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

ANSWER AND REPLY 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). References to respondent's Initial Brief will be set forth as (Respondent's Initial Brief and page number).

STATEMENT OF THE CASE AND OF THE FACTS

The Bar will rely on its statements of the case and of the facts set forth in its Initial Brief.

SUMMARY OF THE ARGUMENT

The referee correctly found that the respondent's actions of directly competing with his client in the client's industry, while continuing to represent the claim and keeping that business secret constituted a conflict of interest in violation of Rules 4-1.7(a)(1)(2) and 4-1.8(a) of The Rules Regulating The Florida Bar in addition to Rule 4-8.4(c) of The Rules Regulating The Florida Bar. The two businesses were directly adverse. Respondent's entry into his client's industry served to cause him to lose 23 customers at a severe financial loss. Further, the adversity was evidenced by the client's dissatisfaction with his attorney's representation during that precise period, as set forth in a lengthy letter.

The referee's findings as to the existence of multiple aggravating circumstances are supported by competent, substantial evidence. The respondent's challenge fails since he has failed to establish that competent, substantial evidence is lacking. Given the seriousness of respondent's misconduct and the extent of aggravation, a two year suspension is warranted.

ISSUES ON APPEAL

I

WHETHER RESPONDENT'S ACTIONS OF OWNING AND OPERATING A COMPETING BUSINESS WITHOUT HIS CLIENT'S KNOWLEDGE, WHILE REPRESENTING THAT CLIENT, WAS A CONFLICT OF INTEREST. (Restated)

II

WHETHER RESPONDENT'S ACTIONS OF FAILING TO INFORM HIS CLIENT THAT HE HIRED HIS KEY EMPLOYEE TO RUN HIS OWN COMPETING COMPANY WHILE CONTINUING TO REPRESENT THE CLIENT CONSTITUTES DISHONESTY IN VIOLATION OF RULE 4-8.4(c) OF THE RULES REGULATING THE FLORIDA BAR. (Restated)

III

(On Reply)

WHETHER RESPONDENT'S MISCONDUCT WARRANTS A TWO YEAR SUSPENSION.

ARGUMENT

I.

RESPONDENT'S ACTIONS OF OWNING AND OPERATING A COMPETING BUSINESS WITHOUT HIS CLIENT'S KNOWLEDGE, WHILE REPRESENTING THAT CLIENT, WAS A CONFLICT OF INTEREST. (Restated)

The gravamen of The Florida Bar's case against Jeffrey Herman was indisputably about a conflict of interest together with the respondent's dishonest behavior when he intentionally failed to disclose that conflict. That is precisely what the referee concluded when the Bar prevailed.[1] The referee further found that Nation Aviation, owned by Jeffrey Herman, and Aero Controls, owned by Herman's client were direct competitors and therefore "adverse" to each other.

> 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

[1] The respondent would have this Court accept his theory that the Bar had not proven its "core" allegations against Jeffrey Herman. In fact, the two areas in which the Bar did not prevail - - whether Jeffrey Herman solicited his client's employee to run his competing company, and whether Jeffrey Herman was not credible in a subsequent civil case - - were matters tangential to the Bar's main claim. That core claim was, in fact, a conflict. The Bar does not take issue with the referee's findings but only that given the egregiousness of the conflict, a more severe disciplinary sanction should have been imposed.

> 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.

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

(A.1, Pages 23-24)
emphasis supplied

Respondent claims that it is worth noting that there is not any authority for the proposition that an attorney's ownership interest in a company that is in direct competition with his client's business rises to the level of an adverse interest requiring disclosure under the conflict rules. The Florida Bar agrees that it is noteworthy, but for another reason. The conflict is so obvious and clear that its interpretation would not be warranted. That is why there is no authority. In this case, the respondent intentionally entered into the identical business as his client, stole some of their business (23 customers), and continued to represent them in their business matters. What could be more directly adverse than that? That to this day, the respondent fails to recognize and acknowledge the gravity of this

misconduct is support for The Florida Bar's argument that a two year suspension is warranted.

Given the referee's findings of fact as to the respondent's adversity and dishonesty, and the fact that respondent has not sought an appeal of any of the referee's findings of fact, the respondent is precluded from making this argument. Nevertheless, the Bar will address those arguments.

