rises to the level of "adverse interest" requiring disclosure under the Conflict Rules, as the Referee found. Rather, the overarching theme in the reported decisions is the notion that an attorney should not undertake a role in which his or her interest would impair the

exercise of his or her independent professional judgment on behalf of an existing client. The comment to Rule 4-1.7, under the heading "Loyalty to a client" makes this point crystal clear:

> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses the general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of a client would be directly adverse to the other. (Emphasis added).

The foregoing language thus eliminates a key component in the Referee's finding: that Mr. Herman's simultaneous representation of Nation Aviation and Aero Controls, companies in competing economic enterprises, in unrelated legal matters is in violation of the Conflict Rules. As the comment expressly indicates, the representation of companies overlapping in industry, without any direct adversity between them in a specific legal proceeding, transaction or legal representation, is not the type of conflict contemplated by the Conflict Rules. The adverse economic interest alleged here as the basis for a conflict of interest is, therefore, not the type of interest contemplated by Rule 4-1.7(a)(1). As the language in the commentary above states, "competing economic enterprises" are only "generally adverse" and not "directly adverse."

The issue for this Court's consideration, therefore, is whether Mr. Herman's ownership interest in Nation Aviation changes the analysis set forth in the Comment to Rule 4-1.7. It does not. Again, the language in the Rule itself provides the best guidance. In subsection (2), Rule 4-1.7(a) equates the risk that the client's representation "will be materially limited by the lawyer's responsibilities to another client" with the risk that the representation will be materially limited "by a personal interest of the lawyer." R. Regulating Fla. Bar 4-1.7(a)(2). The Rule itself draws no distinction between another client's interest or the lawyer's personal interest. Thus, if a lawyer is permitted to simultaneously represent clients with competing economic enterprises in unrelated matters, it should make no difference that the competing economic enterprise belongs to him as opposed to another client. This logic is sound, since the concern is with the lawyer's divided loyalties –whether between clients or between himself and his client.[5]

[5] Taking the analysis one step further, one could posit whether opening a business that competes with a client by using that client's "former top salesman" changes this conclusion. (Box 1(A):22). Here, it does not. The Referee specifically found there is no credible evidence that Mr. Herman used information relating to his representation of Aero Controls to the disadvantage of Aero Controls. (Box1(A):25). This proposition was the gravamen of The Florida Bar's wrongful solicitation charge which alleged that Mr. Herman used information gained during his representation of Aero Controls to steal its "top" employee. But if there is no wrongful solicitation, there is no improper use of the former employee's services. Moreover, Bristow (the former employee) did not have a non-compete agreement and

A review of a representative sampling of the decisions finding a violation of Rule 4-1.7(a) further supports the notion that an actionable "conflict" requires direct adversity in the context of legal representation. *See, e.g., The Florida Bar v. Brown*, --- So. 2d ---, 2008 WL 150402 (Fla. 2008) (violation of rule 4-1.7(a) and (b) to represent driver and passenger of car where gun found); *The Florida Bar v. Rodriguez***,** 959 So. 2d 150 (Fla. 2007) (lawyer representing group of 20 plaintiffs against DuPont guilty of violating 4-1.7(a) and (b) by simultaneously negotiating secret "engagement agreement" with DuPont to clients' detriment); *The Florida Bar v. Cosnow*, 797 So. 2d 1255 (Fla. 2001) (attorney guilty of violating rule 4-1.7(a) for representing mother in custody action after having previously represented grandmother in the same action); *The Florida Bar v. Dunagan*, 731 So. 2d 1237 (Fla. 1999) (representation of husband in dissolution proceeding by attorney who previously had represented husband and wife jointly in matters relating to their business, was conflict of interest in violation of rule 4-1.7(a) and (b), where business was marital asset); *The Florida Bar v. Joy*, 679 So. 2d 1165 (Fla. 1996) (lawyer guilty of violation of Rule 4-1.7(a) and (b) for representing both corporation and minority shareholder in connection with the same claim despite conflict of interest); *The Florida Bar v. McAtee*, 674 So. 2d 734 (Fla. 1996)

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told Mr. Herman that for family reasons he was moving from Seattle to Miami. Accordingly, the fact that a former "top" employee of Aero Controls was employed by Nation Aviation in this case makes no difference in the final analysis.

