IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

Case No. SC07-363
TFB File No. 2006-70,923 (11B)

Jeffrey Marc Herman

Respondent.

_____/

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.6 of the Rules of Discipline, the following proceedings occurred:

On February 26, 2007, The Florida Bar filed its Complaint against Respondent. On August 15 and 16, 2007, a final hearing was held in this matter, with closing arguments taking place on August 22, 2007. The parties filed supplemental written closing arguments on September 5, 2007. All of the aforementioned pleadings, responses thereto, exhibits received in evidence and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida in accordance with Rule 3-7.6 (m) of the Rules of Discipline.

II. STANDARD OF PROOF

The evidence to sustain a disciplinary decision against the Respondent must be clear and convincing. This standard has been interpreted as requiring something less than beyond a reasonable doubt, as required in criminal cases, but something more than a preponderance of evidence, as required in civil cases. See The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla. 1978); Allstar Ins. Co. v. Vanater, 297 So.2d 293, 295 (Fla. 1974). The Florida Bar has the burden of proving by clear and convincing evidence that respondent is guilty of specific rule violations. The Florida Bar v. Rood, 622 So.2d 974, 977 (Fla. 1993). To meet this burden, the Florida Bar must produce evidence sufficient to generate in the Referee's mind a firm belief or conviction, "without hesitancy", of the truth of its allegations against the Respondent. In Re Inquiry Concerning Davey, 645 So.2d 398, 404 (Fla. 1994). The Florida Supreme Court has further stated that clear and convincing evidence is "free of substantial doubts and inconsistencies." The Florida Bar v. Rayman, 238 So.2d 594, 597 (Fla. 1970).

III. FINDINGS OF FACT

A. Jurisdictional Statement

Respondent is, and at all times mentioned during this investigation was, a member of the Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Rules of Professional Conduct At Issue

The Respondent is accused of violating the following Rules:

RULE 4-1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer shall not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 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.

(b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

* * * *

RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction 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.

(b) Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

* * * *

RULE 4-8.4 MISCONDUCT

A lawyer shall not:

(a) 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;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(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;

* * * *

RULE 4-3.3 CANDOR TOWARD THE TRIBUNAL

(a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

* * * *

C. Narrative Summary Of Case

1. In or about November 1996, the Respondent, Jeffrey Marc Herman, was a partner in the firm of Herman & Grubman, P.A. (herein after referred to as the "Firm"). The Respondent represented Aero Controls, which was in the business of selling and repairing component aircraft parts, and Triple J Leasing, an aircraft leasing business. Aero Controls and Triple J Leasing were one hundred percent owned by John Titus and his spouse. During the relevant time periods, Titus was also the owner of Aero Systems, a Miami based affiliate of Aero Controls.

2. During the relevant time periods, Aero Controls and Triple J Leasing were located at the same address in the state of Washington. Aero Systems had an office in Miami, Florida.

3. The Respondent initially represented Aero Controls with regard to a contract dispute concerning the purchase of a DC-10 aircraft from Air Star International, which resulted in litigation. The Firm also represented Triple J Leasing with regard to negotiating and drafting the lease of Triple J's Boeing 737 aircraft to Air Kazakhstan. The Respondent was significantly involved with both of the aforementioned matters.

4. The Respondent's representation of Aero Controls was not his introduction into the aviation industry. In fact, the Respondent testified that several years prior to representing Titus and his companies, he represented various aviation clients, including the estate of Eastern Airlines. It was during this initial venture into the aviation industry

that the Respondent met Jack Ogilby and John Sicilian. Both Ogilby and Sicilian had extensive backgrounds in the aircraft business.

5. Aero Controls designated their employee Thomas Bristow to assist the Respondent and the Firm in connection with the Air Star litigation as well as the Air Kazakhstan lease transaction. As a result, Bristow spent significant periods of time in South Florida between November 1996 and February 1998. Bristow had previously attended college in the state of Florida.

6. Between February 16, 1998 and February 20, 1998, a trial was held in the Air Star matter resulting in a verdict in favor of Aero Controls. At or around the same time period, Bristow told the Respondent's legal secretary, Lisel Mansen that he wanted to move back to Florida. The Respondent also testified regarding Bristow's desire to move to Florida.

7. On February 26, 1998, subsequent to the Air Star trial, Ogilby's employer "New Pan-Am" filed for bankruptcy. As a result, discussions began between Ogilby and the Respondent with the intention of establishing an aircraft leasing company.

8. The negotiations of the lease between Triple J and Air Kazakhstan were concluded in March of 1998.[1]

[1]. The aircraft at issue was originally purchased by Aero Controls in order to dismantle it and sell the parts, however, that idea was scrapped when they saw that the entire plane still had some mileage left in it. As a result, Triple J was created as an aircraft lease company in order to lease the single plane at issue. This appears to be Titus' only venture into the aircraft lease business. Upon repossessing the aircraft at issue, it was "cannibalized" as originally planned.

9. As a result of the Respondent's and the Firm's representation of Aero Controls, Bristow developed a relationship with the Respondent as well as several other members of the Firm, including but not limited to Roland Moore and Jeffrey Grubman.

10. The discussions between Ogilby and the Respondent continued and resulted in a dinner which took place in Miami Beach, Florida on or about May 19, 1998. Present at this dinner were the Respondent, Ogilby, Moore, Grubman, Sicilian and Bristow. The subject of this dinner was the proposed creation of an aircraft leasing company. The day after the dinner, on May 20, 1998, the Respondent prepared a document titled "Term Sheet." The stated purpose of this document was the: "Purchase, Sale and Lease of aircraft engines and spare parts." **(Exhibit 7).** The term sheet was signed only by the Respondent, Ogilby, Moore and Grubman. Although there was a signature block for him to sign, Sicilian testified at the final hearing that he did not recall ever signing the document. There was no signature block for Bristow and he did not sign the document. Sicilian testified that it was his intent to invest in an aircraft lease company and not a sale of parts company.