Respondent's hypertechnical argument that Rule 4-1.7(a)(1) of The Rules Regulating The Florida Bar has not been violated since there has not been any directly adverse representation cannot be taken to a logical conclusion. Jeffrey Herman cannot be separated from Nation Aviation. He was Nation Aviation. He represented Nation Aviation - - his alter ego. Certainly the representation of his own interests would be, and in fact were, directly adverse to Aero Controls. Aero Controls did not deserve to be in that position - - the position of divided loyalties. Rule 4-1.7(b)(4) of The Rules Regulating The Florida Bar mandated their informed consent.

Further, respondent misunderstands the comments to Rule 4-1.7 of The Rules Regulating The Florida Bar with regard to the loyalty to a client. The comment to that rule relates to two distinct clients with <u>generally</u> adverse interests such as competing economic enterprises. Here, it is the respondent who is directly competing with his client, without their knowledge with resulting adverse

consequences. First, the entry into the directly competing industry resulted in the loss of 23 customers. Second, as the referee pointed out with regard to Exhibit 137, the client, John Titus, Aero Controls' CEO, was complaining about the respondent's representation during the precise period of the conflict. (See A.2 in the Initial Brief of The Florida Bar). Thus, the respondent and his client, Aero Controls were indisputably "directly adverse".

Rule 4-1.7(a)(2) of The Rules Regulating The Florida Bar, also found to have been violated by the referee, states that a lawyer shall not represent a client if there is a substantial risk that the representation may be limited by the lawyer's personal interest. Thus, the Bar need not establish actual harm but only the risk of it. In this case, however, actual harm occurred. As previously stated, Aero Control's business was affected when Jeffrey Herman's Nation Aviation barged into their industry, with its former key employee at its helm and the representation in pending matters was suffering.

Respondent's claim that he was not on notice of the "meaning" of the conflict rules which he violated fails. Every member of The Florida Bar is "charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this Court". Rule 3-4.1 of The Rules Regulating The Florida Bar.

Additionally, this Court has very recently held:

> The Rules Regulating The Florida Bar, the Standards for Imposing Lawyer Sanctions, and the opinions issued by this Court, inform attorneys of what conduct is required of them and what sanctions might be imposed for various forms of misconduct.
>
> The Florida Bar v. Dove,
> ---So.2d----, 2008 WL 2373903 (Fla.))

Beyond the notice requirement an attorney is guilty of violating the conflict rules when he either knew or should have known of a conflict of interest. The Florida Bar v. Brown, 978 So.2d 107 (Fla. 2008); The Florida Bar v. Cosnow, 797 So.2d 1255 (Fla. 2001).

In reality, Mr. Herman knew that his conduct was wrong. He was familiar with the process of obtaining a waiver. He obtained one from this very client, John Titus/Aero Controls, so that he could represent Air Kazakhstan. That action was advantageous to him. (A.1, Page 22). The referee found that he did not advise John Titus of the instant conflict for his own dishonest and deceitful reasons.

> 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] (Footnote omitted)
>
> ***

> 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.
>
> (A.1, Page 24, 33)

The conflict and duty to disclose is obvious and inescapable.

ARGUMENT

II

RESPONDENT'S ACTIONS OF FAILING TO INFORM HIS CLIENT THAT HE HIRED HIS KEY EMPLOYEE TO RUN HIS OWN COMPETING COMPANY WHILE CONTINUING TO REPRESENT THE CLIENT CONSTITUTES DISHONESTY IN VIOLATION OF RULE 4-8.4(c) OF THE RULES REGULATING THE FLORIDA BAR. (Restated)

Respondent's argument, which states, "the only conduct that the referee found to be 'deceptive' was Mr. Herman's failure to disclose business activities that the referee labeled a 'conflict of interest' ", misses the mark. Should a lawyer be rewarded for engaging in only one deceptive act? Deceptive conduct, one time or multiple times, is dishonest and constitutes a violation of Rule 4-8.4(c) of The Rules Regulating The Florida Bar.

> A lawyer has the absolute responsibility of being truthful, candid, and aboveboard with his client. A failure in this regard should result in a heavy penalty to assure that other lawyers will be deterred from similar conduct and to protect the clients of lawyers.
>
> The Florida Bar v. Wilder, 543 So.2d 222 (Fla. 1989)

Nevertheless, respondent did not simply "fail to disclose his business activities". The referee found the following:

> He secretly competed with his client using his client's former top salesman.
>
> (A.1, Page 33)

Thus, this referee found more than one dishonest act. The referee found that the respondent acted "in secret", as well as failing to inform his client that he had hired their top salesman to run his own business. See The Florida Bar v. St. Louis, 967 So.2d 108 (Fla. 2007).