(lawyer guilty of violation of Rule 4-1.7(a) for representing clients with conflicting interests in bankruptcy proceeding without first obtaining consent to do so); *The Florida Bar v. Marke*, 669 So. 2d 247 (Fla. 1996) (lawyer guilty of violation of rule 4-1.7(a) for representing both parties in negotiating purchase and sale agreement that had conflicting interests); *The Florida Bar v. Sofo*, 673 So. 2d 1 (Fla. 1996) (attorney's dual representation of two corporations, in which he owned stock, with adverse interests in same matter, and use of information obtained in representation of one corporation without its consent was violation of rule 4-1.7(a)).[6]

Thus, the authority consistent with Mr. Herman's interpretation is overwhelming. In sharp contrast, the undersigned could not find a single decision finding a violation of Rule 4-1.7(a) based on a factual predicate such as the one

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[6] Although not at issue in this appeal, decisions under Rule 4-1.7(b) are also consistent with Mr. Herman's analysis regarding the type of "direct" adversity required for a conflict under Rule 4-1.7. *See, e.g., The Florida Bar v. Cox*, 718 So. 2d 788 (Fla. 1998) (lawyer guilty of violation of rule 4-1.7(b) by representing client in negotiation of line-of-credit agreement between client and two other corporations where attorney failed to disclose to client that he represented one of the other corporations and that he was the general counsel of the other corporation); *The Florida Bar v. Laing*, 695 So. 2d 299, (Fla. 1997) (client paid lawyer a retainer to assist client in obtaining release of a lease/purchase option; lawyer took over the property and eventually occupied and purchased the property; by entering into the business transaction with client and continuing to represent her when the client's interests and the lawyer's interest were at odds, the lawyer violated rule 4-1.7(b)).

presently before the Court. A reasonable reading of Rule 4-1.7(a)(1-2) supports the conclusion that Mr. Herman's ownership interest in Nation Aviation while he acted as counsel for both Nation Aviation and Aero Controls in unrelated matters did not rise to the level of direct adverse interest requiring disclosure under this Rule.

B. Rule 4-1.8(a) Did not Require Disclosure or Waiver

Rule 4-1.8(a), "Conflict of Interest; Prohibited and Other Transactions," is even less applicable. The relevant provision upon which the Referee relies reads as follows:

> (a) **Business Transactions With or Acquiring Interest Adverse to Client.** A lawyer shall not enter into a business transactions with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
>
> (Emphasis added).

Although the introductory language in subsection (a) seems general enough to encompass a situation where an attorney's business competes with a client (*i.e.*, acquiring an ownership interest adverse to a client), it is essential for a proper analysis to read the three provisions after the qualifier "unless" at the end of the introductory section. Each of these provisions clearly expresses the notion that there is a specific transaction at issue that involves the client directly, such that the client should be given the opportunity to seek independent counsel.

The only reasonable reading of this subsection as a whole is that it covers business transactions where there is no adverse legal representation *per se* (which would be covered by Rule 4-1.7), but, rather, where the attorney is involved directly in a specific business transaction with the client.[7] Otherwise, subsections (1)-(3) would be meaningless, contrary to well established principles of rule construction. *CPI Mfg. Co., Inc. v. Industrias St. Jack's, S.A. De C.V.*, 870 So. 2d

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[7] For example, in *People v. Barbieri*, an attorney who owned a financial interest in a company was charged with inducing another client to lend money to this company without disclosing his financial interest. 61 P.3d 488 (Colo. 2000). The attorney and his client became adverse, through the loan, and a disclosure was required under the ethical rules. In that case, the conflict of interest rule was invoked to protect against acquiring an interest that was actually adverse to a client --as opposed to merely hypothetical or theoretical. In another somewhat analogous case, but in a different context, this Court considered whether an officer violated a rule not to acquire title or interest in a property adverse to a corporation. *McGregor v. Provident Trust Co. of Phil.*, 162 So. 2d 323 (Fla. 1935). The Court observed that the rule was inapplicable because the acquisition of an interest *at the time of its accomplishment* was not prejudicial nor adverse to the corporation.

89, 92-93 (Fla. 3d DCA 2003) (*citing Gretz v. Florida Unemployment Appeals Com'n*, 572 So.2d 1384 (Fla. 1991) ("As in statutory construction, the rules must be read as a cohesive whole…"); *see generally, Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198-99 (Fla. 2007) ("A basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.").