11. On or about June 25, 1998, the Respondent incorporated a startup company by the name of Nation Aviation Inc., with the Respondent's law office address as the principal business address of Nation Aviation and the Respondent as the president, sole director and registered agent.

12. On or about July 28, 1998, Air Kazakhstan requested that Moore and the Firm represent it in lease negotiations with a separate entity. Because the Firm had just

represented Triple J in a lease transaction with Air Kazakhstan, the Respondent sent and obtained a waiver from Titus allowing the Firm to represent Air Kazakhstan.

13. The Firm closed its file on the Triple J and Air Kazakhstan lease on or about August 11, 1998.

14. Nation Aviation began operations in the summer of 1998. On or about August 16, 1998, Ogilby traveled to Lima, Peru for negotiations involving an aircraft lease to AeroPeru. Herman traveled with Ogilby and discussed a separate litigation matter with AeroPeru.

15. On or about August of 1998, Bristow called the Respondent and informed him that he was no longer employed by Aero Controls. Instead of wishing Bristow luck on his future endeavors, the Respondent entertained Bristow's interest in working for Nation Aviation. Bristow was not bound by any sort of non-compete agreement with Aero Controls. As a result, he was not barred from continuing to work in the same industry. However, the Respondent was still representing Aero Controls.

16. From August 21, 1998 to September 17, 1998, an employment agreement was negotiated between Bristow and Nation Aviation, with Ogilby acting as the principal negotiator for the new company. Bristow signed an employment agreement with Nation Aviation on or about September 17, 1998. While there were several faxes of the employment agreement sent to the Respondent's offices, there was no evidence presented regarding comments, changes or modifications made by the Respondent to the

employment contract. Furthermore, the employment agreement was signed by Ogilby on behalf of Nation Aviation, not by the Respondent.

17. At the time he signed the employment agreement with Nation Aviation, Bristow was in fact still employed by Aero Controls. A simple call by the Respondent to Aero Controls would have confirmed this fact. Such a call was never made. Bristow did not officially resign from Aero Controls until October 8, 1998, when he submitted his resignation letter. The letter from Bristow makes no mention whatsoever regarding his new employment with Nation Aviation. To the contrary, the letter indicates that one of the reasons for his departure is his need to move his ill mother to a warm weather climate.

18. On or about October 23, 1998, Bristow moved to South Florida. On or about December, 1998, Ogilby had a falling out with Bristow as a result of Bristow's business tactics. Specifically, Bristow, without Ogilby's authorization or knowledge agreed to sell parts on credit to a start up airline called Asia Pacific. Not wanting any further involvement with Nation Aviation, Ogilby asked for a return of his investment. Sicilian also asked for a return of his investment. The Respondent returned both of their investments in January, 2007. The Respondent was left as the only monetary investor in Nation Aviation.

19. At this point (approximately Jan. 1999), the Respondent had a decision to make: he could close Nation Aviation and lose his complete investment or he could allow the company to continue exclusively as a seller and lessor of aircraft parts with

Bristow at its helm. Choosing the latter would mean competing directly with his client. The Respondent knew this and also knew that Bristow, his client's former top salesman, would be running the competition. The Respondent chose to proceed and compete in the very same business as Aero Controls.

20. At or around this time period, the Respondent and the Firm continued to represent Aero Controls in various different legal matters including but not limited to the following: the In Re: Pan American Airways Corp. bankruptcy matter, the Beal Bank litigation matter and the Tzaneen litigation matter.

21. On January 14, 1999, Nation Aviation obtained a sales tax license. This license was needed in order to sell or lease aircraft parts. Nation Aviation never applied for nor obtained such a license prior to making the decision to venture exclusively into the sale of parts business. With Bristow running the day to day activities at Nation Aviation, Nation Aviation also commenced to lease warehouse space in Davie, Florida on or about February 1, 1999.

22. Bristow was the only person at Nation Aviation that sold parts. While Bristow was with Nation Aviation, it did business with twenty three (23) customers who were, or had been, customers of Aero Controls during Bristow's employment there.

23. Through Bristow, Nation Aviation generated gross revenue in 1999 of over $880,000 through the sale of parts. (See Judge Rosenberg's Findings, p.7; See Exhibit 79). It is unclear from the record if this latter sum resulted in any profits for Nation Aviation.

24. On or about July 14, 1999, unbeknownst to the Respondent, Bristow began pursuing personal business interests by creating his own company called Nation Aviation Services, Inc. (Exhibit 57). Bristow listed his home address as the corporate address for this new company and his wife as director. As a result of several alleged wrong doings, the Respondent filed a complaint on behalf of Nation Aviation Inc. against Bristow, his wife and Nation Aviation Services, Inc., on or about January 3, 2000. Nation Aviation obtained a temporary injunction against Bristow and the co-defendants in that matter.

25. The Respondent's representation of Aero Controls and its affiliated companies ended on or about August, 1999. There was evidence introduced regarding Titus' displeasure with some of the Respondent's legal bills and issues involving the Firm's failure to communicate. (Exhibit 137). Overall, Titus and his companies paid the Respondent and his Firm in excess of $500,000 for legal services rendered. While there was no further representation of Aero Controls by the Respondent after August of 1999, Titus testified that he would have hired the Respondent had the need arisen.

