IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Cross-Respondent

v.

PETER DAVID TICKTIN

Respondent/Cross-Complainant

_____/

Supreme Court Case No. SC07-369

The Florida Bar File No. 2005-50,263(15F)

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Complainant/Cross-Respondent, The Florida Bar, is seeking review of a Report of Referee recommending an admonishment.

Complainant/Cross-Respondent will be referred to as The Florida Bar, or as The Bar. Peter David Ticktin, Respondent/Cross-Complainant, will be referred to as respondent throughout this brief.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to specific pleadings will be made by title. Reference to the transcript of the final hearing are by symbol TR, followed by the volume, followed by the appropriate page number. (e.g., TR III, 289).

References to bar exhibits shall be by the symbol TFB Ex followed by the appropriate exhibit number (e.g., TFB Ex. 10). Reference to respondent's Exhibits shall be by the symbol R-Ex followed by the appropriate exhibit number (e.g., R-Ex. 10). TFB Ex. 13 is respondent's affidavit, dated July 30, 2007, filed in the within matter and consisting of 44 paragraphs. References to TFB Ex. 13 will also include a reference to a specific paragraph. (e.g. TFB Ex. 13, par. 3).

STATEMENT OF THE CASE AND FACTS

On February 28, 2007, The Florida Bar filed a two count Complaint against respondent charging him with the commission of several violations of the Rules Regulating The Florida Bar in connection with his representation of a client, Paul R. Johnson. This case was tried on February 18 and 19, 2008. The referee entered a Partial Report of Referee on March 11, 2008, wherein respondent was found guilty of the rule violations charged in Count I and not guilty of the violations charged in Count II. A hearing to determine sanctions was held on April 17, 2008. The Honorable Barry E. Goldstein entered his complete Report of Referee on May 2, 2008.

COUNT I

Beginning in 2001, respondent provided legal representation in various personal and business matters to Paul R. Johnson [Johnson], including matters related to Link Express Delivery Solutions, Inc. [LEDS], Silver State Vending d/b/a Pony Express a/k/a Pony Express [Silver State] and Link Worldwide Logistics [LWL]. These were companies started by Johnson in which he held executive authority until January 2002, and had an ownership interest that continued thereafter. (RR 2). Respondent admits that he or his law firm provided legal representation to Johnson, LEDS, Silver State and LWL. (TR IV, 461-462, 466; TFB Ex. 13, par. 5, 8, 10). Respondent also testified that when he did anything concerning his representation of LWL, Silver State

and LEDS, he dealt with the companies through Johnson. (TR I, 61). TFB Ex. 11, admitted into evidence without objection, consists of various court orders and pleadings filed by respondent or an attorney employed by respondent. The parties stipulated that TFB Ex. 11 shows facts, dates and examples of respondent's legal representation of both Johnson and Johnson's companies. (TR II, 192).

When respondent became Johnson's attorney in 2001, respondent represented Johnson individually and as trustee for LEDS in litigation matters through September 24, 2002. (RR 2-3; TFB Ex. 11) After LEDS dissolved, Johnson started LWL. (RR 3; TFB Ex. 13, par 7.) Respondent provided legal representation to Johnson and LWL in 2001, when LWL purchased the Florida, Southern Georgia, and Southern Alabama operations of Pony Express Delivery Solutions, Inc., at a bankruptcy proceeding in Atlanta, Georgia. (RR 3; TR I, 63-64; TFB Ex. 13, par. 8). Respondent's law firm also represented Johnson and LWL in another lawsuit with Vanderbilt Capital Corporation and remained as attorney of record in that case from March 8, 2002 until August 12, 2002. (RR 3; TR I, 35; TFB Ex. 11).

After Johnson and LWL acquired Pony Express at the Atlanta Bankruptcy proceeding, LWL entered into an asset sale transaction with Silver State Vending Corp. [Silver State], a Nevada public shell corporation. In the transaction, Silver State purchased LWL's assets, which consisted of the Pony Express business, in exchange

for LWL's ownership of the vast majority of Silver State's stock. (RR 3; TR I, 67; TFB Ex. 13, par. 9). Through until on or about January 7, 2002, Johnson and Richard Bee [Bee] were the only directors of LWL, but Johnson made all the decisions for both LWL and Silver State, and was Bee's boss. (RR 3; TT II, 243). Bee testified he reported to Johnson at both LWL (TR II, 245) and Silver State (TR II, 246).

In the fall of 2001, The Securities and Exchange Commission (SEC) brought a civil action against Paul Johnson concerning the LEDS company. Respondent served his Notice of Appearance for his representation of Johnson in that matter on December 19, 2001, and served an Answer and Affirmative Defenses, and Demand For Jury Trial on behalf of Johnson on January 15, 2002. Respondent continued representing Johnson in that matter until his Motion to Withdraw was granted on April 24, 2002. (RR 3-4; TFB Ex. 11).

Sometime after the SEC civil suit was filed, but before January 5, 2002, Johnson learned that criminal charges in connection with LEDS were going to be filed against him. Respondent dealt with the Assistant U.S. Attorney on behalf of Johnson, concerning the imminent criminal charges and advised Johnson concerning his appearance before the Grand Jury. (RR 4; TT III, 406). Respondent also appeared at Johnson's initial arraignment because it occurred during a court hearing involving the

SEC civil matter. Respondent suggested the name of a criminal attorney to Johnson, but did not enter his own appearance in the criminal case. (RR 4; TR I, 103).

Due to his imminent arrest, Johnson met with respondent in respondent's law office on or about January 5, 2002, to discuss who could replace Johnson as CEO of Silver State. Respondent testified in his affidavit that Johnson, as CEO of Silver State, "desperately needed someone to jump into that position." (TFB Ex. 13, par. 38; TT I, 79). Johnson suggested some people he thought might be suitable, including Matthew Sosonkin, an attorney who was employed by respondent. Respondent told Johnson that he did not think Sosonkin was suitable and suggested himself to Johnson as a suitable replacement. (RR 4; TT I, 75-77, 80; TFB Ex. 13, par. 11). Respondent discussed the opportunity with lawyer Harvey Scholl with whom he shared his legal business operation under the firm name of Scholl, Ticktin & Associates. Both respondent and Scholl viewed it as an opportunity. (RR 5; TT I, 77, 80-81, 93-94). Respondent and Scholl met with Johnson and Bee on January 7, 2002, at respondent's law office where the announcement was made to Bee that respondent would replace Johnson as CEO and Chairman of Silver State, and Scholl would become Chief Financial Officer. (RR 5; TT I, 82-84). Bee testified that after the meeting on January 7, 2002, Johnson was no longer his boss at Silver State and respondent was his new

boss. (RR 4-5; TT II, 260-261). Bee testified he became the sole remaining director of LWL after Johnson's departure. (TT II, 261).

