IN THE SUPREME COURT
STATE OF FLORIDA

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

THE FLORIDA BAR,

Complainant/Cross-Respondent,

v.

JEFFREY MARC HERMAN,

Respondent/Cross-Complainant.

AMENDED CROSS-REPLY BRIEF OF RESPONDENT IN SUPPORT OF CROSS-PETITION FOR REVIEW OF REPORT OF REFEREE

ON REVIEW FROM THE HONORABLE ANTONIO ARZOLA, REFEREE

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. NEITHER RULE 4-1.7(a)(1-2) NOR RULE 4-1.8(a) REQUIRES AN ATTORNEY TO DISCLOSE HIS OWNERSHIP INTEREST IN A COMPANY THAT COMPETES WITH A CLIENT COMPANY WHILE HE SIMULTANEOUSLY REPRESENTS HIS COMPANY AND HIS CLIENT COMPANY IN UNRELATED LEGAL MATTERS WHERE THE COMPANIES' LEGAL INTERESTS ARE NOT ADVERSE TO EACH OTHER [RESPONDENT/ CROSS-COMPLAINANT'S CROSS-APPEAL] 3

II. RULE 4-8.4 DOES NOT APPLY WHERE A LAWYER'S CONDUCT FALLS WITHIN THE PURVIEW OF A MORE SPECIFIC RULE AND IS NOT IN VIOLATION OF THAT MORE SPECIFIC RULE [RESPONDENT/CROSS-COMPLAINANT'S CROSS-APPEAL] 9

III. A NINETY DAY SUSPENSION IS NOT WARRANTED WHERE THE LAWYER'S CONDUCT IS CONSISTENT WITH HIS REASONABLE INTERPRETATION OF THE CONFLICT OF INTEREST RULES [COMPLAINANT/ CROSS-RESPONDENT'S APPEAL AND RESPONDENT/CROSS-COMPLAINANT'S CROSS-APPEAL] 10

A. Mitigating Factors not Considered by the Referee 11

B. Aggravating Factors Improperly Considered by the Referee 12

CONCLUSION 15

CERTIFICATE OF SERVICE 16

CERTIFICATE OF COMPLIANCE 16

TABLE OF CITATIONS

Page

Cases

The Florida Bar v. Corbin,
701 So. 2d 334, 337 n.2 (Fla. 1997) 13

The Florida Bar v. Germain,
957 So. 2d 613 (Fla. 2007) 13

The Florida Bar v. Karten,
829 So. 2d 883, 889-90 13

The Florida Bar v. Lipman,
497 So. 2d 1165, 1168 (Fla. 1986) 13

The Florida Bar v. Mogil,
763 So. 2d 303, 312 (Fla. 2000) 13

The Florida Bar v. Nicnick,
963 So. 2d 219, 222 (Fla. 2007) 15

The Florida Bar v. Rodriguez,
959 So. 2d 150 (Fla. 2007) 1, 10

The Florida Bar v. Shankman,
908 So. 2d 379 (Fla. 2005).......... 11

Other Authorities

Fla. Stds. Imposing Law. Sancs. 4.32 1

Fla. Stds. Imposing Law. Sancs. 7.2 1

Fla. Stds. Imposing Law. Sancs. 9.22(f) 14

TABLE OF CITATIONS
(Continued)

Fla. Stds. Imposing Law. Sancs. 9.32(e) 12

Fla. Stds. Imposing Law. Sancs. 9.32(g) 11

R. Regulating Fla. Bar 4-1.7 .... 3, 4, 8

R. Regulating Fla. Bar 4-1.7(a)... 9

R. Regulating Fla. Bar 4-1.7(a)(1) 2

R. Regulating Fla. Bar 4-1.7(a)(1-2).. 2, 3, 15

R. Regulating Fla. Bar 4-1.8 3

R. Regulating Fla. Bar 4-1.8(a).. 1, 2, 3, 9, 15

R. Regulating Fla. Bar 4-8.4 .... 1, 2

R. Regulating Fla. Bar 4-8.4(a)... 15

R. Regulating Fla. Bar 4-8.4(c).. 9, 10, 15

Restatement (Third) of the Law Governing Lawyers § 5 cmt. c (2000) 9

STATEMENT OF THE CASE AND FACTS

Respondent/Cross-Complainant, Jeffrey Marc Herman ("Mr. Herman") adopts and relies on his Statement of the Case and Facts in his Answer Brief and Cross-Initial Brief on the Merits in Support of Cross-Petition for Review of Report of Referee.