26. Aero Controls' Chief Financial Officer, Mary Ann Burns, was in Miami, Florida in the offices of Aero Systems on or about January 17, 2000. On this date, the temporary injunction order was sent by fax to Aero Systems. The temporary injunction was being sent to all of Nation Aviation's customers. The fax was sent to Aero Systems because it apparently had done some business with Nation Aviation through Bristow. Burns testified that she thought nothing of the fax and stated that she was not surprised

that Bristow would be in some kind of trouble. The Respondent's name was not found within the text of the temporary injunction. Instead, he was named in the list of parties getting copies of the injunction. Burns knew that Herman and Bristow had become friendly during the Air Star litigation and assumed that the Respondent's name was on this injunction because he was helping Bristow in the lawsuit. Burns faxed the temporary injunction order to Titus on January 17, 2000.

27. On or about March 1, 2000, Bristow called Burns in order to inquire as to his 401K distribution from Aero Controls. During this conversation, Bristow informed Burns regarding the details of the lawsuit filed by Nation Aviation against him and his co-defendants. Specifically, she testified that she learned for the first time that Herman actually owned Nation Aviation, that he had hired Bristow and that he was the one suing Bristow. Burns testified that she was shocked and immediately went to speak with Titus regarding this issue. Titus became enraged and could not believe that his attorney had hired Bristow and was involved with a competing company. Burns subsequently spoke to Bristow's attorney and Aerocontrols soon thereafter, hired a law firm to look into the legal rights that it could have against the Respondent.

28. Aero Controls sued the Respondent for breach of fiduciary duty and other causes of action in the Broward Circuit Court in a case styled Aero Controls, Inc., et. al. v. Herman & Grubman, P.A. et. al., case no. 00-12376 CACE 25 (referenced to hereinafter at times as "the underlying case"). On or about May 26, 2005, Broward Circuit Judge Robert Rosenberg issued his findings of fact and conclusions of law in the

underlying case. Judge Rosenberg found that Aero Controls had failed to meet its burden of proof on three (3) of the causes of action. However, as to the final cause of action for breach of fiduciary duty, Judge Rosenberg found that the Respondent's testimony was not credible and that the respondent had breached his fiduciary duty to Aero Controls. Specifically, Judge Rosenberg found that he could not credit the Respondent's testimony as to the following nine specific areas:

> a. Nation Aviation was not intended to buy and sell parts and therefore was not going to compete with Aero Controls.
>
> b. Herman was not aware that Bristow's expertise at Aero Controls was locating and selling parts.
>
> c. Bristow was not hired by Nation Aviation to buy and sell parts.
>
> d. Herman had nothing to do with the idea or decision to hire Bristow; rather, it was the doing of Ogilby (who never had a prior relationship with Bristow).
>
> e. Herman never discussed with Bristow any opportunity with Nation Aviation.
>
> f. Herman insulated himself from what was going on with Nation Aviation.
>
> g. Herman insulated himself from what was going on with Nation Aviation.
>
> h. Herman understood that Bristow terminated his employment with Aero Controls before he went to work for Nation Aviation.
>
> i. Ogilby ignored Herman's directives and sent Bristow copies of the drafts of the employment agreement, and in so doing Ogilby had received no input from Herman.

29. Aero Controls' lawsuit against the Respondent was subsequently settled on or about August, 2005.

30. The instant Bar complaint was filed on or about February 22, 2006. Titus testified that he did not file a bar complaint earlier upon the advice of his attorney in the civil action. According to Titus, his attorney advised him that filing the bar complaint during the pending of the litigation could create the appearance that he was trying to extort the Respondent.

D. Respondent's Motion for Final Summary Judgment

The Respondent filed a motion for final summary judgment. The Florida Bar filed a response in opposition to the motion for final summary judgment. A hearing was held on August 8, 2007 on the Respondent's motion. On August 13, 2007, this Referee held a telephonic hearing wherein I announced my ruling denying the Respondent's motion for final summary judgment.

The Respondent's motion sought summary judgment for both the alleged conflict of interest rules violations and the lack of candor rule violation. As to the conflict of interest violations, the Respondent argued that these claims were barred by the applicable statute of limitations. Specifically, the Respondent cited to Fla. Bar R. 3-7.16(a) which states as follows:

> **Time for Inquiries and Complaints**. Inquiries raised or complaints presented by or to The Florida Bar under these rules ***shall be commenced*** within 6 years from the time the matter ***giving rise to the inquiry or complaint*** is discovered or, with due diligence, should have been discovered.

There is a shortage of case law interpreting Rule 3-7.16(a). Generally, "a statute of limitations begins to run when there has been notice of an invasion of legal rights or a

person has been put on notice of his right to a cause of action." Snyder v. Wernecke, 813 So. 2d 213, 216 (Fla. 4th DCA 2002). Here, Aero Controls' complaint with The Florida Bar was filed on February 24, 2006. Therefore, the relevant date for purposes of the Respondent's motion becomes February 24, 2000, six years prior to the filing of the complaint with The Florida Bar.

This Referee found that there were substantial questions of material fact on the issue of whether Aero Controls knew or was somehow put on inquiry notice regarding the matters that gave rise to the complaint. It is undisputed that the temporary injunction in the dispute between Nation Aviation and Bristow was sent by fax to Aero Systems' office in Miami on January 17, 2000. This temporary injunction made no mention regarding the Respondent's affiliation with any of the companies therein listed. In fact, the Respondent's name was only found in the list of parties being copied with the temporary injunction. Because Ms. Burns knew that Bristow and the Respondent had become friendly during the Air Star litigation, she assumed that the Respondent's name was present because he was helping Bristow in the lawsuit. At that time, neither Ms. Burns nor Titus had any reason to believe that the Respondent was actually behind Nation Aviation and was actually suing Bristow. It was not until early March, 2000 when Bristow called Ms. Burns regarding his 401K monies that he divulged the complete story behind Nation Aviation and the Respondent's involvement. Ms. Burns immediately went to see Titus who testified that he was shocked by what he had learned from Ms. Burns. Soon thereafter, Titus began seeking legal representation against the

Respondent. As a result of the foregoing, this Referee denied the motion for summary judgment on the conflict of interest issue. After hearing the testimony during the hearing and reviewing the exhibits, this Referee stands by its ruling on the motion for summary judgment and finds that the conflict of interest violations are not barred by Rule 3-7.16(a).