Decisions finding a violation of Rule 4-1.8(a) are equally supportive of the notion that there must be a specific business transaction where the attorney stands to gain an unfair advantage over the client. *See, e.g., The Florida Bar v. Black*, 602 So. 2d 1298 (Fla. 1992) (lawyer found guilty of violation of Rule 4-1.8(a) for borrowing funds from client, leaving the client completely unsecured in the transaction, failing to advise the client of his right to separate representation, promising to pay the client a usurious rate of interest, never informing the client of the illegality of the transaction, and using the client in an effort to obtain a personal loan); *The Florida Bar v. Kramer*, 593 So. 2d 1040 (Fla. 1992) (lawyer found guilty of violation of Rule 4-1.8(a) for failing to disclose the actual nature of a transaction where lawyer loaned money to the client for fees and costs associated with client's acquisition of rights to mortgage payments and lawyer obtained deed to property but client believed it was just a mortgage).

Indeed, Rule 4-1.8(a) is strictly construed even when there is a specific transaction at issue. *See, e.g.*, *The Florida Bar v. Nesmith*, 642 So. 2d 1357 (Fla. 1994). In *Nesmith*, the attorney obtained a personal loan from the majority shareholder of a corporation that was his client. *Id*. Despite the direct adversity of interests in this specific business transaction, the Court found that the attorney did not violate Rule 4-1.8(a) because the shareholder entered into the loan in his individual, and not his corporate, capacity. *Id*.

Under any reading, two companies merely overlapping in industry do not present the requisite "direct adversity" to trigger the Conflict Rules. To extend the rules so far would create a logistical challenge that could inhibit an attorney's ability to practice law to the extreme. Under such a scenario, prior to investing in a company an attorney would have to assess the industry and all potential competitors of that company and then obtain consents from all clients who could arguably be deemed to be in the same industry.

For example, an attorney could not purchase shares in General Motors without a waiver from a corporate client that is a Ford dealership. Similarly, an attorney could not invest in a condominium building without a waiver from clients who are also developers. This is certainly not the intent or purpose reflected by the language of the Conflict Rules. The more reasonable interpretation requires that an attorney's independent professional judgment *in the matters in which he is*

representing the client be compromised for there to be a "conflict" under the Rules. No such adversity exists here.

III. RULE 4-8.4 DOES NOT APPLY WHERE A LAWYER'S CONDUCT FALLS WITHIN THE PURVIEW OF A MORE SPECIFIC RULE AND IS NOT IN VIOLATION OF THAT MORE SPECIFIC RULE [RESPONDENT/CROSS-COMPLAINANT'S CROSS-APPEAL]

The Referee also invokes Rule 4-8(a) and 4-8.4(c) as a basis for his recommendations as to guilt. (Box 1(A):29). However, neither of these subsections is applicable. Since there is no violation of the Conflict Rules, subsection (a) is inapplicable by its own terms. Since the conduct at issue falls within the purview of a more specific Rule (i.e., the Conflict Rules), subsection (c) is inapplicable as well.

A. Because Mr. Herman did not violate Rules 4-1.7(a)(1-2) or 4-1.8(a), he did not violate Rule 4-8.4(a)

Rule 4-8.4(a), "Misconduct; violating the Rules of Professional Conduct," states that a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Thus, the gravamen of this Rule is the violation of another, more specific rule. In this case, the Referee invoked Rule 4-8.4(a) based on his findings of guilt under Rules 4-1.7(a)(1-2) and 4-1.8(a). However, since those findings of guilt are erroneous as a matter of law, as more fully explained above, the Referee's finding of guilt under 4-8.4(a) should also be set aside.

B. Rule 4-8.4(c) is not applicable to Mr. Herman's conduct

In conclusory fashion and without any separate analysis as to intent, the Referee found Mr. Herman guilty of misconduct involving fraud, deceit, or misrepresentation under Rule 4-8.4(c). This finding is erroneous for two independent reasons. First, the Referee failed to adequately address the requisite element of intent. Second, the application of 4-8.4(c) in this context is duplicitous and inappropriate.

Initially, Rule 4-8.4(c) requires a finding of willful intent to deceive. *The Florida Bar v. Neu*, 597 So. 2d 266, 269 (Fla. 1992) (stating that Rule 4-8.4(c) requires that the referee find by clear and convincing evidence that the lawyer intentionally acted with dishonesty, misrepresentation, deceit, or fraud). Although the Referee described Mr. Herman's conduct, in conclusory fashion, as "dishonest and deceitful", (Box 1(A):22), he did not make any specific findings of intent. The Referee merely states that Mr. Herman "knew what he had to do but decided not to do it." *Id.* The Referee even cites a list of "possible" reasons why Herman "just didn't call Titus," but missing from this list of reasons is the conclusion that Herman did not call Titus because he intended to perpetuate a fraud or deception. Thus, the Referee never made the requisite finding of intent to deceive.