SUMMARY OF THE ARGUMENT

The Answer and Reply Brief of The Florida Bar ("The Bar's Brief") is perhaps most telling for what it does not argue than for what it does. Notably, The Bar's Brief contains no argument to refute Mr. Herman's analysis as to the inapplicability of Rule 4-1.8(a) to Mr. Herman's conduct. It contains no argument to refute Mr. Herman's analysis as to the absence of the requisite finding of intent under Rule 4-8.4 or the proposition that this rule does not apply where, as here, the conduct at issue falls within the purview of a more specific rule. It contains no argument to refute Mr. Herman's analysis as to the inapplicability of the *Rodriguez* decision to the facts of this case, despite The Florida Bar's ("The Bar") reliance on it as the key legal decision "mandating" the imposition of a two year suspension.[1]

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[1] In its Initial Brief, The Bar specifically argued the following:

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.

Rather, The Bar's conflict of interest argument focuses solely on Rule 4-1.7(a)(1) and relies purely on conclusory statements, without any supporting authority or reasoned analysis. Its core proposition is that the conflict was "obvious," without offering any basis in the language of the rule, the commentary, or any reported decision interpreting the rule in a situation such as the one presently before the Court.

The Bar's general "misconduct" argument under Rule 4-8.4 hinges on the notion that the Referee did find misconduct that does not fall within the purview of the Conflict Rules.[2] This, however, is not the case. The "additional" misconduct upon which The Bar relies presupposes a violation of the Conflict Rules. Specifically, The Bar contends that the Referee's statement that Mr. Herman "secretly competed with his client using his client's top salesman" is a separate finding. However, the "secrecy" that is the gravamen of this "additional" misconduct is no misconduct at all unless there is a duty to disclose under the Conflict Rules.

The Bar's argument with respect to the recommended sanction focuses on two of the five mitigating and aggravating factors raised by Mr. Herman. Remarkably, The Bar argues that Mr. Herman was on notice that his conduct was

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(Initial Brief of the Florida Bar, at p. 18).

[2] Rules 4-1.7(a)(1-2) and 4-1.8(a) of the Rules Regulating The Florida Bar are referred to herein as the "Conflict Rules."

in violation of the Conflict Rules, despite its admission that there is no authority applying the Conflict Rules in a situation such as Mr. Herman's and the absence of language in the rules themselves to this effect. The Bar also argues that actual harm to a client may be considered in cases beyond those contemplated by the Florida Standards Imposing Lawyer Sanctions. Even if that were the case, however, the Referee's finding of actual harm hinges on a factual supposition that is not supported by the record.

ARGUMENT

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

Without any legal authority or reasoned analysis, The Bar's Brief states, in conclusory fashion, that Mr. Herman's failure to disclose his interest in a competing business to a client constituted a conflict of interest under Rule 4-1.7(a)(1-2).[3] The sole predicate for its conclusion is that the "…two <u>businesses</u>

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[3] The Summary of the Argument portion of The Bar's Brief mentions both Rules 4-1.7 and 4-1.8, but the Argument portion contains no argument challenging Mr. Herman's Rule 4-1.8 analysis. Accordingly, The Bar effectively concedes that Rule 4-1.8(a), "Conflict of Interest; Prohibited and Other Transactions," does not apply, and this brief replies only to The Bar's argument as to Rule 4-1.7.

were directly adverse." (The Bar's Reply Brief at p. 2) (emphasis added). However, the standard under Rule 4-1.7 is not whether two businesses (either owned by two different clients or by the attorney and a client) are adverse. Rather, the inquiry is whether there is direct adversity in a litigation or transactional matter. In fact, the commentary to the Rule makes it clear that, where the adversity arises in the business context, such as here, the competing interests are only "generally" adverse.

