

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JEFFREY MARC HERMAN,

Respondent.

Supreme Court Case
No. SC07-363

The Florida Bar File
No. 2006-70,923(11B)

ON PETITION FOR REVIEW

INITIAL BRIEF OF THE FLORIDA BAR

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INTRODUCTION

For the purpose of this brief, The Florida Bar will be referred to as “The Bar” or “The Florida Bar”. Jeffrey Marc Herman will be referred to as “Herman”, “Jeff Herman”, “Jeffrey Herman” or “Respondent”. Other persons will be referred to by their respective surnames.

References to the appendix will be set forth as (A. followed by the sequence number). References to the Trial Exhibits will be set forth as (Exhibit followed by the sequence number). References to the transcript of the final hearing held August 15 and 16, 2007 will be set forth as (TR. and page number).

STATEMENT OF THE CASE AND OF THE FACTS

On February 27, 2007, The Florida Bar filed its complaint charging the respondent with misconduct which arose as a result of forming a company, Nation Aviation, which was in direct competition with his client, Aero Controls, and employing their key employee, without their knowledge and with adverse financial consequences to them. Additionally, the respondent continued to represent Aero Controls while he was the President of Nation Aviation and employer of Aero Controls' former employee. The complaint also charged the respondent with misconduct which arose by virtue of judicial findings that his testimony was not credible in a civil case heard in Broward County, Florida in which Aero Controls sued the respondent and prevailed.

On March 21, 2007, the Honorable Antonio Arzola was appointed as referee. A final hearing was held on August 15 and 16, 2007, with closing arguments heard on August 22, 2007.

The Florida Bar presented John Titus as its first witness. Titus was the complainant in this matter. (TR. 81). He was born and raised in India and received a Bachelor's degree in economics there. He came to the United States in 1971 and studied aeronautical technology. In 1984, he established Aero Controls, which is in the aircraft parts sales, repairs and leasing business and operates out of Seattle, Washington. Aero Controls does repairs and overhaul of aircraft

components, as well as the sale and leasing of any type of aircraft part. In 1996, Titus also owned Triple J Leasing, which was in the business of leasing the entire aircraft. Aero Controls and Triple J Leasing operated out of Seattle, Washington. In 1996, Titus also owned Aero Systems, located in Miami, Florida. (TR. 82-83; 156-157). If some other company, like Herman's company, Nation Aviation, was trying to lease out aircraft that would be competition to Triple J Leasing. (TR. 158). In 1993, Titus hired Tom Bristow as his Director of Business Development of Aero Controls. Bristow attended Embry Riddell Aeronautical University in Daytona Beach, Florida. (TR. 110). Bristow was good at locating parts, as well as with the computer system. He knew how to bring out the information and analyze it. He was a valuable employee and a rainmaker. (TR. 84). During the first 5 years of Bristow's employ with Aero Controls, he averaged about \$3 to \$4 million in sales each year. He knew a lot of people in the industry from his background working for airlines and had a keen sense of knowing what was going on in the industry. (TR. 85).

John Titus first hired Jeffrey Herman's firm in 1996 concerning a matter with Aero Systems in Miami. In 1996, Herman handled a matter for Titus' company, Triple J Leasing, concerning a lease with Air Kazakhstan. Herman's firm was preparing the lease. Around that same time, Herman and his firm were representing Aero Controls in the Air Star litigation concerning the purchase of a

DC-10 for Aero Controls. (TR. 84-86). During that time Herman or someone from his firm requested that Titus send 1 of their employees to assist them with those 2 matters. With regard to the lease matter they needed someone familiar with leases, aircraft modifications, sea checks and various aspects of the technical side of an aircraft. Titus sent Tom Bristow since he was familiar with the contract with Air Kazakhstan as he had worked to put the terms of the deal together.

Bristow spent months in Miami at Herman's office. (TR. 88).