But even more importantly, Rule 4-8.4(c) is a general "catch-all" provision that captures misconduct in situations where the Rules of Professional Conduct are

silent. Restatement (Third) of the Law Governing Lawyers § 5 cmt. c (2000).[8] To ensure that lawyers have fair warning of what conduct is prohibited under 4-8.4(c), "[n]o lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule." *Id.* Moreover, a finding of guilt under 4-8.4(c) is not proper where the finding would be duplicitous of other findings. *See The Florida Bar v. Insua*, 609 So. 2d 1313, 1314 (Fla. 1992) (noting that the referee found the respondent not guilty of violating Rule 4-8.4(c) because a finding of guilt would be duplicitous of a finding of guilt under another provision).

Here, the Referee failed to make any findings of guilt outside of his analysis under Rules 4-1.7(a)(1-2) and 4-1.8(a). The only conduct that the Referee found to be "deceptive" was Mr. Herman's failure to disclose business activities that the Referee labeled a "conflict of interest" pursuant to Rules 4-1.7(a)(1-2) and 4-1.8(a). Specifically, the Referee found that,

> [Mr. Herman's] failure to contact Titus regarding the existence of and his ownership of Nation Aviation while continuing to represent both Nation Aviation and Aero Controls amounted to conduct that this Referee finds is dishonest and deceitful.
>
> (Box 1(A):24).

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[8] As its example, the Restatement actually uses ABA Model Rules of Professional Conduct, Rule 8.4(c). Like its Florida counterpart, ABA Model Rule 8.4(c) is a general "catch-all" provision that prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation."

The Referee also found that "[p]ursuant to Rules 4-1.7 and 4-1.8, [Mr. Herman] had to disclose the conflict to Titus and obtain his consent." (Box 1(A):23).

If Mr. Herman violated those provisions, a finding of guilt under 4-8.4(c) would be duplicitous since such a finding would rely on the same set of facts. If Mr. Herman did not violate conflict of interest sections, then application of 4-8.4(c) should be preempted because the result under the specific rule should govern the result under the general rule. The reasoning behind this is that a finding of guilt under 4-8.4(c) would mean that in order to prevent deception, Mr. Herman would have had to disclose his ownership interest in Nation Aviation to Mr. Titus. The result would be that 4-8.4(c) would create a duty to disclose in a situation where Rules 4-1.7(a) and 4-1.8(a) do not mandate such disclosure. In such a case, the more specific rules, 4-1.7(a) and 4-1.8(a), should govern. Thus, the Referee erred in finding Mr. Herman guilty of violating Rule 4-8.4(c).

IV. A NINETY DAY SUSPENSION IS NOT WARRANTED WHERE THE LAWYER'S CONDUCT IS CONSISTENT WITH HIS REASONABLE INTERPRETATION OF THE CONFLICT OF INTEREST RULES [COMPLAINANT/CROSS-RESPONDENT'S APPEAL AND RESPONDENT/CROSS-COMPLAINANT'S CROSS-APPEAL]

Mr. Herman's conduct does not warrant the imposition of a ninety day suspension, and certainly not the extreme sanction of a two-year suspension

proposed by The Florida Bar.[9] The Referee, in his Conclusions, stated that the basis for his finding that a conflict of interest existed was Respondent's ownership interest in a business that "competed" with that of his client, Aero Controls. (Box 1(A):24). As more fully discussed in the argument above, the Referee erroneously concluded that it is an ethical violation for a lawyer to have an interest in a business that may compete in the same marketplace as a client of that lawyer. Absent more compelling circumstances, such as where the attorney's interest in a competing business is adverse to a client in the same matter, a lawyer's ethical duties do not prohibit him from entering a marketplace merely because a client already operates there and may compete with him. Such a broad interpretation would be contrary to the plain language and commentary to Rules 4-1.7 and 4-1.8.