Notably, The Bar's argument has no basis in the language of the Conflict Rules or in any legal authority interpreting them. Because The Bar has no legal basis to refute Mr. Herman's interpretation, it attempts to dismiss Mr. Herman's legal analysis as "hypertechnical." The Bar's argument, however, does not put forth any reasoned analysis --albeit devoid of legal support. Instead, it weaves a string of conclusory statements with points that are *non-sequiturs*, which shed no light on the legal issues presently before this Court.

For example, The Bar suggests that Mr. Herman should be precluded from making a purely legal argument --*i.e.*, whether his conduct amounts to a violation under the Conflict Rules-- because he did not seek an appeal of the "findings of fact" on this issue. Yet, the only violation found by the Referee is based on facts not disputed by Mr. Herman. There is no need to challenge a factual finding not in dispute.

Indeed, The Bar's suggestion that it "prevailed" below is misleading, to say the least. Mr. Herman never challenged the fact that in January 1999 Nation Aviation entered the spare parts business and, by doing so, would be in competition with his firm's client, Aero Controls. He conceded that he did not disclose this interest to Mr. Titus, Aero Controls' owner, and testified that he did not believe the Conflict Rules required him to do so. While the Referee questioned Mr. Herman's motive in failing to disclose his business interest, there is no authority to even suggest that Mr. Herman's belief was not well-founded. In fact, the more reasonable interpretation of the plain language and commentary to the Conflict Rules supports Mr. Herman's belief.

In sharp contrast, The Bar offers nothing more than its view that the conflict was "obvious and clear." It also injects new allegations that were never argued below and for which there are no findings. For example, The Bar attempts to support its argument on the notion that Mr. Herman cannot be separated from Nation Aviation because it was his "alter ego." No such allegation was made below and there is no such finding in the Referee's report. Even if this were true, however, it does not change the legal analysis under the Conflict Rules.

The only two factual findings cited by The Bar are insufficient to defeat the legal analysis supporting the inapplicability of the Conflict Rules. First, it notes that Nation Aviation's entry into Aero Controls' industry resulted in the loss of 23

customers. This fact merely illustrates the unremarkable proposition that, when businesses compete, customers that could have gone to one may end up going to the other. There is nothing in the Conflict Rules or the commentary to suggest that the "generally adverse" nature of competing businesses changes when there is evidence of one party's performance in the context of lawful competition.

Moreover, this a business claim already addressed in the civil action filed by Mr. Titus against Mr. Herman and his firm. In that case, the trial judge (upon whose findings The Bar has relied heavily throughout this proceeding), specifically found that Aero Controls had failed to establish a recognized and protected business relationship with the parts buyers serviced by Nation Aviation.[4]

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[4] The relevant excerpt reads as follows:

> In this cause of action, the plaintiff is claiming tortious interference with the alleged business relationships it maintained with parts buyers. It makes its claims against Herman and H&G based upon their involvement in the hiring of Bristow by Nation Aviation.
>
> At trial, the following points were established:
>
> a. No employment contract existed between Bristow and the plaintiff regarding a covenant not to compete.
>
> b. There was insufficient evidence that an unalterable business relationship existed between the plaintiff and any of the parts buyers.
>
> c. There was no evidence that established existing or prospective legal rights of the plaintiff in any sales transactions conducted by Nation Aviation.

Accordingly, the fact that Nation Aviation serviced these customers was merely the by-product of lawful competition --the cornerstone of our American market system and the obvious reason why the Conflict Rules do not place a "generally adverse" interest in a competing business on the same footing as a directly adverse representation in a legal or transactional matter.

Next, The Bar points to Mr. Titus' letter of complaint to Mr. Herman as evidence of a "directly adverse" interest. However, the Referee did not rely on

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d. The evidence presented established that the only contact of Nation Aviation with clients was conducted by Bristow, and not by Herman or H&G.

e. There was no evidence presented showing any direct contract or interference with specific "clients" of the plaintiff by Herman or H&G.