Bristow had never expressed any dissatisfaction with his employment. He never asked for a raise and never asked to be transferred from his home base in Seattle, Washington to Miami, Florida. Bristow did not indicate a desire to move with his family to Miami. Titus was satisfied with Bristow, as an employee. Titus was surprised when Bristow resigned in October of 1998. (TR. 89-90). Bristow had his hourly pay increased from \$29 to \$30 on September 21, 1998 and had received bonuses. (TR. 112). When Bristow started working for Aero Controls his salary was approximately \$35,000. When he left, 3 or 4 years later, his salary was close to \$90,000, plus. (TR. 159). Bristow's departure, being one of Titus' top employees, impacted Titus financially since Bristow had produced \$3 to \$4 million a year and personally impacted Titus since Bristow had never mentioned that he was unhappy. Bristow told Titus that he was going to start his own business, which Titus later came to know as Nation Aviation, using an inheritance from his

grandmother. Today he knows that those statements were false. (TR. 113-114). He always thought Nation Aviation was Tom Bristow's company, not Jeff Herman's. (TR. 123). In Bristow's resignation letter, Bristow stated that he had not been considered for other positions in Aero Systems, located in Miami, Florida or promoted. Titus told Bristow that he never mentioned any interest in moving to Miami to him and that there could not be a promotion as the only job above Bristow was Titus'. (TR. 115-117). Although Bristow's resignation letter discussed being dissatisfied with his income, Titus did not discuss this with him so as not to discourage him from starting his own business. (TR. 118). Bristow was paid by Aero Controls until October 23, 1998. Titus would have felt betrayed and stolen from if he was paying Bristow during that time as a full time employee and Bristow was also working for Jeffrey Herman's company, Nation Aviation, at the same time. (TR. 119-120). He would have also felt betrayed by Jeff Herman for employing him, while Bristow was being paid by Aero Controls. (TR. 162).

Although Bristow was replaced by another employee, he did not fill his shoes since Bristow had a special knack for generating money for the company. Titus had no reason to believe that would have changed had Bristow remained in his employ. (TR. 91-93).

Herman and his firm continued to represent Titus in the Triple J Lease matter until the middle of 1999. (TR. 95). Herman's firm billed Titus for the last

time on the Air Star Litigation on March 29, 1999 for time spent, and for costs incurred in May of 1999. (TR. 95-96, Exhibit 129). A bill from Herman's firm on the Beale Bank matter that it handled for Aero Controls reflected that the last service performed was on December 23, 1998. (TR. 98, Exhibit 130). Herman's firm billed on the Aero Controls v. Tzaneen matter for the last service performed on April 30, 1999. (TR. 99). Herman's firm also billed Aero Controls on the Pan Am matter for its last service on August 30, 1999. (TR. 99, Exhibit 132). Herman's firm billed Aero Controls for their work on the Olympic 727 aircraft matter as the last date services were performed on July 13, 1998. (TR. 100, exhibit 135). Titus would have continued using Herman to represent him had there been any pending matters. (TR. 177). At no time during any of that representation or thereafter did Herman contact Titus to advise him that he was the owner and president of Nation Aviation, to seek a waiver of a conflict of interest or to advise that he employed Tom Bristow. Titus paid all bills to Herman. Some were discounted since Titus felt they were overcharged. They ultimately agreed to a settlement amount after going back and forth. It was quite a hassle. Those problems occurred in 1998 and 1999. Aero Controls paid Herman's firm over \$400,000 in legal fees. (TR. 101-102; 145-146; 169). Herman did seek a waiver from Titus to enable him to represent Air Kazakhstan in a subsequent matter. (TR. 103).

Once the Air Star litigation was completed in April of 1998, Herman had agreed to write letters on behalf of Aero Controls to obtain the return of a part called an APU. It took them a while to recover those parts. This occurred in early 1999. Titus was dissatisfied with Herman's handling of that matter. (TR. 166-169). Titus was also dissatisfied with Herman's handling of the Beale Bank matter. He felt that a better job could have been done to get a discounted settlement amount from the bank. (TR. 169).

Titus learned of Herman's involvement in Nation Aviation for the first time in March of 2000. He was outraged, upset and mad. He could not express how he felt. He thought he had hired a lawyer to do something in confidence, had shared information with him and sent his best employee to help with the process (Bristow) and then found out that employee had been hired away and his lawyer was going to be his competition. He was "mad as hell" (TR. 103,127,128). Titus testified as follows:

Because it is a company he started with using my main man. What do you expect me to do in that one? I mean, I have – I sent my guy down there to work with him. He turned around and hired and started a competing business. What would you feel? How would you feel?