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[9] This Court has imposed suspensions where there are clear and egregious violations of the conflict of interest rules. *See The Florida Bar v. Rodriguez*, 959 So. 2d 150 (Fla. 2007) (two year suspension for lawyer who represented group of 20 plaintiffs against defendant while simultaneously agreeing to and failing to disclose to clients secret "engagement agreement" with defendant); *The Florida Bar v. Feige*, 596 So. 2d 433 (Fla. 1992) (lawyer suspended for two years for assisting client in perpetrating a fraud and later representing client as defendant in an action where attorney was a named co-defendant); *The Florida Bar v. Norvell*, 685 So. 2d 1296 (Fla. 1996) (lawyer suspended 91 days for representing real estate developer client in sale of lots and bankruptcy proceeding while negotiating to buy out developer at the same time); *The Florida Bar v. Mastrilli*, 614 So. 2d 1081 (Fla. 1993) (lawyer suspended for 6 months for filing suit against one client, on behalf of second client, in matter for which he had been retained by both clients).

A. A public reprimand would be the applicable sanction, if any

A review of all of this Court's cases involving lawyer misconduct and ethical violations reveals not one single case where this Court sanctioned a lawyer merely because his interest in a business might compete in the same market as a client's business.[10] Rule 3-4.1 states that all members of The Florida Bar are charged with notice and held to know the provisions of the standards of ethical and professional conduct. However, a member of The Florida Bar cannot be on notice of a rule of conduct that is neither clearly inferable from the text of the Rules of Professional Conduct nor established by this Court in its opinions interpreting the Rules.

In the Preface to Florida's Standards for Imposing Lawyer Sanctions ("Sanctioning Standards"), The Florida Bar instructs that "sanctions must be based on clearly developed standards" and "sanctions which are too onerous may impair confidence in the system." Fla. Stds. Imposing Law. Sancs., Preface. In establishing such standards, the Sanctioning Standards state that "[s]uspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client." Fla. Stds. Imposing Law. Sancs. 4.32 (emphasis added).

[10] An even more comprehensive search of all published opinions from all fifty (50) states on lawyer disciplinary proceedings similarly fails to uncover any cases that are even remotely similar to the facts here.

Although Respondent knew that his interest in Nation Aviation would create marketplace competition with his client, Aero Controls, he did not know that it created a "conflict of interest" under the Rules of Professional Conduct.[11]

If this Court determines that Mr. Herman's interest in a business that competes in the same market as his client does, in fact, create a conflict of interest, Mr. Herman's failure to recognize it as such is, at worst, a negligent act with a good faith excuse based on a reasonable interpretation of the text of the Conflict Rules. The Sanctioning Standards note that "[p]ublic reprimand is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client." Fla. Stds. Imposing Law. Sancs. 4.33 (emphasis added). Thus, if the Court is nevertheless persuaded that Mr. Herman's conduct warrants disciplinary action, public reprimand, rather than suspension, would be more appropriate.

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[11] The Referee himself acknowledged that Respondent had been diligent in the past, contacting his clients to seek consent to and/or a waiver of potential conflicts of interest. (Box 1(A):23-24). The Referee had no explanation, other than "possible" surmising, as to why Mr. Herman, a lawyer who knows and abides by his ethical obligations when he is aware of a conflict, would disregard such obligations here unless: (1) he did not know there was a conflict, or (2) believed that his ownership interest did not create a conflict of interest under the Rules.

B. *The Florida Bar v. Rodriguez* Decision is Completely Inapposite

The Florida Bar cites to *The Florida Bar v. Rodriguez* in support of its recommendation of a two-year suspension. 959 So. 2d 150 (Fla. 2007). The Bar's attempt to analogize the *Rodriguez* decision to the alleged conflict of interest in this case fails on numerous grounds. *Rodriguez* involved an attorney and his partners who developed and executed a secret engagement agreement with defense counsel during an ongoing litigation. *Id.* The attorney, unbeknownst to his clients, accepted payment of $6,445,000 from the opposing party in exchange for his firm's agreement not to pursue future claims against the opposing party. *Id.* The attorney's firm also agreed to be on retainer to the opposing party to ensure compliance with the agreement not to bring future claims against that party. *Id.*

Thus, in *Rodriguez*, the attorney personally benefited from the unique settlement at the client's expense in a specific litigation matter and did not disclose the details of it to his clients when trying to get them to accept its terms. *Id.* Consequently, the attorney facing disciplinary charges in that case was found to have accepted a settlement agreement pertaining to ongoing litigation for his own benefit at the expense of his clients in the litigation at issue. *Id.* This is a far cry from the market competition at issue here.