The plaintiff needed to establish a recognized and protected business relationship with the parts buyers serviced by Nation Aviation. They did not do so. While 23 clients were identified as being common to the two companies, the representatives of the plaintiff, John Titus and Mary Ann Burns, readily admitted during trial that there were no contracts entered into with its customers for on-going business and that all parts sales were point-of-purchase (singular) transactions. Additionally, these witnesses agreed that the clients were free to transact business with any vendor they wished and were not required to transact their parts purchases solely with the plaintiff. Thus, there was no enforceable contract or agreement between the plaintiff and any of these customers.

Accordingly, there was no relationship with the 23 clients which afforded the plaintiff ongoing contractual rights, as required by the Ethan Allen case. Furthermore, it is clear that Florida law prohibits a cause of action for tortious interference with the business community at large. Id.

(Box 1(B); A-1, at Exh. B:11-12).

such letter as evidence of a conflict and simply noted that "[t]here was evidence introduced regarding Titus' displeasure with some of the Respondent's legal bills and issues involving the Firm's failure to communicate." (Box 1(A):11). This is common with clients who seek to negotiate discounts from their legal bills. With respect to the quality of the representation, however, the Referee found --and the evidence showed-- that Mr. Herman's firm obtained a verdict in favor of Aero Controls in a key litigation matter, (Box 1(A):6), and that Mr. Titus himself testified that "he would have hired [Mr. Herman] had the need arisen" after the work flow stopped in August 1999, (Box 1(A):11). Although he was clearly a demanding client, Mr. Titus had no meaningful concerns about the quality of the legal work as he was quite willing to continue doing business with Mr. Herman's firm.

In the final analysis, The Bar simply cannot refute the fact that Rule 4-1.7 itself draws <u>no</u> distinction between another client's interest or the lawyer's personal interest in the context of competing businesses. Thus, if a lawyer is permitted to simultaneously represent clients with competing economic enterprises in unrelated matters, it makes no difference that the competing economic enterprise belongs to him as opposed to another client. For these reasons, as a matter of law, there is no violation of the Conflict Rules.

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

The Bar's Brief tacitly concedes that where the conduct at issue falls within the purview of a more specific Rule (*i.e.*, the Conflict Rules), Rule 4-8.4(c) is inapplicable.[5] Instead, it argues that there is "additional" misconduct to invoke this rule based on the Referee's finding that Mr. Herman "secretly competed with his client using his client's former top salesman." This argument, however, does not withstand scrutiny. Unless there is a duty to disclose, the "secrecy" cannot be sanctionable --that is precisely the question of law raised under the Conflict Rules.

To illustrate, for Mr. Herman not to "secretly" compete he would have had to disclose his ownership interest in Nation Aviation to Mr. Titus at the time Nation Aviation entered the spare parts business. The result would be that 4-8.4(c) would create a duty to disclose in a situation where Rules 4-1.7(a) and 4-1.8(a) do not mandate such disclosure. In such a case, the more specific rules, 4-1.7(a) and 4-1.8(a), should govern. Thus, the "additional" misconduct invoked by The Bar is simply a restated version of the same misconduct and cannot support a finding of

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[5] Rule 4-8.4(c) is a general "catch-all" provision that captures misconduct in situations where the Rules of Professional Conduct are silent. Restatement (Third) of the Law Governing Lawyers § 5 cmt. c (2000).[5] To ensure that lawyers have fair warning of what conduct is prohibited under 4-8.4(c), "[n]o lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule." *Id.*

violation of Rule 4-8.4(c).[6]

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

As a threshold matter, The Bar's Brief does not dispute that, unlike the situation in *Rodriguez,* this case does not involve the type of clear and egregious conduct warranting the imposition of a suspension, and certainly not the extreme sanction of a two-year suspension as proposed by The Bar here. Instead, The Bar focuses its response on Mr. Herman's discussion of the aggravating and mitigating factors. Contrary to The Bar's suggestion, Mr. Herman has shown that one of the factors the Referee failed to consider in mitigation is amply supported by the record and <u>by the findings in the Referee's own Report</u>. The other mitigating factor is not in dispute. And, contrary to The Bar's suggestion, Mr. Herman did argue below and established that one of the factors considered in aggravation was