After the January 7, 2002 meeting, respondent began taking over Johnson's position in Silver State. Respondent testified that he did not start the position right away, but the referee found this not to be credible. (RR 8). On February 13, 2002, Silver State filed an application, signed by respondent as Chairman, to the Florida Division of Corporations for authority to transact business in Florida. (RR 8; TFB Ex. 1). On February 26, 2002, respondent, in the capacity of CEO/Chairman of Silver State d/b/a Pony Express, sent a letter to potential shareholders wherein he stated that he "took over as CEO and Chairman approximately 8 weeks ago." (RR 8; TFB Ex. 2).

Respondent made it known that he did not intend to be Johnson's "puppet," when he replaced Johnson as CEO, and thus respondent's position in Silver State became adverse to Johnson's executive role in Silver State. (RR 5; TT I, 94-96, 145). The adverse positions between respondent and Johnson became stark by April of 2002. Johnson had been arrested, and while he was being held in jail, respondent decided that he needed to get Johnson completely out of Silver State because he believed the business would not succeed and that he would not be able to obtain investors as long as Johnson was affiliated with the company. (RR 5, 8; TT I, 145-

146; TT IV, 503).

Johnson had been issued 14.5 million shares in LWL, making him the vast majority shareholder, and LWL, in turn, was the vast majority shareholder in Silver State. (RR 8; TR I, 52; TR II, 241). Bee testified that the certificate for Johnson's LWL shares, though issued to Johnson, had never been delivered to him. (TR II, 241). After Johnson's arrest, Bee was the sole remaining director in LWL, but only held approximately 40,000-50,000 shares in LWL that had been previously gifted to him by Johnson. (RR 8; TR II, 241-242). Although Bee became the boss at LWL, respondent was Bee's boss with respect to Silver State. Respondent and Bee both took the position that Johnson's failure to take delivery of the shares provided a means for each to obtain their mutual objective of getting Johnson out of the company. (RR 8-9, 12; TFB, Ex. 8).

During April of 2002, respondent made visits to Johnson in jail. The purpose of the visits was to get Johnson to sign an agreement prepared by respondent that offered him 2.5 million shares of Silver State from LWL in exchange for holding harmless and releasing all claims Johnson had against Silver State, LWL, as well as their current directors, officers, lawyers and employees, arising out of the cancellation of Johnson's 14.5 million LWL shares of stock. Included with the agreement was a written waiver of conflict of interest respondent wished Johnson to sign. (TFB Ex. 4

and 5; TFB Ex. 13, par. 25). Respondent admitted he was still Johnson's attorney. (TT II, 203). Johnson did not sign the agreements or the conflict waiver. (RR 9) Bee accompanied respondent to one of the visits to Johnson at the jail, but was not allowed into the visit. Respondent told Bee that it had not been a friendly meeting. (TT II 269-270).

During this same period of time that respondent was meeting with Johnson in jail, and attempting to have Johnson sign the agreement and waiver, Bee approached respondent for advice about how to deal with Johnson's 14.5 million shares in LWL with respect to removing Johnson from the company. Respondent professed to Bee that to give such advice would be a conflict of interest for him since he had no conflict or confidentiality waiver from Johnson respecting LWL.[1] On respondent's suggestion, Bee sought counsel from other attorneys and then informed respondent that he had received advice that Johnson's shares could be cancelled. Though Bee testified the decision to cancel Johnson's shares was his own, he acknowledged discussing it with respondent who told Bee to do whatever Bee thought was necessary. (RR 9; TT II, 265-268, 282-283). Bee then cancelled Johnson's shares in LWL, after

[1] Despite not having the waiver from LWL, Respondent was aware of Bee's plans to let LWL administratively dissolve after Johnson's LWL shares were transferred. (TFB Ex. 8 at page 11.)

issuing himself sufficient shares in LWL to give himself a majority over Johnson's shares. (RR 9-10; TT II, 275). Bee testified the shares were cancelled sometime between April 18, 2002, and May 1, 2002. (TT II, 275).

Around the time those shares were cancelled, Bee sought counsel from Bruce Chaimowitz, an attorney employed in respondent's law firm, whom respondent had made the chief legal officer for Silver State. (RR 10; TT I, 133). Chaimowitz prepared a letter on Pony Express letterhead, for Bee's signature, dated May 1, 2002. (RR 10; TT II, 272; TFB Ex. 6).[2] The letter states that Johnson's shares in LWL have been nullified and gives Johnson one more chance to sign the agreement and waiver. Bee informed Chaimowitz of the terms that were to go into the letter based on conversations with respondent. (TT II, 274). Bee discussed the contents of the letter with respondent before it was sent. (TT II, 272-274). Enclosed with the letter was another agreement and conflict waiver prepared by respondent for Johnson to sign. (TFB Ex. 6). This latest version of the agreement lowered the number of Silver State shares offered to Johnson from 2.5 million to 1.7 million shares and was also accompanied by a conflict of interest waiver prepared by respondent. (RR 9-10; TFB Ex 6).

[2] The letter was addressed to Dominic Grosso, an attorney, because Bee knew him. (TT II, 200). Grosso was not Johnson's attorney. (RR 10; TT IV, 606).