(TR. 128)

Once he discovered that Herman had formed Nation Aviation and hired away Tom Bristow, Titus hired the Ruden, McClosky law firm to look into his

rights. He spoke with Bristow and his lawyer, Larry Adair, and learned a lot of details. He met with Bristow and Adair in Fort Lauderdale. (TR. 104). He did not have any personal knowledge of Herman's solicitation of Bristow, only what he learned from Bristow and Adair. (TR. 137). A lawsuit was filed and Titus incurred \$700,000 in legal fees. The entire process took 5 years. There was a bench trial and a decision issued in his favor awarding him 1.5 million dollars. The matter ultimately settled and he received the funds in August of 2005. (TR. 105-106,107).

John Titus filed a grievance with The Florida Bar since he felt that what Herman did was not right and not ethical and that he was not willing to admit that he was wrong. Herman kept thinking that whatever he did was right. Titus could not believe that Herman could go on and hurt other people. Titus believed he was fortunate enough to have the resources to pursue Herman, but other people might not be able to do that. (TR. 107). He still is shaking his head, after 7 years, at the thought that Herman could take his information, hire his best employee and start a business against him. Herman breached the loyalty due to him. Herman had no respect for his client and did whatever he could to his own benefit. (TR. 108).

Titus and his companies were adversely affected when Herman hired Bristow since they lost 3 to 4 million dollars in business. Titus was also adversely affected by the formation of Nation Aviation since they were directly competing

with Aero Controls. They took over 25 of Aero Controls customers. (TR. 108). Nation Aviation also competed with Triple J Leasing in the lease matters. (TR. 109). Titus believed that Nation Aviation was trying to do leases with Air Kazakhstan and may have been trying to use the lease that Herman & Grubman negotiated for them. (TR. 147).

Titus traveled to Florida to be deposed in the Bar matter and to appear at the final hearing. He had nothing to gain financially by filing a complaint against Herman with The Florida Bar. (TR. 109).

The Florida Bar's second witness was Mary Ann Burns. Ms. Burns earned a Bachelors of Science degree in business administration, with a major in accounting from Florida State University in 1975. She has worked in public accounting for 21 years. (TR. 187). She has worked for Aero Controls for 11 years as its vice-president of finance and administration and their chief financial officer. The human resources department reports to her. (TR. 188). She knows Tom Bristow. He was a very high-producing employee and served as their director of business development. He brought a lot of revenue into the company. (TR. 188). After his departure there was an immediate loss in revenues and the growth rate of the company slowed down. They were not able to replace the skills that Tom had. The void he left was never filled since they could never find the kind of person able to find that deal, and find the stuff to buy and find the person to sell it to, as

well as negotiating the transactions. (TR. 188-189). She actually learned that Tom Bristow worked for a company owned by Jeff Herman in March of 2000. (TR. 190). She was shocked and testified as follows:

[N]ever in my wildest dreams would I have ever thought that our lawyer would have formed a company that had been competing in the same industry and against us since 1998.

(TR. 197-198)

As part of the litigation that Aero Controls initiated against Herman, Ms. Burns prepared an analysis of customers in common with Aero Controls and Herman's company, Nation Aviation. There were 23 customers. Ms. Burns also determined that Aero Controls had paid Herman's firm \$ 425,000 in legal fees and that the Ruden, McClosky firm was paid \$650,000 to handle the litigation against Herman. (TR. 204). Aero Controls also paid an attorney's fee to present a grievance to The Florida Bar. Ms. Burns has traveled to Florida to be deposed and attend the 2 week civil trial and possibly a mediation. (TR. 205). The settlement proceeds were received in October of 2005. (TR. 223).

The grievance was filed with The Florida Bar because they strongly believe that what happened to them was unethical and should not be permitted. When the civil suit was filed they were advised by their attorney that they could not and should not use a bar complaint to hold over someone's head. (TR. 205-206).

Herman's actions have impacted the company in other ways. It took a tremendous

effort on her part, as well as the staff and company efforts and energies to pursue the matter. A document production was enormous. A lot of company time was devoted to it. They were also required to compile documents pursuant to subpoenas issued in the Bar matter. (TR. 207).