With respect to the lack of candor violations, this Referee also denied the Respondent's motion for summary judgment. The Respondent argued that the lack of candor claim did not state a cause of action. This Referee found that "intent" was crucial in the determination of the lack of candor claims and that summary judgment was not the proper mechanism to deal with the issue of intent. See Owens v. Mackenzie, 103 So.2d 677 (Fla. 1st DCA 1958). As a result, the Respondent's motion for summary judgment as to the lack of candor claims was denied.

E. Conclusions (Conflict of Interest)

1. The relationship between an attorney and his client is a sacred one. People seek out attorneys and upon retaining them expect honesty, commitment and loyalty. This is what Aero Controls expected when it hired Herman.

2. 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.

3. Interestingly, Herman always knew what to do in those situations. Knowing that he had a client to whom he owed a duty of loyalty, Herman himself testified to various instances where he sought out the client to obtain some sort of waiver in order to represent the former opposing party. Titus himself agreed to such a waiver after the Respondent called him indicating that Air Kazakhstan was seeking to hire the Respondent. (Exhibit 100).

4. Prior to the hearing in this matter, this Referee referred to Titus and Ms. Burns as The Florida Bar's star witnesses. However, during the hearing, it became apparent that this Referee was incorrect. The "star witness" designation belonged to Bristow. While Titus and his company where the victims here, the portion of the Florida Bar's case against the Respondent concerning the solicitation of Bristow hinged solely on the testimony of Bristow himself. Whatever Titus and Ms. Burns knew regarding the alleged solicitation, they knew only because Bristow told them.

5. From all the testimony that I heard and read, as well as all of the exhibits reviewed and analyzed, it does not appear to this Referee that Bristow is a credible witness. Unfortunately, Bristow did not testify in person. This Referee was not able to view Bristow's deportment, demeanor, mannerisms and overall attitude. Instead, this Referee was left to read his deposition transcript, consider the testimony of others regarding Bristow as well as documents either created by him or referring to him. In

conducting this analysis, this Referee was provided with example after example of Bristow's deceit, dishonesty, misrepresentations and self-dealing. Some of these examples are seen below:

- Bristow tells the Respondent that he resigned from Aero Controls when he in fact had not;
- While still working for Aero Controls, Bristow negotiates directly with Ogilby in an effort to gain employment with Nation Aviation;
- Bristow testified during his deposition that he had no interest in relocating his family to Florida. This is completely contrary to the testimony of Ms. Mansen who testified that Bristow told her he wanted to move back to Florida. Ms. Mansen was a disinterested witness who had nothing to gain by testifying in this matter;
- Bristow signed an employment contract with Nation Aviation but did not submit a resignation letter to Aero Controls until almost three (3) weeks later;
- Bristow submits a resignation letter to Titus that is replete with falsehoods;
- After resigning from Aero Controls and beginning work with Nation Aviation, Bristow was paid substantial sums by Aero Controls for consulting work provided in November and December of 1998. Specifically, these payments were for consulting work he completed after beginning his employment with Nation Aviation. As a result, it is clear that Bristow was double-dipping and working for two companies at the same time without either company knowing it;
- During his deposition, Bristow admits to creating his own company while he was still employed by Nation Aviation. Bristow conveniently named this company Nation Aviation Services. Bristow's justification for doing this was that he "was Nation Aviation." Basically, he admitted that he was entitled to take what was not his. He further justified his actions by stating that he had a new baby and a mortgage;
- Bristow changed the address of Nation Aviation to his home address;
- Bristow changed the phone number of Nation Aviation to his home phone;
- Bristow diverted Nation Aviation parts to his garage at his home;
- Bristow diverted Nation Aviation business and payments to his home;
- Bristow misused and/or failed to use the Nation Aviation inventory software program;
- Bristow caused Grubman to be sued by Aero Controls as a result of his allegations that Grubman had solicited him to work for Nation Aviation. As it turns out, the claim against Grubman was dropped because this allegation was not true and Grubman was not even at the May, 1998 dinner meeting as Bristow originally claimed;

- When discussing the lawsuit filed against Bristow, Mrs. Burns testified that it was not "unusual" for Bristow to be in trouble; and
- Bristow returned parts belonging to Nation Aviation only after receiving a civil theft letter from Nation Aviation.[2]

6. As previously stated, the solicitation evidence comes in the form of Bristow's deposition as well as Titus' testimony regarding what Bristow told him. In other words, Titus had no independent knowledge that the solicitation in fact took place. Bristow had an interest in gaining an alliance with Titus. This interest arose from the fact that Bristow and his wife were being sued by the Respondent as a result of his actions while employed by Nation Aviation. It was in Bristow's best interests to align himself with Titus and divert the Respondent's attention away from Bristow. Bristow succeeded in doing this.[3]

7. The clear and convincing standard has been defined as being free of substantial doubts and inconsistencies. See Florida Bar v. Rayman, 238 So.2d at 597. This Referee finds that there are substantial doubts and inconsistencies when it comes to the Florida Bar's solicitation claim. Specifically, this Referee finds that there is not clear and convincing evidence establishing that: **(a)** the Respondent participated in the employment contract negotiations with Bristow; and **(b)** that the Respondent solicited and hired Bristow away from Aero Controls. It is undisputed that Nation Aviation hired Bristow. The Respondent did know that Bristow was negotiating with Nation Aviation

[2] The Florida Bar pointed out throughout the hearing that Bristow was not the person on trial. While this is true, Bristow was the Bar's star witness on the solicitation issue. As a result, this Referee is required to review and analyze the record in this case in order to assess Bristow's credibility. Many of these areas that I cited above were rebuttable but no such rebuttal took place here, primarily because Bristow was never called to the witness stand by the Florida Bar.