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[6] Moreover, the Referee found no credible evidence that Mr. Herman used information relating to his representation of Aero Controls to the disadvantage of Aero Controls. (Box 1(A):25). This proposition was the gravamen of The Florida Bar's wrongful solicitation charge which alleged that Mr. Herman used information gained during his representation of Aero Controls to steal its "top" employee. If there is no wrongful solicitation, then there is no improper use of the former employee's services either. In fact, Mr. Bristow did not have a non-competition agreement with Aero Controls, (Box 1(A):8), and the judge in the civil action rejected Aero Controls' claim against Mr. Herman and his law firm for tortious interference with the business relationship between Mr. Bristow and Aero Controls, (Box 1(B); A-1, at Exh. B:9).

not supported by competent, substantial evidence and the other two are inapplicable as a matter of law.

A. Mitigating Factors Not Considered by the Referee

As set forth in more detail in Mr. Herman's Answer Brief and Cross-Initial Brief, Mr. Herman's "character or reputation" was not considered in mitigation. *See* Fla. Stds. Imposing Law. Sancs. 9.32(g). Yet, the Referee specifically found that Mr. Herman has a reputation for being a good lawyer who sought conflict waivers when necessary.[7] Thus, Mr. Herman is not asking this Court to go beyond the Referee's Report and make a new finding. Rather, he asks this Court to consider a finding evidenced by the Referee's own Report.[8] Indeed, A lawyer's reputation, after years of active practice, of being a "very fine attorney," should

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[7] In his "Conclusions," the Referee stated the following:

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

The Referee went on to conclude that Mr. Herman "always knew what to do in those situations," and recounts an instance where Mr. Herman obtained a waiver from Mr. Titus himself to represent a former opposing party. (Box 1(A):17).

[8] Mr. Herman's request is no different than The Bar's request in *The Florida Bar v. Shankman*, 908 So. 2d 379 (Fla. 2005). In *Shankman*, The Bar did not challenge the referee's findings of fact, but asked this Court to find two additional aggravating factors based on the findings of fact as they existed. *Id*. at 384.

weigh heavily in his favor in considering both his good faith in trying to be ethical and the imposition of any sanction, if he was mistaken.

Similarly, it is undisputed that Mr. Herman cooperated with The Florida Bar at all stages of the proceeding. Accordingly, the "full and free disclosure to the disciplinary board" is also a factor in support of a reduced sanction. Fla. Stds. Imposing Law. Sancs. 9.32(e).

B. Aggravating Factors Improperly Considered by the Referee

The Bar first argues that the Referee properly considered Mr. Herman's "refusal to acknowledge the wrongful nature of his conduct" as an aggravating factor because Mr. Herman's belief that he was not required to make disclosure of his business interest is no defense if based on his own legal interpretation. On this point, The Bar faults Mr. Herman for not "revisiting" his interpretation of the Conflict Rules when Nation Aviation entered the spare parts business in January 1999, and for not seeking legal advice or calling The Florida Bar. But if Mr. Herman believed the Conflict Rules did not apply to this set of facts, there was no need for him to seek legal advice or to call The Bar.[9] Thus, The Bar's position merely invites circular reasoning.

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[9] Moreover, there was no change in the text of the Rules, the commentary or the existence of reported decisions in the time between the latter part of 1998 and mid January 1999 that would have made a difference had Mr. Herman "revisited" his interpretation --and The Bar does not argue that there was.

The Bar's reliance on *The Florida Bar v. Germain*, 957 So. 2d 613 (Fla. 2007), is rather surprising, as this decision supports Mr. Herman's case. In *Germain*, this Court held that the respondent's refusal to admit the alleged misconduct was relevant as an aggravating factor because "[w]ith a minimum of legal research, Germain could have discovered that his conduct did constitute unethical conduct." *Id*. at 622 (emphasis added). Here, it is undisputed that even extensive legal research would not have yielded any instructive authority suggesting that Mr. Herman's interpretation of the Conflict Rules was incorrect. Unlike the situation in *Germain,* neither party in this proceeding has been able to cite a single reported decision involving a similar situation.