Once Bristow resigned, Burns would not have thought it was ethical for him to be paid by Aero Controls and Nation Aviation at the same time. (TR. 234). She remembered Bristow telling her he was starting his own business from an inheritance from his grandmother. (TR. 235). She believed that Bristow had used information in his head against Aero Controls. (TR. 237). Aero Controls had sold some parts to Bristow and Nation Aviation. (TR 247).¹

Jeffrey Herman testified. He was admitted to The Florida Bar in 1985. He now exclusively represents child and adult survivors of childhood sexual abuse. That practice began in 1997 and evolved from a case involving an autistic child in

¹ Wayne Wyndam Geyer, Jr. testified on behalf of The Florida Bar. He is the attorney who represented Aero Controls in their civil suit against Jeffrey Herman. His testimony focused on the Bar's charge with regard to Judge Rosenberg's findings that Herman's testimony before him lacked credibility. The referee did not find in favor of the Bar on this matter and the Bar has not sought an appeal. Mr. Wyndham's testimony is also not relevant to the points raised in the respondent's petition for review. As a result, a narrative of Mr. Geyer's testimony has not been presented.

Lisel Mansen, the respondent's former secretary and John Sicilian, the respondent's former business partner in Nation Aviation testified on his behalf. Their testimony is not material to any points raised by either the Bar or the respondent. As with Mr. Geyer's testimony, a recitation has not been presented. Thereafter, the respondent read portions of the deposition testimony of Eylon Porat into the record. That testimony is not material to the points raised on appeal by either party and is not summarized.

a preschool. Before that his firm practiced commercial litigation in the aviation field. (TR. 395-396). Mr. Herman has 4 children; ages 12, 10, 6 and 5. He is the primary custodian for 2 of his children who were 1 and 3 when he began raising them in October of 1998. He is the Vice President of his Temple and sits on the board of the Jewish Federation, which raises money for people in need. He is also involved with APAC, an organization that educates the legislature on issues affecting the relationship between the United States and Israel. He also speaks to different organizations concerning how children can be protected. (TR. 399-400, 465). He graduated from the University of Arizona in 1982 and Case Western Reserve Law School and studied tax law at the University of Miami. He first worked in a firm in New York dealing with mergers and acquisitions. After that he worked for DWG doing the same work and ultimately litigation. He then formed a firm with another lawyer named Steve Ruf. It was a litigation practice which evolved into aviation work. In that practice he met Jack Ogilby and John Sicilian. (TR. 400-403).

Herman was retained by Jack Ogilby to handle the sale of his company, Aero Systems to John Titus. After that transaction, Titus hired Herman. (TR. 405). The first big matter was the Air Star litigation. Aero Controls bought an airplane that was in Africa. They were going to remove parts from it and either refurbish or sell them. The documentation connected with the parts gives them

value. The seller was not providing the required documentation to Aero Controls. As a result, Aero Controls did not pay certain monies and was sued by Air Star. A counterclaim was filed and litigation resulted. (TR. 407-408). Tom Bristow, a corporate representative for Aero Controls came to assist with the documentation. (TR. 409). The case went to trial in February of 1998 with a successful outcome. (TR. 410,413).

Herman testified that Bristow told him that he was planning to move to Florida, and that John Titus knew he was leaving the company. (TR. 411-412). In February of 1998 Herman began to discuss possible business ideas, particularly on aircraft leasing with Jack Ogilby. (TR. 413). Thereafter, John Titus hired Herman to handle another matter for Titus' company Triple J Leasing to consummate a lease with Air Kazakhstan. (TR. 414).

After a dinner with various investors, Herman prepared a term sheet for a new business entity which would eventually be known as Nation Aviation. The purpose of the company was to be an aircraft leasing company which would also provide a spare parts package. (TR. 418-421). Herman said he had no intention or interest to be in the spare parts business. He was aware that Aero Controls was in the spare parts business. He did not understand Nation Aviation to be in competition with Aero Controls when he prepared the term sheet. He testified that leasing is a different business than selling parts. (TR. 424-425). Initially, Jack

Ogilby's role was managing director to run the day to day operations of the business. Herman and Sicilian were going to be passive investors. (TR. 428). According to Herman, Ogilby said that Bristow had approached him to become involved in the business. (TR. 429). Herman testified that he told Ogilby that if Bristow left Aero Controls on his own then it would be alright to speak with him. (TR. 430). He was not concerned with his ethical obligations with regard to Nation Aviation hiring Tom Bristow. He did not believe there was anything unethical given the facts. He believed that Bristow had left Aero Controls in August of 1998 and that he was an investor in an aircraft leasing company that hired Tom. (TR. 445-447). Herman is aware of the ethical rules and tries to follow them very carefully. He is aware of what he could and could not do. He believed that since he was investing in a business that was not competing with Aero Controls and he understood that Bristow had left Aero Controls on his own, he saw no conflict or adversity created by his company hiring Bristow. (TR. 465). During May through September of 1998, Herman did not contact his client John Titus to confirm that he was aware that Tom Bristow was leaving Aero Controls. Herman represented Aero Controls at that time and knew that Titus considered Bristow a valuable employee since he had sent him to assist Herman with legal issues for Aero Controls. (TR. 499). Herman bought out Ogilby and Sicilian and

returned \$25,000 to each of them. (TR. 444). Herman had invested \$75,000 in the company. (TR. 455).