Johnson did not sign that latest version of the agreement or waiver that was sent with the letter. Thereafter, on May 16, 2002, respondent sent a letter to Pony Express shareholders and potential shareholders informing them of the events that had transpired. (TFB Ex. 8). Respondent admits the accuracy of the contents of the letter when written. (TT II, 215-216). The referee found the letter demonstrated that respondent had taken an adverse position against Johnson's shares of stock in LWL, notwithstanding his acknowledgement that Johnson had a claim to those shares. (RR 10-11). Respondent's position was, that based on promises Johnson had purportedly made to LEDS shareholders, Johnson's cancelled shares should be used to satisfy potential claims by LEDS shareholders against Silver State, Link Worldwide, and its present officers and directors. The letter also relates respondent's efforts to get Johnson to cooperate in relinquishing his shares in LWL and his failure to so cooperate, which resulted in Bee's action to cancel Johnson's shares. It also demonstrates that respondent's law firm prepared releases for the shareholders to sign in order to accomplish the stock transfer. (RR 10-11). At pages 8-9 of TFB Ex. 8, the respondent wrote:

> The way I thought that we would deal with Paul Johnson would have been to have made a contract that would have resolved all of his holdings and any potential claims that he could have made. I tried this. Mr. Johnson and I agreed to the *quid pro quo* of his getting a certain number of shares in return for his waiver of any claim for

the cancellation of all the shares he might otherwise claim.

Unfortunately, Mr. Johnson had no intention of working with me for the benefit of the company, and would not sign the agreement to which he agreed.

I am further sorry to report that neither Mr. Bee nor I have been able to get cooperation from Mr. Johnson. The weekend before last, Harvey Scholl and I attended at the Broward County Jail to visit with Mr. Johnson, but when he learned we were there, he refused to visit with us. That was the last effort that I was willing to make. Hence, we have no choice at this time but to act accordingly.

The referee's report quotes the following additional pertinent statements made by respondent in TFB Ex 8: (RR 11-12).

At Page 9 of TFB Ex. 8:

> We were advised that the present administration of Link Worldwide and Silver State may have no obligation to the original shareholders of LEDS. Perhaps this is true. However, after careful consideration and consultation, Mr. Bee (on behalf of Link World wide) and I (on behalf of Silver State) believe that Paul Johnson, by making promises coupled with his seeking funding, has caused at least a potential liability to Link Worldwide.
>
> In any event, irrespective of whether there is a legal duty…. We are determined to make Paul Johnson's promises of gift come true… Please understand that this is Richard Bee's, Harvey Scholl's and my unanimous decision.

At page 10 of TFB Ex. 8:

> …We are anxious to get this done. Therefore, in the weeks to come, you will be getting a letter from Bruce Chaimowitz of Scholl Ticktin & Associates, my law firm, on behalf of Richard Bee with an enclosed release. The release will

> forgive any potential claims by the shareholder against Silver State, Link Worldwide, and its present officers and directors. My law firm will ask you to return the Release and a reasonable administrative legal fee….

At page 11 of TFB Ex. 8:

> …Moreover, as a note of interest, Richard Bee (the Board of Directors of Link Worldwide) nullified the share certificate purported to grant Paul Johnson the 14.5 million shares….He [Johnson] acted in ways that were detrimental to the company. Also, it was those shares that were used to make the settlements for his promises.

On November 12, 2002, respondent sent a letter enclosing the stock certificates to those shareholders who had signed the releases. (RR 10-12; TFB Ex. 9).

Respondent claims that when he took over Johnson's position as CEO for Silver State in January 2002, he discussed with Johnson the need for Johnson to sign a conflict of interest waiver pertaining to Silver State because respondent was his lawyer, that Johnson agreed, but then refused to sign the waiver. (TT I, 98; TFB Ex. 13, par. 12, 25). The referee found there was no evidence to show Johnson understood the meaning or extent of any oral conflict or confidentiality waiver claimed by respondent. He also found that, although respondent had later tried to set forth the extent of the purported oral waiver in writing, Johnson's refusal to sign it demonstrated he did not agree to the waiver. (RR 7). The only evidence of proposed written waivers prepared by respondent were those that respondent presented with the

agreements for Johnson to relinquish his rights in the 14.5 million shares of LWL stock. (TFB Ex. 4,5, and 6). Respondent admits that he had no conflict waiver from Johnson pertaining to LWL, and no waiver of any sort from Silver State or LWL. (RR 7; TT I, 128-130; TFB Ex. 13, par. 44).

The referee found respondent did not prepare a written document to Johnson or Silver State fully disclosing and transmitting the terms of the transaction or the terms on which respondent acquired the interest in Silver State, as required by [former] Rule 4-1.8(a)(1), Rules Reg. Fla. Bar. (RR 5; TT I, 104). At respondent's deposition on June 14, 2007, he testified there were no terms to the deal he made to take over Johnson's executive authority in the business. (RR 6; TT I, 112). Respondent also testified at the final hearing that the only term to the deal was that he was going to replace Johnson as CEO of Silver State. (TT I, 111). Respondent relied on a "press release" that was discovered by Bee on his computer hard drive the night before Bee's deposition, which took place on July 26, 2007, as sufficient satisfaction of the requirement of written terms in former Rule 4-1.8(a). (TFB Ex. 14; TT I, 112-113; TT II 321). The referee did not find this claim to be supported by credible evidence. (RR 6). The "press release" stated that respondent accepted the position of Chairman and CEO, Scholl accepted the appointment of CFO, and Johnson, the founder and major shareholder was to remain as primary consultant. The referee found this "press

release" did not satisfy the requirement of [former] Rule 4-1.8(a)(1) because it did not fully disclose the terms of the transaction to Johnson in writing. (RR 6-7). It did not state that Johnson was resigning the company, and respondent's testimony that the portion of the press release pertaining to Johnson remaining as a primary consultant was not one of the terms of the deal. (TT I, 119). It also did not state that Johnson waived any conflict of interest. Further, it did not make reference to the oral waiver of conflict and confidentiality respondent claims he obtained from Johnson at the January meetings. Respondent had testified in paragraph 12 of his Affidavit (TFB Ex. 13) that the waivers of confidentiality and conflict were "two major concerns" he had in replacing Johnson. The referee found that these major concerns were essential terms that were not disclosed nor consented to by Johnson or Silver State as is required by [former] Rule 4-1.8(a)(1). (RR 6 -7).