[3] During the hearing of this matter, it was revealed that Bristow entered into a "joint defense agreement" with Titus even though they were not part of the same lawsuit.

through Ogilby. Specifically, the Respondent received at least three (3) drafts of the employment contract from Ogilby. The Respondent testified that he told Ogilby that he did not want to be involved in the process[4] and claims he told Ogilby not to continue sending these drafts. It is unclear as to why Ogilby continued to do so. However, there is no evidence that Herman responded to Ogilby by making any comments and/or changes to the drafts of the contract faxed to his office. The Respondent knew Bristow was about to get hired by Nation Aviation and thought Bristow had resigned from Aero Controls. The Respondent testified that he wanted to stay away from the negotiations. It is unclear to this Referee as to how truly involved the Respondent was in this process. As a result, this Referee finds that the Florida Bar has not met its burden on the solicitation issue[5].

8. This Referee further finds that it has not been established by clear and convincing evidence that the Respondent intended on being in the business of sale of parts when he created Nation Aviation. The idea to establish an aircraft leasing company apparently originated with Ogilby. Sicilian testified that the aircraft parts business was terrible and too populated. On the other hand, according to Sicilian, the aircraft leasing business was different because of its low overhead and lack of inventory. The initial term sheet prepared after the dinner meeting appears to indicate a desire to lease aircraft and sell parts. The Respondent and Sicilian explained that any

[4] Specifically, the Respondent testified that he told Ogilby not to even talk to Bristow if Bristow was still working with Aero Controls.

[5] Judge Rosenberg may have felt that the solicitation was proven by the Plaintiffs in the underlying case by a preponderance of the evidence. However, this Referee does not believe that the Florida Bar has proven solicitation here by clear and convincing evidence, particularly given Bristow's lack of credibility.

such sale of parts referenced therein actually was meant to refer to the supplemental sale of spare parts in conjunction with corresponding aircraft lease agreements. In fact, the actual Nation Aviation business documentation for the relevant time period (i.e., 1998) overwhelmingly evidences Nation Aviation's business as an aircraft leasing company. (See exhibits 5, 8, 14 and 19). 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 1998. This is consistent with the hearing testimony of the Respondent and Sicilian.[6] Furthermore, Nation Aviation did not apply for the sales tax license nor lease warehouse space (both requisites for the selling of aircraft parts) until after Ogilby's departure in January of 1999.

9. This matter is not resolved based simply on the findings that this Referee has made above.[7] That is so because there came a time period in January of 1999 that the Respondent had to make a critical decision. Specifically, the Respondent had to decide what to do with Nation Aviation once Ogilby decided that he wanted out. Ogilby was the "day-to-day man" at Nation Aviation and apparently did not like Bristow. The Respondent returned Ogilby's investment but decided not to shut down Nation Aviation. Instead, he left Bristow at the helm and agreed to get into the sale of parts business. In the Respondent's own words, Bristow was responsible for the "heart of [the] operations" at Nation Aviation. (Exhibit 50). The Respondent admitted during his testimony that he probably should have called Titus regarding his decision to sell parts

[6] Bristow even testified during his deposition that "[w]hen they [Aero Controls] were starting up, they were going to do aircraft leasing" and that Aero Controls had no sales in 1998.
[7] The conflict of interest rules violations are not based solely on the solicitation issue.

in January of 1999 and regrets not doing so. In fact, as stated above, the Respondent had done just that in similar situations where conflicts had arisen during his legal career.[8] For reasons known only to the Respondent, he did not make that phone call to Titus and decided to stay in the parts business.

10. This decision resulted in the Respondent basically entering into a business that competed directly with his current client, Aero Controls. The testimony is undisputed that the Respondent's law firm still represented Aero Controls in January of 1999, and that Aero Controls had paid and was continuing to pay the Firm substantial attorney's fees. Not surprisingly, with Bristow in control, Nation Aviation solicited and participated in numerous transactions with over twenty three (23) of Aero Controls' customers. Nation Aviation, with Bristow in control, generated over $880,000 in gross revenue through the sale of parts in 1999. Basically, the Respondent used his client's former employee to compete against his client.

11. Additionally, the Respondent's Firm continuously represented Nation Aviation while it was still counsel for Aero Controls.

12. The Respondent testified that he had concerns and felt stuck. These feelings are apparently attributed to the fact that he had invested a substantial amount of money in Nation Aviation. Rather than just let the Nation Aviation experiment come to an end, he instead agreed to enter into a competing business with his client, a business that was now being run on a day-to-day basis by his client's former top salesman.

[8] For instance, the Respondent testified that he informed Ogilby that Nation Aviation not to do business with Air Kazakhstan because the Respondent was representing them in legal matters. (Exhibit 100).

13. The Respondent's hesitancy and concern show that he knew that there was a risk in transforming Nation Aviation into a parts business. The Respondent knew that this would be a competing business. The Respondent's explanation that he was not involved in day-to-day operations and that he was letting Bristow handle things does not justify or excuse his violations of the Rules of Professional Conduct. Neither does the fact that he told Bristow not to do business with Aero Controls' customers. He 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. As a result, the Respondent had to know that these actions would be adverse to Aero Controls and that it would suffer directly as a result of Nation Aviation's new venture into the parts business.