In January of 1999, Herman decided to go into the parts business. Bristow ran the day to day operations from that point on. (TR. 452, 501, 515,516). Bristow informally started to sell parts in December of 1998 (TR. 457). Herman testified that he was definitely in a competing business with Aero Controls and that there was no question about it. (TR. 516). He did not think that there was anything ethically wrong about it. (TR. 517). He was aware that his client Aero Controls was in the aviation parts business. He did not think it created a problem for him in terms of any ethical issues. He regrets not calling Titus at the time. It would have been a good thing to do. It would have been a smart thing to do. He wishes he would have done that now. (TR. 456, 503). He could have avoided so much aggravation and it would have been the right thing to do to let Titus know he was in business. He did not think and he doesn't think he had an ethical issue that he had to call John Titus. (TR. 526). Herman continued to actively represent Aero Controls and Triple J Leasing until August of 1999. (TR. 502). Herman did not ask Aero Controls to execute a waiver of a conflict of interest. (TR. 503). Herman did ask Titus to sign a waiver in order for Herman to represent Air Kazakhstan, which would have been a money maker for him. (TR. 504). If Herman had informed Titus of his interest in Nation Aviation he could have possibly ran the

risk of losing him as a client and his business had brought a lot of money into his firm. (TR. 505). Herman believes that Titus and Burns are angry because Bristow told them he solicited him to work for Nation Aviation and Herman says that was not true. (TR. 507).

Bristow was running the day to day operation of Nation Aviation and Herman was the sole owner. (TR. 458-459). In February of 1999, Herman leased commercial space for a warehouse. In April of 1999, another investor, Eylon Porat became involved. Herman bought Porat out in November of 1999. (TR. 469-470). After having difficulties with Bristow, in January of 2000, Herman filed a civil lawsuit which, among other things, sought to enforce a covenant not to compete against Bristow. (TR. 473). After Herman obtained an injunction, it was forwarded by facsimile to all of Nation Aviation's customers in January of 2000. (TR. 474). That lawsuit was dismissed for a lack of prosecution and Herman got nothing from Bristow. (TR. 478, 514).

Herman testified that prior to going into the parts business, Herman traveled to Peru with Ogilby to propose a lease arrangement with Aero Peru and Nation Aviation. Herman was also representing Aero Peru in litigation concerning a plane crash. Herman disclosed his ownership interest in Nation Aviation to Aero Peru. (TR. 460-461).

Herman was sanctioned by the United States Court of Appeals, 9th Circuit, in Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112 (9th Cir. 1999). (TR. 509, Exhibit 113, A.3). Herman claimed he did not hear the Judge's ruling. The trial Judge in that case stated that he was having a credibility problem with Mr. Herman. The appellate court found that the judge did not err in finding Herman lacked credibility and upheld the sanctions. That decision was not appealed. (TR. 513).

Herman testified that he tries to be a very ethical person and lawyer. He recalls reviewing the Florida Bar rules when investing in Nation Aviation to see if there was anything he was running afoul of. He did not get legal advice on the issue or telephone The Florida Bar. (TR. 530).

Judge Arzola issued a report of referee dated November 15, 2007. In that report he found that the respondent did engage in a conflict of interest when he directly competed in business with his client, and failing to advise his client as well as continuing to represent that client. The referee found that the respondent's conduct was deceitful and dishonest. The referee also found that the respondent's failure to inform his client was motivated by his own selfish, financial interests. The referee likewise held that Herman was deliberate with regard to his "inaction" since at other times he sought waivers when a conflict existed. The referee did not find any rule violation as a result of Judge Rosenberg's extensive findings that the

respondent was not credible when he testified in his courtroom. Judge Arzola recommended that the respondent be suspended for 90 days, placed on probation for 2 years, receive a public reprimand and perform 200 pro bono hours to be completed during the probationary period at a rate of 100 hours per year. The Bar filed its notice of appeal on January 7, 2008 in which it seeks to challenge the disciplinary sanction, given the referee's findings.