The referee found that Silver State and LWL were inextricably linked. Respondent was Bee's boss at Silver State, Bee was the boss at LWL, and respondent's law firm provided legal advice to Bee on LWL matters. Respondent was privy to confidential information of all the parties involved and owed a duty of loyalty and confidentiality to each of those parties. (RR 12). The referee found respondent was representing the adverse interests of Johnson, LEDS and LWL contemporaneous with his efforts and the efforts of his law firm to resolve potential and legally

questionable claims, which were being made against Silver State and LWL by former LEDS shareholders. In taking steps to resolve those claims, he acted adversely against Johnson's ownership interest in LWL. (RR 13). The referee found respondent's letter of May 16, 2002 (TFB Ex. 8), clearly demonstrated that he was acting in concert with Richard Bee against Johnson's interests. (RR 12)

The referee also determined that respondent's exercise of independent judgment in representing Johnson and LWL, was clearly limited by his own self interest, and the interests of Silver State. (RR 13). Respondent had invested considerable sums of his own money in the business, thus giving him another basis for self interest. (RR 5) Instead of seeking appropriate legal means in which to act to protect Johnson's ownership interest in LWL as Johnson's attorney, respondent acted against Johnson's interest by trying to get Johnson to sign the agreement to relinquish his shares, and when that failed, participating in the adverse action to extinguish Johnson's ownership interest in LWL, which ultimately was designed to extinguish Johnson's involvement in Silver State. (RR 13)

Based upon his factual findings, the referee found the respondent guilty of violating R. Regulating Fla. Bar, former Rule 4-1.7(a) [A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless (1) the lawyer reasonably believes the representation will not

adversely affect the lawyer's responsibilities to and relationship with the other client; and (2) each client consents after consultation.]; former Rule 4-1.7(b) [A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.]; 4-1.7(c) [When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.]; former Rule 4-1.8(a) [A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possesory, 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 given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto.].

Despite his factual findings, however, the referee only recommended that respondent receive an admonishment.

COUNT II

In February or March of 2002, shortly after Mr. Johnson was arrested, there was a bond hearing before Magistrate Judge Snow. At that time, the respondent testified that in his opinion, Johnson was not a flight risk. (RR 14). This occurred before the time when respondent was making the visits to Johnson in jail to try to get him to sign the agreement and conflict waiver. (TT I, 211). The bond was denied and Johnson appealed.

During one of the meetings respondent had with Johnson at the jail, and while Johnson's appeal of the denial of bond was pending, Johnson advised him that if he were to be convicted, he would not be sent to minimum security but rather to medium or maximum security. Respondent testified that based solely on Johnson's statement and the fear he saw in Johnson's eyes, respondent formed the opinion that Johnson would be a flight risk. (RR 15). Johnson never told respondent that he would flee if released on bond, and respondent never asked Johnson if he intended to flee or what Johnson meant by his statement. (TT I, 204-206; TFB Ex. 13, par. 27).

Days following the incident, respondent had a telephone conversation with the Assistant U.S. Attorney in Johnson's criminal case on April 30, 2002. Respondent

believed there was to be a trial de novo on the bond appeal and advised the Assistant U.S. Attorney that he would not testify for Mr. Johnson, as the respondent was not of the same mind as he was at the original bail hearing. (RR 15). The U.S. Attorney advised respondent that there would be no trial de novo, but the appeal would be based on the record. Respondent was requested to provide an affidavit, but instead, he sent a letter that same day to the Assistant U.S. Attorney advising that he changed his mind. (TFB Ex.7). This occurred just one day before sending the latest version of respondent's agreement enclosed with Bee's letter of May 1, 2002. (TFB Ex. 6). Respondent admitted in his Answer to the Complaint (Paragraph 20) that he did not seek or obtain Johnson's consent to make the communications to the U. S. Attorney.

The April 30, 2002, letter sent by respondent (TFB Ex. 7) states in pertinent part:

> I wish to confirm our telephone conversation that we had this afternoon at which time I advised that it is necessary for me to rescind my testimony regarding Paul Johnson. Although I testified honestly to my beliefs at the initial bail hearing, my opinions have changed, and I would not want Judge Ferguson to rely on my previous testimony, as it could mislead him.

The referee, nonetheless, found respondent was not guilty of former Rule 4-1.6(a) [A lawyer shall not reveal information relating to a representation of a client except as stated in subdivision (b), (c), and (d), unless the client consents after

disclosure to the client.]; and former Rule 4-1.8(b) [A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by rule 4-1.6.].

The referee's report was considered by the bar's Board of Governors at the meeting which ended on May 30, 2008. The Board determined to petition for review of the referee's disciplinary sanction and seek a suspension. The bar also appeals the referee's factual findings made in Count II.

SUMMARY OF ARGUMENT

The referee committed error in recommending that respondent receive an admonishment as a disciplinary sanction when a suspension is the appropriate sanction under the case law and the standards. The referee applied the incorrect Standard for Imposing Lawyer Sanctions in derogation of his findings of fact that respondent knowingly engaged in a conflict of interest and that respondent's client suffered injury or potential injury as contemplated by the standards. The referee erred in minimizing respondent's violation of former rule 4-1.8(a) by characterizing it as a "technical" violation and by finding justification for respondent's representation of adverse interests. The referee committed error in his application of mitigating and aggravating factors and failed to properly consider relevant case law to support a disciplinary sanction of suspension rather than the recommended admonishment.

The competent substantial evidence in the record does not support the referee's finding respondent not guilty of the rule violations charged in Count II because respondent revealed confidential information to the client's detriment without the client's consent.

ARGUMENT

I. THE REFEREE COMMITTED ERROR IN RECOMMENDING RESPONDENT RECEIVE AN ADMONISHMENT AS A DISCIPLINARY SANCTION WHEN A SUSPENSION IS THE APPROPRIATE SANCTION UNDER THE CASE LAW AND THE STANDARDS.

As a general rule, this Court will not second-guess a referee's recommended discipline as long as that discipline is authorized under the Florida Standards for Imposing Lawyer Sanctions and has a reasonable basis in existing case law. The Florida Bar v. Spear, 887 So. 2d 1242 (Fla. 2004). As this Court stated in The Florida Bar v. Sweeney, 730 So. 2d 1269, 1272 (Fla. 1998), "[a]lthough a referee's recommended discipline is persuasive, we do not pay the same deference to this recommendation as we do to the guilt recommendation because this Court has the ultimate responsibility to determine the appropriate sanction."