14. Pursuant to Rules 4-1.7 and 4-1.8, the Respondent had to disclose the conflict to Titus and obtain his consent. It is undisputed that Aero Controls never consented to the creation, operation and transformation of Nation Aviation. Instead, Titus testified that he was shocked and felt betrayed by the Respondent's actions.

15. The Respondent argues that two companies merely overlapping in industry does not present the requisite adversity to trigger the conflict of interest rules. This case does not present the simple scenario of "two companies merely overlapping in industry" or that of an attorney who innocently invests money with a potential competitor of a current client. The Respondent here knew precisely what he was doing. He was the competing company. He knew that he was venturing into a territory that made him feel uncomfortable. In the past, the Respondent had done the proper thing and had called his

clients to seek consent and/or a waiver. He did not do that here. He 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. To make matters worse, the Respondent was representing both Aero Controls and Nation Aviation while his own company competed directly with Aero Controls.[9] This entire scenario presents a classic conflict of interest and not a "theoretical business conflict" as proposed by the Respondent. This Referee finds that the Florida Bar has proven the conflict of interest violations against the Respondent by clear and convincing evidence.

16. The Respondent'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. The Respondent knew what he had to do but decided not to do it. This is the question this Referee keeps asking himself: Why didn't the Respondent just call Titus? The only logical response is that the call was not made because of possible monetary concerns including: **(a)** the fear of losing Aero Controls as a client; **(b)** the fear of being sued by Aero Controls; **(c)** the fear of losing his investment in Nation Aviation; or **(d)** the fear of having Titus refuse to consent resulting in the Respondent's inability to obtain profits from his venture into the sale of parts industry.[10]

[9] Clearly, the Respondent had divided loyalties that could have and in fact did adversely affect Aero Controls. (See Exhibit 137).

[10] Interestingly, the Respondent testified during the hearing that Nation Aviation was closed and he lost his entire investment after all the legal proceedings involving Bristow were initiated.

17. Finally, the Florida Bar argued that the Respondent surreptitiously violated Rule 4-1.8(b) by hiring Bristow and using the information that Bristow possessed. This Referee believes that the Florida Bar extends Rule 4-1.8(b) beyond its plain meaning. The Rule indicates that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client." This Referee was not presented with credible evidence demonstrating that the Respondent himself used information relating to his representation of Aero Controls to the disadvantage of Aero Controls.

F. <u>Conclusions (Lack of Candor)</u>

1. The Florida Bar's lack of candor claim against the Respondent is based squarely upon Judge Rosenberg's findings of fact and conclusions of law in the underlying case.

2. Specifically, Judge Rosenberg wrote that he "found it difficult to accept [the Respondent's] version of events," and indicated that he "could not credit [the Respondent's] testimony" in nine delineated areas. The Florida Bar points out that Judge Rosenberg could have easily made findings of fact without specifically finding a lack of credibility against the Respondent in the specific areas. According to The Florida Bar, by choosing to delineate these specific areas, Judge Rosenberg was expressing "how strongly he felt."

3. Judge Rosenberg did not testify at the hearing in this matter nor was an affidavit submitted on his behalf. There was also no specific finding of a lack of candor by Judge Rosenberg in his ruling nor was there any evidence presented that he reported

the Respondent himself to the Florida Bar as a result of these nine specific areas or that he directed the plaintiffs in the underlying case to do so.

4. In the underlying case, Judge Rosenberg had to reach a decision based on the preponderance of the evidence, a standard much lower than the one at issue in this case.

5. In this Referee's opinion, lack of credibility does not necessarily mean lack of candor. Credibility of a witness is a factual determination to be made for each witness in every case. State v. Wolff, 310 So.2d 729 (Fla. 1975). As a County Court Judge, this Referee makes credibility findings on a day-to-day basis. These determinations are based not only on what witnesses say but also on the witnesses' deportment, demeanor and overall attitude.

6. While Judge Rosenberg indicates in his findings that he carefully considered the Respondent's testimony, deportment and demeanor, it is clear that he was never given the opportunity to observe the deportment and demeanor of Bristow. This Referee was also placed in the same situation because Bristow was never called to the stand by the Florida Bar. Instead, this Referee was left to read his deposition transcript, consider the testimony of others regarding Bristow as well as documents either created by him or referring to him. As previously stated, this analysis led this Referee to numerous examples of Bristow's deceit, dishonesty, misrepresentations and self-dealing resulting in a finding that he is not a credible witness.

7. The parties are in dispute as to the proper standard that is to be applied in lack of candor cases. The Respondent argues that a lack of candor charge is tantamount to a

perjury charge and requires an affirmative showing of knowing and intentional misstatements that the Respondent did not believe to be true at the time that they were made. See In Re: Davey, 645 So.2d 398 (Fla. 1994). On the other hand, the Florida Bar asserts that it merely has to show that the Respondent's conduct was deliberate or knowing. See The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999). The Florida Bar further argues that the standard proposed by the Respondent and his reliance on In Re: Davey is misguided. See The Florida Bar v. Mogul, 763 So.2d 303 (Fla. 2000).

8. The parties spent much effort arguing these different standards. It is not clear to this Referee whether there is even a difference. Regardless, under either standard, the issue boils down to whether or not the Respondent knowingly made false statements to Judge Rosenberg. The comment section of Rule 4-3.3 lends some guidance by indicating that an assertion by an attorney in open court can only be made if the lawyer "knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry."