On January 11, 2008, the respondent filed a petition for review in which he challenges findings made by the referee.

The Florida Bar's brief follows.

SUMMARY OF THE ARGUMENT

Jeffrey Herman represented John Titus' aviation parts business, Aero Controls. During that representation, Herman formed and owned an aviation business which directly competed with Aero Controls. Herman also hired Aero Controls' most valuable employee, Tom Bristow, to run that competing business. Herman never told John Titus about his new company and continued to represent Aero Controls for another year. When the deception was revealed, Titus sued Herman and a judge awarded him 1.5 million dollars on a breach of fiduciary duty.

The same issues were pursued before a referee who found that Herman was dishonest and deceitful and engaged in a conflict of interest which damaged his client, Aero Controls.

Despite those findings and the existence of several aggravating factors, the referee recommended that the respondent be suspended for 90 days, placed on probation for 2 years, receive a public reprimand and perform 200 pro bono hours.

It is the position of The Florida Bar that the recommendation of discipline is wholly inadequate and that Standard 4.32 and 7.2 of the Florida Standards for Imposing Lawyer Sanctions and The Florida Bar v. Rodriguez, 959 So.2d 150 (Fla. 2007) mandate the imposition of a 2 year suspension.

ISSUE ON APPEAL

WHETHER A 2 YEAR SUSPENSION IS APPROPRIATE GIVEN THE REFEREE'S FINDINGS THAT THE RESPONDENT'S ACTIONS OF OWNING AND OPERATING A COMPETING BUSINESS WITHOUT HIS CLIENT'S KNOWLEDGE, WHILE REPRESENTING THAT CLIENT, WAS DISHONEST, DECEITFUL AND A CONFLICT OF INTEREST TOGETHER WITH THE EXTENSIVE AGGRAVATING FACTORS FOUND.

ARGUMENT

A 2 YEAR SUSPENSION IS APPROPRIATE GIVEN THE REFEREE’S FINDINGS THAT THE RESPONDENT’S ACTIONS OF OWNING AND OPERATING A COMPETING BUSINESS WITHOUT HIS CLIENT’S KNOWLEDGE, WHILE REPRESENTING THAT CLIENT, WAS DISHONEST, DECEITFUL AND A CONFLICT OF INTEREST TOGETHER WITH THE EXTENSIVE AGGRAVATING FACTORS FOUND.

This Court’s scope of review over disciplinary recommendations is broader than that of findings of fact because it is this Court’s responsibility to order the appropriate discipline. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989). See also art. V, §15, Fla. Const. “The Supreme Court shall have exclusive jurisdiction to regulate...the discipline of persons admitted [to the practice of law]”. The Court usually will not second-guess a referee’s recommended discipline as long as that discipline has a reasonable basis in existing case law and in the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Temmer, 753 So.2d 555 (Fla. 1999). A 90 day suspension, public reprimand and pro bono hours, to be followed by 2 years of probation was recommended by the referee. The recommended discipline has no reasonable basis in existing case law and a 2 year suspension is the appropriate sanction.

[R]esolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer.... Choose some other occupation...

Abraham Lincoln,
Notes for a law lecture, 1850

At the heart of the practice of law is trust and honesty. A client will trust that his lawyer will be honest and protect the client's interests. John Titus trusted his lawyer, Jeffrey Herman. In exchange, Jeffrey Herman deceived his client when he hired his key employee to work for Herman's competing company. Throughout, Herman continued to represent his client, John Titus and his companies, and never informed the client what had occurred. Once John Titus discovered the deception, he initiated litigation against Jeffrey Herman and prevailed on a breach of fiduciary duty claim before the Honorable Robert Rosenberg, Circuit Court Judge of the 17th Judicial Circuit, after a 2 week bench trial. Aero Controls was awarded 1.5 million dollars. Herman did not appeal. Instead, the matter was settled. Despite the foregoing, to this day, Herman remains vigilant in his position that he behaved ethically and committed no wrongdoing.

Although the Bar argued that the formation and ownership of Nation Aviation by Jeffrey Herman was an ethical breach, the referee's findings as to an ethical violation begin from either December of 1998 or January of 1999 when Nation Aviation entered the spare parts business. That business was in direct

competition with Herman's client Aero Controls.² The respondent conceded his recognition of that direct competition.

Jeffrey Herman: Well, we're in definitely a competing business. I don't think there is any question about it.