In the instant case, the referee's recommendation of an admonishment as the discipline to be imposed has no reasonable basis in existing case law nor is it authorized by the Florida Standards for Imposing Lawyer Sanctions. As set forth in the preceding Statement of the Case and Facts herein, the referee's factual findings as to respondent's guilt in Count I are clearly supported by the evidence, but the rationale for recommending the admonishment significantly deviates from those findings. A referee's findings of fact regarding guilt carry a presumption of correctness that should

be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000).

The referee committed error by minimizing and excusing respondent's misconduct, and did not recommend the appropriate sanction based on the factual findings pertaining to Count I. An admonishment is not supported by the evidence in the record and disregards the referee's serious factual findings that related to respondent's guilt to violating former Rules 4-1.8(a); 4-1.7(a); 4-1.7(b); and 4-1.7(c).

1. The Referee Committed Error by Applying the Incorrect Standard for Imposing Lawyer Sanctions to Recommend an Admonishment in View of Findings of Fact That Respondent Knowingly Engaged in a Conflict of Interest and That the Client Suffered Injury or Potential Injury as Contemplated in the Standards.

The referee considered Standard 4.34 of the Standards for Imposing Lawyer Sanctions and recommended an admonishment. (RR28). Standard 4.34 is not applicable in this case. It provides that an admonishment is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no injury or potential injury to a client.

First, there was no finding that respondent was negligent. Rather, the referee found that respondent represented adverse interests in simultaneously representing Johnson, LWL, and Silver State (RR 12); that he knew there was a conflict of interest

(RR 21); that he acted adversely against Johnson's shares of LWL stock, notwithstanding respondent's acknowledgement that Johnson had a claim to those shares (RR 10-12); that respondent's own personal interest and his duty to Silver State was paramount to Johnson's interests (RR 13); and that respondent could not reasonably believe his representation of Johnson was not adversely affected by the actions in which he and his law firm participated. (RR 13-14).

As the basis for using Standard 4.34, the referee opined that there was no injury or potential injury to Johnson. (RR 28). This opinion is not supported by the record and directly conflicts with significant factual findings the referee made relating to respondent's guilt to the rule violations charged in Count I.

The referee specifically found that LWL and Silver State were companies started by Johnson in which he held executive authority until January 2002, and had an ownership interest that continued thereafter. (RR 2). The referee also found that Johnson had been issued 14.5 million shares in LWL, making him the majority shareholder, and that LWL was the majority shareholder in Silver State. This ownership interest by Johnson motivated respondent's decision to get Johnson completely out of Silver State because respondent believed he would not be able to obtain investors as long as Johnson was affiliated with the company. (RR 8). That is

the reason he prepared the agreements for Johnson to sign (TFB Ex. 4, 5, and 6), and that is the reason he acted against Johnson's ownership interest in those shares.

The referee found that respondent and Bee had a mutual objective to get Johnson out of the company and that Johnson's failure to take delivery of the 14.5 million LWL shares issued to him, provided a means to achieve their objective (RR 8-10).

The referee states at page 13 of his report:

> In this case, respondent was representing the interests of Johnson, LEDS and LWL contemporaneous with his efforts and the efforts of his law firm to resolve potential and legally questionable claims, which were being made against Silver State and LWL by former LEDS shareholders. In taking steps to resolve those claims, he acted adversely against Johnson's ownership interest in LWL.

In his report, the referee quoted portions of respondent's letter to Pony Express Shareholders and Potential shareholders, dated May 16, 2002, (TFB Ex. 8). One of the quotes from page 11 of the letter stated:

> …Moreover, as a note of interest, Richard Bee (the Board of Directors of Link Worldwide) nullified the share certificate purported to grant Paul Johnson the 14.5 million shares….He [Johnson] acted in ways that were detrimental to the company. Also, it was those shares that were used to make the settlements for his promises. (Underlining added for emphasis).

These factual findings do not support the referee's rationale that Johnson's property, including his shares in LWL, had been seized and eventually forfeited to the government. (RR 28). Respondent stated that Johnson's assets were frozen by the SEC in his letter to Pony Express Shareholders dated March 22, 2002 (TFB Ex. 3), and in his testimony. (e.g. TT I, 156-157). In fact, respondent states in TFB Ex. 8 at page 13:

> This is where the SEC really helped us by freezing Paul Johnson's assets…

Even assuming Johnson's assets were frozen, there was no evidence to show that respondent's shares in LWL had been forfeited to the government. Had those shares been forfeited, then those shares would have been property of the government, and could not have been cancelled without the government's agreement. There is an obvious distinction between assets that are frozen and assets that are forfeited and respondent's actions were premised on the factual basis that Johnson, not the government, had an ownership interest in the shares.

Standard 4.31, which provides for disbarment and 4.32, which provides for suspension, are the applicable standards to respondent's misconduct in the instant case. Taking into account all possible relevant mitigating factors, the Bar, at the final

hearing, sought a suspension of at least 60 days as the appropriate sanction in this case.

Standard 4.31 provides:

> Disbarment is appropriate when a lawyer, without the informed consent of the client(s):
>
> (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
>
> (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
>
> (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

Standard 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.

In this case, the referee found that respondent simultaneously represented Johnson, LWL and Silver State without having consents or conflict waivers from each client contemporaneous with his efforts to resolve potential and questionable claims being made against LWL and Silver State, and in the process, acted adversely against Johnson's ownership interest in LWL. (RR 12-13). The referee also found that

respondent's exercise of independent judgment was clearly limited by his own self interest and the interests of Silver State, in which he had invested his own money. (RR 5, 13; TFB Ex. 13, par. 20).

Pony Express and Link Worldwide Logistics were Johnson's companies. Respondent participated in actions to take those companies from Johnson. There was serious injury and potential serious injury to Johnson, as contemplated by the Standards. The admonishment recommended by the referee has no basis in the Florida Standards for Imposing Lawyer Sanctions.