Notably, the conflict of interest allegations in *Rodriguez* were in the context of a present dispute under Florida Bar Rule 4-1.7. By having a significant

financial stake in the settlement of his clients' cases, the Court found that the attorney's *independent professional judgment* was limited in the context of advising his clients with respect to the specific settlement in a pending litigation in which the attorney represented them. *Id*. Additionally, because the attorney secretly agreed to be on retainer to the opposing party, the attorney was representing parties that were directly adverse to each other in the same matter. *Id*.

This conduct also involved violation of the rule prohibiting lawyers from entering into an agreement which restricts his right to practice. By agreeing not to pursue future claims against the opposing party, the secret engagement agreement clearly violated Rule 4-5.6(b). "Attorneys who engage in such engagement agreements receive severe sanctions, even when the misconduct is far less egregious than that in the instant case." *Id*. at 161.

The attorney then failed to disclose the secret settlement agreement to a circuit court judge when the court asked the attorney why he had filed a motion to withdraw representation on behalf of one of his clients. 959 So. 2d 150. In fact, the attorney threatened to withdraw from representation because the client did not want to settle the case according to the terms that the attorney's firm had negotiated--potentially jeopardizing the attorney's claim to its secret $6,445,000 fee from the opposing party. *Id*. The attorney also failed to disclose the secret engagement agreement to The Florida Bar when The Bar initiated a preliminary

investigation against the attorney's firm relating to the settlement of these claims. *Id*. In total, the Court found that the attorney in *Rodriguez* violated eleven (11) of the Rules Regulating The Florida Bar.[12]

In this case, there was no pending dispute which Mr. Herman settled to the detriment of Aero Controls without disclosing a secret remuneration and compromising Aero Controls' rights in a pending litigation. Mr. Herman did not agree to represent a party that was directly adverse to Aero Controls in a present dispute. Mr. Herman did not restrict his right to practice law. Mr. Herman did not fail to disclose information to a judge or The Florida Bar. In short, Mr. Herman's decision to invest in a business that would possibly compete in the same marketplace as one of his clients is in no way analogous to the conduct in *Rodriguez.*

Indeed, it would be difficult to find two cases that are more different. Rather, the type of theoretical business conflict borne out by the facts suggests that

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[12] These violations included: 4-1.4(a) (informing client of status of representation), 4-1.4(b) (duty to explain matters to client), 4-1.5(a) (prohibited fees), 4-1.7(a) (representing a client whose interests are adverse to another client), 4-1.7(b) (duty to avoid limitation on independent professional judgment), 4-1.8(a) (business transaction with or acquiring interest adverse to client), 4-1.9(a) (conflict of interest as to former clients), 4-1.16(a)(1) (declining or terminating representation), 4-5.1(c) (responsibilities of a partner for rules violations), 4-5.6(b) (restriction on lawyer's right to practice), and 4-8.4(a) (lawyer shall not violate or attempt to violate the Rules of Professional Conduct).

no sanction is warranted, and certainly no more than a reprimand would be appropriate.

C. Proper Application of Aggravating and Mitigating Factors Requires a Much Lesser Sanction, if Any

In addition to the foregoing, a correct application of aggravating and mitigating factors under the Sanctioning Standards actually suggests a lesser sanction that the one proposed by the Referee. Specifically, two mitigating factors that do apply were not considered, and three of the four aggravating factors cited in support of his recommendation do not apply.

1. Character or Reputation

A major mitigating factor not considered by the Referee is "character or reputation." Fla. Stds. Imposing Law. Sancs. 9.32(g). The Referee specifically found --and even The Bar admits-- that Mr. Herman has a reputation for being a good lawyer and seeking waivers when necessary. In his "Conclusions," the Referee stated the following:

> Herman's reputation is that of being a very fine attorney. He is the type of attorney that leaves a lasting impression not only with his clients but also with the parties opposing him. Throughout the hearing, there was testimony regarding several instances where Herman was approached by parties seeking representation after Herman had represented their opponent in legal matters. In fact, this is precisely how Titus met and hired the Respondent.
>
> (Box 1(A):16-17).

The Referee goes on to conclude that Mr. Herman "always knew what to do in those situations," and recounts an instance where Mr. Herman obtained a waiver from Mr. Titus himself to represent a former opposing party. (Box 1(A):17). Mr. Herman's conduct is consistent with his position that he did not seek a waiver of the business conflict giving rise to the guilty finding here because he did not think one was necessary. Indeed, he had already obtained a waiver from Mr. Titus once before --why not just ask again?