(TR. 516)

Throughout that entire year, Herman continued to represent Aero Controls on many matters, despite his ownership of Nation Aviation - - Aero Control's competitor. Interestingly, although Titus was unaware that Herman was his competition, he was apparently becoming disenchanted with Herman's legal services, as evidenced by Titus' July 8, 1999 letter to the firm. (Exhibit 137, A.2). This letter makes it abundantly clear that something was very wrong with the attorney/client relationship. What was wrong was Herman's divided loyalties between his own business, which was competing with his client and the representation of his client. Portions of that letter are set forth below.

Dear Jeff, Jeff and Roland:

...

Since Mary Ann and I met with you on March 29 I continue to have concerns about what is going on with the numerous matters you are handling for us...

² On page 24 of the Report of Referee, the referee did find that, "the respondent's failure to contact Titus regarding 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 selfish".

...

My first concern is the issue of common courtesy. We want to be kept abreast in a timely manner of developments (or lack thereof) in our cases and transactions. We want to be consulted before you incur significant costs. We want your professional advice regarding possible courses of action and the likelihood of prevailing. We want you to give us reasonable estimates of cost versus benefits. We want you to return our phone calls and to acknowledge our facsimile requests in a timely manner. We are not asking for (and do not expect) a written update every time someone does something on one of our cases. A timely phone call would suffice.

...

We are also concerned about your billing practices:

...

Jeff, I believe you already know how we feel about the Beal Bank matter. Suffice it to say that we are very dissatisfied with the way this matter was handled. Everything from how long it took, the course it took, the fact that still we await receipt of the UCC's from the Secretary of State's office, and the outcome itself is beyond our belief. In retrospect, it was a mistake to involve your office. We feel certain we could have negotiated a better result ourselves. We communicated to your our concern and lack of confidence in how this matter was being handled several times throughout this ordeal. Quite frankly, it is beyond comprehension that your invoice for handling this matter now totals \$8,070.40!

...

We have paid you over \$500,000.00 since 1997. I think we deserve better than we are receiving for professional services. Overall we have enjoyed working with you.

However, we need to resolve these issues. I will await your response.

(Exhibit 137, A.2)

It is also clear, and the referee found, that Herman did not inform his client of his competing business for the following reasons:

- (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 Respondent's inability to obtain profits from his venue into the sale of parts industry.

(A.1, Page 24)

The motive for Herman's failure to advise his client of the conflict, as was ethically required, was greed. Herman was concerned with his success as a businessman, while foregoing his responsibilities as a lawyer. "That an attorney might, as it were, wear different hats at different times does not mean that professional ethics can be 'checked at the door' or that unethical or unprofessional conduct by a member of the legal profession can be tolerated". The Florida Bar v. Della-Donna, 583 So.2d 307 (Fla. 1989).

This Court has recently held that a suspension is appropriate in conflict of interest situations which rise above mere negligence. The Florida Bar v.

Rodriguez, 959 So.2d 150 (Fla. 2007). It must be first determined whether or not the attorney's actions constitute mere negligence. Here, Herman stated that he was deliberate in his actions and that he did in fact review the Rules Regulating The Florida Bar and determined his conduct to be ethical. (TR. 530). He neither sought legal advice nor contacted The Florida Bar for an ethics opinion. The referee noted that in 2 other situations which gave rise to a conflict, the respondent sought a waiver. In the Aero Peru matter, the waiver was sought in order to benefit Mr. Herman. He was representing Aero Peru in litigation concerning a crash and sought to do business with them by entering into a lease agreement on behalf of Nation Aviation. Requesting a waiver could ultimately prove to be to his financial benefit. (TR. 460-461). When he sought and obtained a waiver from John Titus to represent Air Kazakhstan in a lease matter, it was likewise to his financial benefit. (TR. 103). Mr. Herman was deliberate when he did not inform John Titus of his involvement in Nation Aviation and their direct competition with Aero Controls. To do so, even according to Mr. Herman, could have – and most likely would have – ended his relationship with John Titus and Aero Controls as a client. (TR. 505).