2. In Arriving at the Recommended Disciplinary Sanction of Admonishment the Referee Erred When He Minimized Respondent's Violation of Former Rule 4-1.8(a) by Characterizing it as a "Technical" Violation.

The referee made factual findings that respondent did not prepare a written document to Johnson or Silver State that fully disclosed and transmitted the terms of the transaction or the terms on which respondent acquired the interest in Silver State, as required by [former] Rule 4-1.8(a)(1), R. Regulating Fla. Bar (RR 5); that respondent's use of a purported "press release" found on Bee's computer hard drive to satisfy the requirements of the rule was not credible or sufficient. (RR 6); that terms considered essential to the deal were not disclosed in writing nor consented to in writing by Johnson or Silver State (RR 6-7); and that there was no evidence to show that Johnson understood the meaning or extent of any conflict or confidentiality

waiver claimed by respondent or agreed to such a waiver. (RR 7).

Despite having made these factual findings, the referee states, as it relates to his sanction recommendation, that respondent's failure to obtain a written document prior to his acceptance as CEO of Silver State "was more technical than substantive." (RR 20). It is submitted that this does not comport to this Court's view of business transactions between attorneys and their clients. In The Florida Bar v. Kramer, 593 So. 2d 1040 (Fla. 1992), the Court states at page 1041:

> Business dealings between lawyers and clients are fraught with conflict-of-interest problems, such as this case clearly illustrates. Human nature makes such conflicts virtually inevitable notwithstanding a lawyer's good intentions. When a lawyer deals with a client in a business transaction, the lawyer must be scrupulous in disclosing the exact nature of the transaction and in obtaining the client's consent in writing. Failure to comply with these safeguards normally warrants a greater punishment than a reprimand. . . See The Florida Bar v. Dougherty, 541 So. 2d 610, 612 (Fla. 1989); The Florida Bar v. Dunagan, 509 So. 2d 291, 292 (Fla. 1987).

In State of Florida ex rel. The Florida Bar v. Rhubottom, 132 So. 2d 395 (Fla. 1961), this Court stated at page 398:

> There is little which we can add to that which has already been written by this Court regarding the responsibility which a lawyer carries in his dealings with his clients. While business transactions between lawyers and clients are not prohibited by the Canons of Ethics, nevertheless they will be meticulously scrutinized when alleged to have been unfair.

This has been the repeated message of the Court, even outside of the arena of attorney

discipline. In Gerlach v. Donnelly, 98 So. 2d 493 (Fla. 1957), this Court reiterated its holding in Brass v. Reed, 64 So. 2d 646, 648 (Fla. 1953), and stated at page 498:

> The only difference in dealings between an attorney and client and other people is that relationship between attorney and client is very intimate, close, personal and confidential, and an attorney is required to exercise in all his dealings with his client a much higher standard than is required in business dealings.

This is not an arm's length transaction which took place outside the scope of bar review nor is it a dispute deserving only civil review, to the exclusion of bar discipline. Rather, it is a business transaction between a lawyer and a client and, accordingly, it is of grave significance that it took place without the clearly mandated safeguards provided by the Rules Regulating The Florida Bar.

3. In Arriving at the Recommended Disciplinary Sanction of Admonishment, the Referee Erred by Finding Justification for Respondent's Misconduct.

Among the clear factual findings made by the referee in finding respondent guilty of Rules 4-1.7(a), (b), and (c), was that respondent represented adverse interests contemporaneously with his efforts to resolve potential and legally questionable claims being made against Silver State and LWL by former LEDS shareholders, and that respondent acted adversely against Johnson's interests in taking steps to resolve those claims. (RR 13). The referee also clearly found respondent's exercise of independent judgment was limited by his own self interest. (RR 13).

Despite these findings, the referee makes the following statement in the portion of his report relating to the sanction recommendation:

> However, Mr. Ticktin also acted in a conflict of interest position, in that he failed to assure that Mr. Johnson, who was incarcerated awaiting trial, was protected from Mr. Bee's cancelling of Mr. Johnson's shares in Link Worldwide Logistics, Inc. Mr. Ticktin knew that there was a conflict of interest, as he refused to act directly and recommended that Mr. Bee seek other counsel. However, after Mr. Bee cancelled the shares, Mr. Ticktin accepted that fact and supported it.
>
> Although this was more serious than a technical violation, it is apparent that Mr. Ticktin was attempting to do the right thing for the investors of Silver State Vending Corporation as its CEO. Also, he got himself involved in Silver State due to the manipulations of Mr. Johnson, and once he was in that position, as CEO, there was little that he could do to avoid the conflict where Mr. Bee's actions were condoned by Mr. Ticktin, Mr. Bee's employer.
>
> It is apparent that Mr. Ticktin was to some extent in a 'Catch 22" situation, where he had no good options. (RR 21).

And:

> Although the Respondent could have theoretically succeeded with Silver State Vending Corporation, his failure to assure that Mr. Johnson's shares were not cancelled primarily benefitted [sic] victims of Mr. Johnson. (RR 23).

Thus, in excusing respondent's conduct, the referee ignored his own factual findings of respondent's own financial investment in Silver State, his self dealing and legally questionable claims made by the shareholders. The referee did not take into consideration the importance of respondent's ethical obligation to his client. Indeed,

the first sentence of the comment to Former Rule 4-1.7(a) states, "Loyalty is an essential element in the lawyer's relationship to a client."

The referee seems to further excuse respondent's misconduct by intimating that respondent, not Johnson, was the victim because respondent was manipulated by Johnson and placed in a "Catch 22 situation, where he had no good options." This is in contrast to the referee's finding that respondent viewed replacing Johnson as CEO as an opportunity. (RR 5; TT I 76-77). In a letter respondent admits preparing to Pony Express Shareholders, dated March 22, 2003 (TT I, 139; TFB Ex. 3), he stated in pertinent part at page 3:

> I was honored when hired to be CEO of Pony Express….
>
> The name and the business plan induced me to jump into this company. I saw the value of its assets and saw an opportunity for myself. That is why I am here. I want to make money, and I intend to do it through the shares that I will ultimately own.