This Court has held repeatedly that an attorney's "claim of innocence cannot be used against him." *See The Florida Bar v. Mogil*, 763 So. 2d 303, 312 (Fla. 2000) (*citing The Florida Bar v. Corbin*, 701 So. 2d 334, 337 n.2 (Fla. 1997); *see also The Florida Bar v. Karten*, 829 So. 2d 883, 889-90; *The Florida Bar v. Lipman*, 497 So. 2d 1165, 1168 (Fla. 1986). Mr. Herman asserts now, as he has continued to assert throughout this proceeding, that his conduct did not and does not violate The Rules of Professional Conduct. Mr. Herman cannot be punished for maintaining his innocence based on his reasonable interpretation of the Rules.[10]

[10] Similarly, the Referee improperly relied on "dishonest or selfish motive" as an aggravating factor in this case. (Box 1(A):30). Of necessity, this factor presupposes wrongful conduct and does not apply for the same reasons that the

The Bar next argues that the Referee properly found "actual harm to client" to be an aggravating factor. (Box 1(A):30). Notwithstanding the fact that this factor does not apply in this case under the Florida Standards for Imposing Lawyer Sanctions,[11] the finding that Mr. Herman's conduct resulted in actual harm has no record support and must fail. Specifically, The Referee found the following:

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

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

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"refusal to acknowledge wrongful nature of conduct" does not apply. There is also no factual basis for the Referee's finding of dishonest or selfish motive. Although the Referee asks himself "[w]hy didn't [Mr. Herman] just call Titus?," his response merely surmises that "[t]he only logical response is that the call was not made because of possible monetary concerns…." (Box 1(A):24). Monetary concerns (*i.e.*, business concerns), however, do not equate to dishonest or selfish motive, especially where the Referee's comment appears to be rhetorical speculation on his part, as opposed to a factual finding. Indeed, elsewhere in his report, the Referee acknowledges that "[f]or reasons known only to [Mr. Herman], he did not make that phone call to Titus and decided to stay in the parts business." (Box 1(A):22) (Emphasis added).

[11] Section 9.22(f) of the Sanctioning Standards enumerates eleven (11) factors that may be considered in deciding what sanction to impose in non-drug cases. Absent from that list is any reference to "harm to a client." Since the allegations against Mr. Herman do not involve the use or possession of controlled substances, this factor is wholly inapposite to the instant case.

the opposite is true. Mr. Herman testified that he instructed Bristow not to do business with Aero Controls' customers. (Box 1(A):23). The Referee's speculation that Mr. Herman "had to have known that Bristow would be running things at Nation Aviation through the same contacts and customers that he had while at Aero Controls," (Box 1(A):23), is insufficient to overcome specific, unequivocal and uncontradicted testimony. There is no evidentiary basis to conclude that Mr. Herman "knew" Bristow would disregard his instructions.

Where, as here, the evidence does not support a referee's finding or it clearly contradicts the referee's conclusion, such finding and conclusion are erroneous. *The Florida Bar v. Nicnick*, 963 So. 2d 219, 222 (Fla. 2007). It simply cannot be an aggravating factor for the Referee to make an assumption that is contrary to the evidence.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August, 2008, the original and seven copies of the foregoing have been sent by overnight delivery to **Florida Supreme Court, Attention: Clerk's Office,** 500 South Duval St., Tallahassee, FL 32301; **RANDI KLAYMAN LAZARUS, ESQ.**, The Florida Bar, 444 Brickell Ave., Suite M-100, Miami, FL, 33131; **THE HONORABLE ANTONIO ARZOLA**, Referee, Richard E. Gerstein Justice Building, 1351 N.W. 12th St., Room 508, Miami, FL, 33125; and **KENNETH LAWRENCE MARVIN**, **ESQ.**, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL, 32399-2300.

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ALAN T. DIMOND

CERTIFICATE OF COMPLIANCE

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

____
ALAN T. DIMOND