Florida Standard for Imposing Lawyer Sanction 4.32 provides:

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

Florida Standard for Imposing Lawyer Sanction 7.2 provides:

Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Here there is no question that Herman knew of the conflict. There is no question that he did not disclose it to the client. There is no question that the conflict caused injury to the client. Both John Titus, the Chief Executive Officer and Mary Ann Burns, the Chief Financial Officer of Aero Controls testified to the harm caused to them when Herman hired Tom Bristow, their key employee. Titus testified that they lost 3 to 4 million dollars in business. Mary Ann Burns prepared an analysis of customers in common and determined that Aero Controls was adversely affected since Nation Aviation took twenty 23 of Aero Controls' customers. (TR. 204, 108). Mary Ann Burns also stated that after Tom Bristow's departure there was an immediate loss in revenues and the growth rate of the company slowed down. (TR. 188).

The adverse affects and injury to Aero Controls of Mr. Herman's conduct did not stop there. Once John Titus discovered Mr. Herman's duplicity, he pursued legal action. He incurred \$650,000 in legal fees. (TR. 204). John Titus and Mary Ann Burns traveled to Florida several times for depositions, trial and The Bar matter. (TR. 205). The company's resources were used enormously to respond to

document production in the civil trial and in the Bar matter. (TR. 207). Both standards are applicable.

In Rodriguez, supra, that respondent entered into a “secret” engagement agreement which benefited him and his firm financially, without disclosing its existence to his clients. Rodriguez’ interests were divided and “[T]o satisfy his own greed, he engaged in actions that directly conflicted with the interests of his clients”. Rodriguez, at 160. This Court enhanced the discipline recommended by the referee, and suspended Rodriguez for 2 years.

Herman’s misconduct, as found by the referee, is just as severe. According to the referee, Herman’s decision not to inform his client that he was entering into a competing business was motivated by greed. The impropriety of that decision was exacerbated since Herman had previously sought waivers when conflicts existed. Apparently, he knew the “right” way to handle a conflict, but only traveled down that road when it was certain to benefit him. Herman, like Rodriguez, put his own interests ahead of the client.

Herman employed Aero Controls’ employee to their detriment without their knowledge. Clearly, he did so because he thought that employee would help his company make money. Herman was right. The referee found:

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.

(A.1, Page 22)

Beyond taking their employee, Herman competed with his own client in the same market, while continuing to represent the client in several matters. The adversity of that action would only need to be theoretical to constitute a rule violation. Here, the adversity was actual, as evidenced by the level of dissatisfaction of Herman's representation expressed in John Titus' July 8, 1999 letter. (Exhibit 137, A.2).

In this case the referee found that Herman was dishonest and deceitful and violated Rule 4-8.4(c) of The Rules Regulating The Florida Bar. The referee aptly explained as follows:

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.

(A.1, Page 24)

Mr. Rodriguez was not found to have engaged in dishonest or deceitful conduct nor found to have violated Rule 4-8.4(c) of The Rules Regulating The Florida Bar.

In Rodriguez, supra, the referee found 1 aggravating factor - - multiple offenses and 8 mitigating factors. In this case, the referee's only finding in mitigation was Herman's absence of a prior disciplinary record. In aggravation, the referee found:

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

(A.1, Page 30)

In addition to the foregoing the referee referenced the decision in Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112 (9th Cir. 1999), presented by the Bar. (A.1, Page 32, Footnote 13; Exhibit 113, A.3). In that case, the respondent was found to have lacked credibility and was sanctioned by the Federal Court. The Ninth Circuit Court of Appeals upheld those findings.

Given the referee's extensive findings against Mr. Herman and aggravating factors, it is simply hard to fathom why the discipline imposed is so lenient. Here

the referee was “clearly off the mark” The Florida Bar v. Vining, 707 So.2d 670 (Fla. 1998).

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the referee's recommendation of discipline is too lenient and the respondent should receive a 2 year suspension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 7 copies of The Florida Bar's Initial Brief was forwarded via Federal Express Priority Overnight Mail (809685806461) to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was hand delivered to Alan Theodore Dimond, Attorney for the Respondent, at his record Bar address, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131, and via regular mail only to Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this ____ day of March 2008.

RANDI KLAYMAN LAZARUS
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

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

RANDI KLAYMAN LAZARUS
Bar Counsel

INDEX TO APPENDIX

- A.1 Report of Referee in the matter of The Florida Bar v. Jeffrey Marc Herman, Supreme Court Case No. SC07-363, The Florida Bar File No. 2006-70,923(11B).
- A.2 Letter from John Titus to Jeffrey Herman, Jeff Grubman and Roland Moore, dated July 8, 1999.
- A.3 Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112 (9th Cir. 1999).