Respondent was one of the investors in Silver State for whom he was trying to "do the right thing." It is submitted that it should be obvious that the rules against representing conflicting interests are designed to prevent this "Catch 22 situation" from arising in the first place. Respondent immersed himself into a situation that was laden with conflict and admits that he had no conflict waiver from Silver State or LWL. (RR 7; TT I, 128-130; TFB Ex. 13, par. 44). In fact, respondent stated that the

conflict could not be waived by Silver State because it was a publicly traded corporation. (TT I, 125).

The comment to Former Rule 4-1.7 provides in pertinent part:

> **Consultation and consent**
> A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer cannot properly ask for such agreement or provide representation on the basis of client consent. When more than 1 client is involved, the question of conflict must be resolved as to each client….

It is submitted that this situation presented conflicts of interests that could not be waived. The referee erred in excusing respondent's serious ethical misconduct when considering the disciplinary sanction to be imposed.

4. The Referee Committed Error in His Application of Mitigating and Aggravating Factors.

The referee found only one aggravating factor, substantial experience in the law; and found six mitigating factors: absence of a prior disciplinary record; absence of a dishonest motive; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; good character and reputation; imposition of other penalties or sanctions; and remorse.

Even assuming, arguendo, the referee correctly applied the mitigating and

aggravating factors, the Bar submits that respondent's misconduct is so egregious that a suspension of at least 60 days would be the appropriate disciplinary sanction under the applicable standards and case law. This court is free to impose a sanction greater than 60 days if it deems it appropriate.

The Bar concedes the respondent has no prior disciplinary record and that he offered sufficient evidence to warrant the finding of good character or reputation as a mitigating factor. But, the Bar takes issue with the finding of the remaining mitigators and submits that additional aggravating factors of selfish motive, multiple offenses, pattern of misconduct, and vulnerability of the victim are warranted.

Like other factual findings**,** a referee's findings of mitigation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record. A referee's failure to find an aggravating factor or mitigating factor is due the same deference. The Florida Bar v. Germaine, 957 So. 2d 613 (Fla. 2007).

In the instant case, the referee improperly found respondent suffered imposition of other penalties or sanctions for the reason that respondent and his family lost a great deal of money they invested in Silver State after he became CEO. (RR 24, 25-26) Silver State closed after several hurricanes in 2004-2005 impacted its ability to continue in business. (TT III, 419-420). But as previously stated, respondent took

over Johnson's position because he considered it an opportunity. The referee found that respondent's investment of his own money was a basis for self interest that affected his independent professional judgment in violation of former Rule 4-1.7(b). (RR 5). The fact that respondent lost money in the process of trying to make money in this business transaction laden with conflicts and self interest should not serve as mitigation for his ethical misconduct.

Further, there is no basis for mitigation in the referee's finding that embarrassment to respondent caused by the finding of guilt was, in and of itself, greater punishment to respondent than any other sanction. (RR 26). Respondent's embarrassment for his conviction of the rule violations, while possibly stemming from a bruised ego, should not be the basis for mitigation. It certainly does not equate to remorse for his egregious conduct, given the minimal weight the referee gave respondent's sense of remorse in the next paragraph of the report. He found respondent only regretted that he did not put the terms of his arrangement with Johnson in writing. (RR 26). This should be contrasted with the Court's holding in The Florida v. Smith, 650 So. 2d 980 (Fla. 1995), where the attorney was found to have a profound sense of remorse for evading taxes and his attendant embarrassment caused by the imposition of other penalties, i.e. media attention, jail time and fines imposed. Indeed, at the closing argument on sanctions, respondent stated:

> Was I happy that Mr. B canceled the shares? Yes, I was. Was it better for Silver State Vending Corporation? Yes, it was. Was it better for the potential interest of Peter Ticktin? Yes, it was. (TT V, 685).
>
> …And if I'm suspended, basically it's not going to hurt me to be on vacation nearly as much as it's going to hurt my clients and the attorneys that are working for my firm. To say that this is a lesson that needs to be learned for everybody else, to be a deterrent for the world not to get involved with somebody like Paul Johnson, I was fooled. I got into it in the first place. (TT V, 688).

Remorse should not have been applied as a mitigating factor, even with minimal weight. The record does not demonstrate any remorse by respondent for the egregiousness of engaging in self dealing, conflicting representations, or for his participation in the removal of Johnson's ownership interests.

The Bar sought the imposition of Standard 9.22(b) as an aggravating factor based on selfish motive. (TT V, 626). The referee found respondent's selfish motive to be an element, but unlike his consideration of respondent's remorse, he did not give it any weight as an aggravating factor. (RR 23). This is despite the referee's finding that respondent's investment of his own money was a basis for self interest (RR 5) and that respondent placed his own personal interest above Johnson's interests. (RR 13). The referee ignored the central issues of this case in failing to consider selfish motive as an aggravating factor and instead, applying lack of dishonest motive as a mitigating factor.

At the sanctions hearing, the Bar also requested the referee to apply Standards 9.22(c), pattern of misconduct; 9.22(d), multiple offenses; 9.22(h) vulnerability of victim; and 9.22(i), substantial experience in the practice of law as aggravating factors. (TT V, 626-627). The referee allowed only 9.22(i).

There are multiple rule violations because respondent was convicted of all four rule violations charged in Count I. And the referee specifically found a pattern to the misconduct:

> Respondent's own personal interest and his duty to Silver State was paramount to Johnson's interests as respondent tried to get him to sign the agreement to relinquish his shares, and when that failed, participated in the adverse action to extinguish Johnson's ownership interest in LWL, which ultimately was designed to extinguish Johnson's involvement in Silver State. (RR 13)

The referee provides no explanation for not applying multiple offenses and pattern of misconduct as aggravating factors. This is clearly erroneous and without support in the record.

Further, the referee should have considered Johnson's vulnerability as a victim as an aggravating factor. Johnson was imprisoned while these violations took place and his lack of liberty limited Johnson's ability to protect himself from respondent's misconduct, other than to refuse to sign the agreement and conflict waiver. As respondent's client, the duty to protect Johnson's interests was no less because his

client was in jail.

5. The Applicable Case Law Supports a Suspension of at Least 60 Days.

This Court has provided ample guidance and clear warnings to lawyers who engage in conflicting representations and business with their clients. It is settled that an attorney may not represent conflicting interests in the same general transaction, no matter how well-meaning his motive or however slight such adverse interest may be. The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989), The Florida Bar v. Moore, 194 So. 2d 264, 269 (Fla.1966).