Further, the respondent has not sought to appeal the referee's findings as to the underlying findings of fact as to dishonesty and should be precluded from making this argument.

Respondent's argument that he was entitled to fair warning that his conduct constituted a violation of Rule 4-8.4(c) of The Rules Regulating The Florida Bar is without merit. As previously stated, every member of The Florida Bar is charged with knowledge of The Rules Regulating The Florida Bar. It is elemental that an attorney who acts in secret when he competes against his own client, while he currently represents that client, is acting dishonestly and deceitfully. "A person of common intelligence could be expected to understand the conduct prescribed by the rule". The Florida Bar v. Ross, 732 So.2d 1037 (Fla. 1998).

Respondent argues that the referee erroneously found that Rule 4-8.4(a) of The Rules Regulating The Florida Bar was breached. That rule prohibits attorneys from violating the Rules of Professional Conduct. Since Herman violated Rules 4-

1.7(a)(1)(2); 4-1.8(a) and 4-8.4(c) of The Rules Regulating The Florida Bar, he is necessarily guilty of violating Rule 4-8.4(a) of The Rules Regulating The Florida Bar. The Florida Bar v. Feinberg, 760 So.2d 933 (Fla. 2000).

ARGUMENT

III

(On Reply)

RESPONDENT'S MISCONDUCT WARRANTS A TWO YEAR SUSPENSION.

Respondent argues that two mitigating factors were not considered by the referee and apply and three aggravating factors found by the referee do not apply. The respondent applies the wrong standard. "A referee's findings concerning aggravating and mitigating circumstances will be upheld if supported by competent, substantial evidence". The Florida Bar v. Abrams, 919 So.2d 425 (Fla. 2006). A referee must consider and weigh the mitigating and aggravating circumstances and make appropriate conclusions. The Florida Bar v. Smith, 650 So.2d 980 (Fla. 1995); The Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997). The referee clearly considered all evidence offered in this case and found as he did. The respondent has neither argued nor established that the referee's findings were unsupported by competent, substantial evidence. A referee's failure to find that an aggravating factor or mitigating factor applies is due the same deference as other findings of fact. The Florida Bar v. Germain, 957 So.2d 613 (Fla. 2007).

The respondent also argues that as a matter of law a referee cannot find the aggravating circumstance of "refusal to acknowledge the wrongful nature of his conduct" if the respondent believes he has done no wrong. Respondent claims to

have conducted extensive legal research. (Respondent's Initial Brief, Page 34). Respondent's testimony, however, does not support that statement. The respondent claimed to have reviewed The Rules Regulating The Florida Bar "when investing in Nation Aviation". He did not revisit his review when he entered the spare parts business in direct competition with his existing client. He did not seek legal advice. He did not contact The Florida Bar. (TR. 530) This minimal effort could hardly be labeled "extensive". Here, just like the respondent in Germain, supra, the respondent argues that as "a matter of law" his conduct was permissible. As previously argued by the Bar and found by the referee, it was not. Thus, since the respondent bases his claim of innocence on his own legal interpretation, the aggravating factor applies.

The respondent also argues that the referee is precluded from finding the existence of actual harm to the client as an aggravating factor since that factor only applies to drug cases. The Florida Standards for Imposing Lawyer Sanctions are not all inclusive. They are a starting point. The Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001). Many cases have found aggravating circumstances that are not on the list set forth in The Florida Standards for Imposing Lawyer Sanctions. See e.g. The Florida Bar v. Insua, 609 So.2d 1313 (Fla. 1992). In The Florida Bar v. Shankman, 908 So.2d 379 (Fla. 2005) the referee found that actual harm to the client constituted an aggravating circumstance. That case did not involve drugs.

In this case the sole mitigating circumstance found, pales by comparison to the aggravating circumstances found. The Florida Bar v. Barrett, 897 So.2d 1269 (Fla. 2005). The conflict was egregious. The respondent was dishonest. He harmed his client. A two year suspension is the appropriate sanction.

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 Answer and Reply Brief of The Florida Bar was forwarded via Federal Express Priority Overnight Mail, Tracking Number 809685806634, 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 sent by e-mail and regular mail 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 June 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