Because Mr. Herman's character and reputation show that he heeded ethical conflicts when he believed them to exist, this factor should also be considered in mitigation (should this Court be persuaded that a violation of the Conflict Rules occurred). A lawyer's reputation, after years of active practice, of being a "very fine attorney," should weigh heavily in his favor in considering both his good faith in trying to be ethical and the imposition of any sanction, if he was mistaken.

2. Full and free disclosure to disciplinary board

A mitigating factor not considered by the Referee is the "full and free disclosure to the disciplinary board." Fla. Stds. Imposing Law. Sancs. 9.32(e). Mr. Herman cooperated fully with The Florida Bar at all stages of the proceeding, albeit while maintaining his innocence. Should this Court be persuaded that there was a violation of the Conflict Rules, this factor should be considered in addition

to the one other factor considered by the Referee in mitigation and the "character or reputation" factor more fully discussed above.

3. Dishonest or Selfish Motive

On the other hand, the Referee improperly relied on "dishonest or selfish motive" as an aggravating factor in this case. (Box 1(A):30). Of necessity, this factor presupposes wrongful conduct and does not apply for the same reasons that the "refusal to acknowledge wrongful nature of conduct" does not apply.[13] Mr. Herman should not be penalized for maintaining his innocence based on his reasonable interpretation of the Conflict Rules. Because Mr. Herman reasonably believed --and continues to believe-- that his conduct was consistent with the Conflict Rules, he should not be charged with dishonest or selfish motive.[14]

4. Actual Harm

The Referee also improperly included in his Report "actual harm to client" as an aggravating factor. (Box 1(A):30). Section 9.22(f) of the Sanctioning Standards enumerates eleven (11) factors that may be considered in deciding what

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13 *See* Argument Section IV(C)(5), *infra*, at pp. 33-35.

14 It is also unclear what is the factual basis for the Referee's finding of dishonest or selfish motive. Although the Referee asks himself "[w]hy didn't [Mr. Herman] just call Titus?," his response merely surmises that "[t]he only logical response is that the call was not made because of possible monetary concerns…." (Box 1(A):24). Monetary concerns (*i.e.*, business concerns), however, do not equate to dishonest or selfish motive, especially where the Referee's comment appears to be rhetorical speculation on his part as opposed to a factual finding.

sanction to impose in non-drug cases.[15] Absent from that list is any reference to "harm to a client." Under the commonly accepted doctrine of statutory construction of *expressio unius est exclusio alterius*, inclusion of factors in a list should be presumed to be exclusive and any omissions to be deliberate. *See Cook v. State*, 381 So. 2d 1368, 1369 (Fla. 1980). Therefore, this Court should not consider "actual harm to client" as an aggravating factor.

Notwithstanding the fact that this factor does not apply at all, the Referee's basis for finding that Mr. Herman's conduct resulted in actual harm has no support in the record and must fail. Specifically, The Referee found the following:

> [Mr. Herman] knew that Bristow would call customers of Aero Controls and try to recruit them into becoming Nation Aviation clients. Ultimately, the loss of these clients solicited by Bristow had a direct adverse impact on Aero Controls.
>
> (Box 1(A):24) (Emphasis added).

There is absolutely no record evidence that Mr. Herman "knew" that Bristow (Aero Controls' former employee), would call customers and try to recruit them.

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[15] It is important to note that The Florida Bar argues for additional factors that may be considered in aggravation for imposing lawyer sanctions in drug cases. *See* Fla. Stds. Imposing Law. Sancs. 10.0, 12.0. Only where the disciplinary case involves "personal use and/or possession for personal use of controlled substances" should the Court consider these additional factors. One of these additional factors is "Actual harm to clients or third parties." *See* Fla. Stds. Imposing Law. Sanc. 12.1(b). Since the allegations against Mr. Herman do not involve the use or possession of controlled substances, and the "actual harm" factor is only to be considered in drug cases, this factor is wholly inapposite to the instant case.

In fact, the opposite is true. Mr. Herman specifically testified that he instructed Bristow not to do business with Aero Controls' customers. (Box 1(A):23). The Referee's speculation that Mr. Herman "had to have known that Bristow would be running things at Nation Aviation through the same contacts and customers that he had while at Aero Controls," (Box 1(A):23), is insufficient to overcome Mr. Herman's unequivocal testimony on this point. There is simply no support for the Referee's giant leap to the conclusion that Mr. Herman "knew" at the time that Bristow would completely disregard his express instructions.[16] Where, as here, the evidence does not support a referee's finding or it clearly contradicts the referee's conclusion, such finding and conclusion are erroneous. *The Florida Bar v. Nicnick*, 963 So. 2d 219, 222 (Fla. 2007).