9. The nine areas at issue were adopted verbatim by Judge Rosenberg from Aero Controls' counsel's written closing statement in the underlying case. (Exhibit 156). The specific lack of credibility findings made by Judge Rosenberg in these nine areas either: **(a)** mischaracterized the Respondent's testimony; **(b)** reflect facts that are uncontradicted or corroborated by other witnesses; or **(c)** are contradicted solely by the deposition testimony of Bristow. The foregoing was thoroughly and convincingly set forth by the Respondent's counsel at the hearing and is attached as Appendix "M" to the

Respondent's Closing Argument. None of these nine areas, when scrutinized through an analysis of the record evidence and testimony available to Judge Rosenberg support a lack of candor finding. It should be noted that Judge Rosenberg did not make a lack of candor finding. He merely found that the Plaintiffs had proven their breach of fiduciary duty claim. In making his finding, Judge Rosenberg held that he could not credit the Respondent's testimony in some specific areas. This does not necessarily and automatically mean that a lack of candor is present. The record evidence shows that the Respondent had support for his belief that the statements he made were true when he made them and also shows that Bristow, a witness whose version of the facts Judge Rosenberg relied on, is not credible at all. Much of the Respondent's testimony at trial in front of Judge Rosenberg came from conversations that he had with Bristow. The Respondent's blind reliance on these representations made by Bristow was plain dumb. However, this Referee does not believe that the Respondent's testimony during trial rose to a level of a lack of candor toward Judge Rosenberg.

10. Judge Rosenberg did not believe the Respondent's version of the events and made his findings. This Referee is not indicating in any way that Judge Rosenberg made the incorrect findings. Instead, this Referee feels that Judge Rosenberg's findings were merely just his "findings" based on a preponderance of the evidence. Just like this Referee has to make day-to-day credibility findings as a County Court Judge, Judge Rosenberg also had to make credibility determinations in making his findings. This does not result in an immediate finding of lack of candor. If this were so, then every

time an attorney testifies, she would subject herself to a Florida Bar lack of candor charge if a judge were to find her version of the events unworthy of belief or find the testimony of another witness more credible or logical. See In Re: Davey.[11]

11. In view of the foregoing, this Referee finds that The Florida Bar has not presented clear and convincing evidence to support the lack of candor charge against the Respondent.[12]

IV. RECOMMENDATIONS AS TO GUILT

I recommend that Respondent be found **guilty** of violating **Rule 4-1.7(a)(1-2)** (Conflict of interest; representing adverse interests); **Rule 4-1.8(a)** (Conflict of interest; acquiring ownership interest adverse to client); **Rule 4-8.4(a)** (Misconduct; violating the Rules of Professional Conduct); and **Rule 4-8.4(c)** (Misconduct involving fraud, deceit or misrepresentation) of the Rules of Professional Conduct of The Florida Bar.

[11] Rule 4-3.3 does not limit lack of candor claims to situations where attorneys themselves take an oath and testify. Such a claim could be filed against an attorney who litigates a position in open court based on information provided to her by someone else, such as a client. The claim, of course, would have to be based on the attorney having knowingly made a false statement of material fact or law. If a lack of candor claim could be based merely on a judge's finding that one attorney's arguments were more credible or logical than another attorney's arguments, then every attorney in the State of Florida would be subject to a Rule 4-3.3 claim every time he or she loses an argument in court. This clearly is not the intent behind Rule 4-3.3.

[12] The Respondent argues that the claims against him are barred by the equitable doctrine of laches. Laches generally requires proof of (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice by the party asserting the defense. McCoy v. State 699 So.2d 1366, 1368 (Fla. 1997). Here, the Respondent has not met these two elements. First, the Respondent asserts that Aero Controls knew that Ogilby was dying of cancer and implies that Aero Controls waited until after Ogilby's death to file its claim with the Florida Bar. There was no evidence presented at the hearing to corroborate this theory. To the contrary, Titus testified that he did not file a bar complaint sooner based upon his counsel's advice not to do so because of the pending litigation. More importantly, the Respondent's laches defense fails because this Referee has found that the Florida Bar has not shown by clear and convincing evidence: (1) that Herman solicited Bristow to leave Aero Controls and come work for Nation Aviation, and (2) that Nation Aviation was created initially to be a sale of parts company. These are the main areas where Ogilby would have assisted the Respondent during this hearing. Since this Referee has determined that the Respondent was successful on these issues, there is no prejudice to the Respondent.

I recommend that Respondent be found not guilty of violating **Rule 4-3.3(a)** (Candor toward a tribunal) and **Rule 4-1.8(b)** (Conflict of interest; using information to disadvantage of client) of the Rules of Professional Conduct of The Florida Bar.

V. CASE LAW

Prior to recommending discipline, I considered all of the case law cited by both sides in their multiple briefs and memorandums of law.

VI. PERSONAL HISTORY, PAST DICIPLINARY RECORD; AGGRAVATING AND MITIGATING FACTORS

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following:

A. Personal History of Respondent:

- Age: 48 years old
- Date admitted to the Bar: December 26, 1985

B. Aggravating Factors:

- Dishonest or selfish motive;
- Substantial experience in the practice of law;
- Refusal to acknowledge wrongful nature of conduct; and
- Actual harm to client.

C. Mitigating Factors:

- Absence of a prior disciplinary record.

VII. **RECOMMENDATION AS TO DISCIPLINARY MEASURE TO BE APPLIED**

Prior to recommending discipline, I considered the Florida Standards for Imposing Lawyer Sanctions.

The sanction in an attorney disciplinary case must serve three purposes: **(1)** it must be fair to society; **(2)** it must be fair to the attorney; and **(3)** it must sufficiently deter other attorneys from similar misconduct. Florida Bar v. Wasserman, 654 So.2d 905, 907 (Fla. 1995). The Florida Bar is seeking the disbarment of the Respondent as the sanction in this matter. This Referee rejects the Bar's recommendation of disbarment. The Florida Bar cites to the St. Louis opinion in support of its request for disbarment. See In The Florida Bar v. St. Louis, 2007 WL 128 5836 (Fla. 2007). The St. Louis case does not support the disbarment sanction sought by the Florida Bar in this case. In St. Louis, the attorney clearly made false statements not only to the Florida Bar but also to a Circuit Court Judge. Here, the lack of candor charges against the Respondent have not been proven by clear and convincing evidence. The only remaining claims are the conflict of interest violations for which the Respondent will be punished as set forth below. This Referee does not believe that disbarment would accomplish any worthy objective. I also reject the Respondent's recommendation of a simple admonishment or public reprimand. The Respondent clearly violated the conflict of interest rules which resulted in harm to his client. Therefore, the sanction must be more severe than a simple admonishment or public reprimand.

The Respondent is a member in good standing with the Florida Bar since 1985. There is no evidence of any prior disciplinary action against the Respondent.[13] The evidence presented during the hearing demonstrated that the Respondent has substantial experience in the practice of law. On many occasions, when presented with conflict of interest scenarios during his career, the Respondent did precisely what he had to do under the ethical rules. The Respondent testified as to several of these scenarios and indicated that he understood that there were ethical lines in those situations which he could not cross. The Respondent testified that, in this situation, he did not feel that he was doing anything that was ethically wrong. However, at the same time, he testified that he regrets not calling Titus. This regret does not amount to either remorse nor to an acknowledgement of the wrongful nature of his conduct. It is mind-boggling to this Referee that the Respondent could not see that there was an ethical line present when he had to decide whether to transform Nation Aviation from an aircraft lease company to a sale of parts company. He knew what he was doing was wrong. That is why he told Bristow, his client's former top salesman, not to sell to customers of Aero Controls. That is why he felt "stuck" as he testified.

It is undisputed that Aero Controls suffered actual harm as a result of the Respondent's actions. The Respondent admits that he had a company that was competing with his client, Aero Controls. The Respondent further testified that he directed Bristow not to sell to any customers of Aero Controls. Simply having told

[13] However, there was some evidence presented during the hearing that the Respondent was sanctioned by a federal court judge in 1997. See Pacific Harbor Capital Inc. v. Carnival Airlines, 210 F.3rd 1112 (9th Cir. 1999). It does not appear as if any bar complaints were filed against the Respondent as a result of these aforementioned sanctions.

Bristow not to compete does not shield the Respondent from his ethical obligations as an attorney. As it turns out, Bristow sold parts directly to twenty-three (23) of Aero Controls' customers. This is business that the Respondent took directly from the hands of Aero Controls, a pending client that was still paying him and had already paid over $500,000 in legal fees.

The Respondent obviously was not concerned about Aero Controls. The Respondent had a decision to make in January of 1999 as to whether or not he would transform Nation Aviation into a sale of parts business. He could have decided not to proceed in that business, or at a minimum, he could have called Titus to determine whether a waiver and/or consent could be obtained. The Respondent pursued neither of these options. As indicated earlier, the only explanation that this Referee can garner from the record evidence is that the Respondent was making his decision based upon his own selfish monetary concerns. The Respondent made a horrible decision in January of 1999 and he is going to have to live with the consequences of his decision for the rest of his life.[14]

While this Referee does not agree that disbarment is an appropriate sanction, I do believe that a suspension is appropriate. The Respondent knew that a conflict of interest existed and failed to disclose it to Aero Controls. He secretly competed with his client while using his client's former top salesman. As a result, Aero Controls suffered actual harm. Accordingly, this Referee recommends that the Respondent be suspended from

[14] Although the decision by the Respondent was made in January of 1999, he could have changed his mind. He never did and instead continued competing with Aero Controls for approximately one (1) year until such time as his relationship with Bristow soured.

the practice of law for ninety (90) days and be placed on probation for a two (2) year period of time. This Referee also recommends that the Respondent be given a public reprimand and that he be required to pay the Florida Bar's taxable costs as set forth below. During the Respondent's probationary period, this Referee recommends that the Respondent be required to perform two hundred (200) hours of pro bono legal services. The pro bono hours should be performed at a rate of one hundred (100) hours per year.

To summarize, I RECOMMEND THAT Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. **Suspension from the practice of law for ninety (90) days; two (2) years of probation; a public reprimand; two hundred (200) pro bono hours to be completed during the probationary period (at a rate of one hundred (100) hours per year) .**

B. **Payment of the Florida Bar's costs in these proceedings. <u>See</u> Section VIII below.**

VIII. **STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED**

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Fee Rule 3-7.6(o)(1)(I)	$1,250.00
Bar Counsel's costs	$141.34
Court Reporting costs	$8,628.90
Staff Investigator's costs	$51.80
Witnesses' expenses	$1,669.36
TOTAL:	**$11,741.40**

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

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Hon. Antonio Arzola, County Judge/Referee
1351 N.W. 12 Street, Suite 508
Miami, Fl. 33125

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Report of the Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32301; that an e-mail copy of the Report was also sent to THE HONORABLE THOMAS D. HALL; and that copies were mailed by regular U.S. Mail and fax to: KENNETH LAWRENCE MARVIN, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; RANDI KLAYMAN LAZARUS, Bar Counsel, The Florida Bar, Rivergate Plaza, Suite M-100 444 Brickell Avenue, Miami, Florida 33131; and ALAN T. DIMOND, Respondent's Counsel, Greenberg Traurig, 1221 Brickell Avenue, Miami, Florida 33131, on this 15th day of November, 2007.

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Honorable Judge Antonio Arzola, Referee