5. Refusal to Acknowledge Wrongful Nature of Conduct

It is also improper for the Court to consider Mr. Herman's "refusal to acknowledge [the] wrongful nature of [his] conduct" as an aggravating factor. (Box 1(A):30). This Court has previously held that an attorney's "claim of innocence cannot be used against him." *See The Florida Bar v. Mogil*, 763 So. 2d

[16] Additionally, it is worth noting that any "actual harm" resulting from any loss of customers was monetary and completely redressed in the civil action for damages brought by Mr. Titus against Mr. Herman and his law firm. Mr. Herman respectfully submits that the civil action --and not a Bar disciplinary proceeding-- was the proper context for the type of business claim at issue here.

303, 312 (Fla. 2000) (*citing The Florida Bar v. Corbin*, 701 So. 2d 334, 337 n.2 (Fla. 1997); *see also The Florida Bar v. Karten*, 829 So. 2d 883, 889-90; *The Florida Bar v. Lipman*, 497 So. 2d 1165, 1168 (Fla. 1986). Mr. Herman asserts now, and has continued to assert at all stages of this proceeding, that his conduct did not and does not violate The Florida Bar's Rules of Professional Conduct. Mr. Herman cannot be punished for maintaining his innocence based on his reasonable interpretation of the Rules.

This is especially true here, where the official comment to the Rules also supports Mr. Herman's conclusion. If this Court disagrees with the comment and with Mr. Herman, this Court's conclusion will state the law on this issue and then The Bar will be educated. But Mr. Herman's good faith understanding is a good faith interpretation, and a lawyer should not be punished under such circumstance. Therefore, the severity of any punishment should not rely on Mr. Herman's refusal to acknowledge the allegedly wrongful nature of his conduct.

On this point, this Court's recent decision in *The Florida Bar v. Germain*, 957 So. 2d 613 (Fla. 2007) is instructive. In *Germain*, this Court held that the respondent's refusal to admit the alleged misconduct was relevant as an aggravating factor because "[w]ith a minimum of legal research, Germain could have discovered that his conduct did constitute unethical conduct." *Id*. at 622 (emphasis added). Here, it is clear that even after extensive legal research, Mr.

Herman is not --and was not-- reasonably on notice that his conduct could be deemed unethical. Unlike the situation in *Germain*, the undersigned have not been able to find a single reported decision involving a situation like the one at issue here. On the contrary, the plain language of the Conflict Rules and the comment Rule 4-1.7 suggest an interpretation consistent with Mr. Herman's analysis.

Finally, The Bar originally filed its Complaint and sought disbarment based on a totally false understanding of the facts in this case. A close and careful examination of the facts convinced the Referee that Mr. Herman was not guilty of any of the charges that were based on disputed facts. Mr. Herman maintained his innocence throughout and was ultimately vindicated of all charges, save the issue he challenges here. He was the victim of a former employee whose lack of credibility was not exposed until the proceeding before the Referee. Surely, when a lawyer, in good faith, maintains his innocence under these circumstances, a subsequent finding that his understanding of an uncertain legal issue was not correct should not be a basis for an enhanced sanction.

CONCLUSION

Based on the foregoing, Mr. Herman respectfully seeks a finding that his conduct did not violate Rule 4-1.7(a)(1-2), Rule 4-1.8(a), Rule 4-8.4(a) or Rule 4-8.4(c), and, in the alternative, a finding that the recommended discipline should be limited to a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2008, the original and seven copies of the foregoing have been sent by overnight delivery to: **Florida Supreme Court, Attention: Clerk's Office,** 500 South Duval Street, Tallahassee, Florida 32301; and a copy by overnight delivery to **THE HONORABLE ANTONIO ARZOLA**, Referee, Richard E. Gerstein Justice Building, 1351 N.W. 12th Street, Room 508, Miami, Florida, 33125; **RANDI KLAYMAN LAZARUS, ESQ.**, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida, 33131; and **KENNETH LAWRENCE MARVIN**, **ESQ.**, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida, 32399-2300.

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ANGELIKA HUNNEFELD

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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ANGELIKA HUNNEFELD