In Della-Donna at p. 310, the Court states in pertinent part:

> The practice of law is a privilege which carries with it responsibilities as well as rights. 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…..
>
> …..It is settled that, except in exceptional circumstances ..., an attorney may not represent conflicting interests in the same general transaction, no matter how well-meaning his motive or however slight such adverse interest may be. The rule in this respect is rigid, because it is designed not only to prevent the dishonest practitioner from fraudulent conduct but also to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. The Florida Bar v. Moore, 194 So.2d 264, 269 (Fla.1966). See also The Florida Bar v. Bennett; Rules Regulating Fla. Bar, rule 4-1.7.

Moore at page 269:

Case law supports a suspension. In The Florida Bar v. Mastrilli, 614 So. 2d 1081 (Fla. 1993), the attorney received a six month suspension for representing a driver and a passenger in an automobile accident personal injury case. The attorney filed suit against his own client-driver after the insurance company denied the claim. The Court rejected the attorney's argument that he was negligent in failing to discover the conflict and that there was no harm to the client and applied Standard 4.32. The opinion does not mention the application of any aggravation or mitigation.

In The Florida Bar v. Dunagan, 731 So. 2d 1237 (Fla. 1999), the attorney received a 91 day suspension for representing a husband and wife in a business matter and later representing the husband in a divorce and acting against the wife's business interests.

In The Florida Bar v. Cosnow, 797 So. 2d 1255 (2001) the attorney received a 60 day suspension and one year probation for representing a minor child's mother in paternity and guardianship proceedings where he had previously represented the child's grandmother and knew or should have known grandmother legal interests were directly and materially adverse];

In The Florida Bar v. Black, 602 So. 2d 1298 (Fla. 1992), despite finding six

mitigating factors, the attorney was given a 60 day suspension for an impermissible business transaction with a client. In aggravation, the referee found selfish motive, vulnerability of the client and substantial experience in the law. In mitigation, there was no prior disciplinary record, remorse, timely good faith effort to make restitution, cooperation with the disciplinary process, and no intent to deprive his client of property or deceive him. The Court stated at page 1298:

> Lawyers must be extremely careful in their personal dealings with clients. Lawyers act in a special fiduciary capacity with their clients and must avoid using that relationship for personal gain.

In The Florida Bar v. Bennett, 276 So. 2d 481 (Fla. 1973), Bennett participated in a joint venture to purchase a shopping center. While the Court accepted that Bennett was not "acting in an actual attorney-client relationship," it determined that he did have a fiduciary responsibility and he was given a one year suspension.

In summary, a lawyer is always a lawyer. As the aforementioned case law teaches, respondent is a lawyer when he is a CEO and is a lawyer when he enters into any business relationship, and a lawyer when engaging in business transactions with one's own clients.

For all of the reasons set forth herein, and based on all of the case law argued herein, respondent should be suspended for at least 60 days. No lesser discipline will comply with this Court's requirements for lawyer discipline. This court is free to

impose a sanction greater than 60 days if it deems it appropriate.

II. THE COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD DOES NOT SUPPORT THE REFEREE'S FINDING RESPONDENT NOT GUILTY OF THE RULE VIOLATIONS CHARGED IN COUNT II BECAUSE RESPONDENT REVEALED CONFIDENTIAL INFORMATION TO THE CLIENT'S DETRIMENT WITHOUT THE CLIENT'S CONSENT.

This Court has the authority to review the record to determine whether "competent substantial evidence supports the referee's findings of fact and conclusions concerning guilt." The Florida Bar v. Cueto, 834 So. 2d 152 (Fla. 2002), citing The Florida Bar v. Jordan, 705 So. 2d 1387 (Fla. 1998). When that occurs, the party contending the referee's findings of fact and conclusions as to guilt must demonstrate either a lack of record evidence to support such findings and conclusions, or evidence the record clearly contradicts such findings and conclusions. The Florida Bar v. Feinberg, 760 So. 2d 933 (Fla. 2000), quoting The Florida Bar v. Sweeney, 730 So. 2d 1269, 1271 (Fla. 1998).

In the instant case, the evidence in the record does not support the referee's finding respondent not guilty of the rule violations charged in Count II of the Complaint, former Rules 4-1.6(a) and 4-1.8(b). Respondent testified at Johnson's bond hearing that Johnson was not a flight risk. During one of the meetings respondent had with Johnson at the jail trying to obtain the agreement relinquishing Johnson's ownership interests in LWL, and while Johnson's appeal of the denial of

bond was pending, respondent states that Johnson advised him that if he were to be convicted, he would not be sent to a minimum security, but to a medium or maximum security prison. Respondent formed the opinion that Johnson would be a flight risk. (RR 15). But Johnson never said to respondent that he would flee if released on bond, and respondent never asked Johnson if he intended to flee or what Johnson meant by his statement. (TT I, 205-206; TFB Ex. 13, par. 27). Respondent then revealed to the U.S. Attorney in a telephone call on April 30, 2002, that he had changed his mind concerning his earlier testimony. (RR 15). Respondent sent a letter that same day to the Assistant U.S. Attorney advising that he changed his mind. (TFB Ex.7). This occurred just one day before the latest version of respondent's agreement enclosed with Bee's May 1, 2002, letter was sent. (TFB Ex. 6). Respondent admitted in his Answer to the Complaint (Paragraph 20) that he did not seek or obtain Johnson's consent to make the communications to the U. S. Attorney.

The referee found that respondent was permitted by Rule 4-1.6(c)(5) to take remedial measures by revealing the confidential information because he believes he would have been in violation of Rule 4-3.3(a)(4) if he had not. This is error because the confidential information revealed was respondent's opinion attached to Johnson's innocuous statement. Johnson never told respondent that he would run if he were to be released. (TFB Ex. 13, par. 27).

The remedial measures a lawyer should consider taking when the lawyer believes he has offered materially false evidence are discussed in the comment to the rule. The comment to Rule 4-3.3 states in pertinent part:

> **Representations by a lawyer**
> …. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

Respondent never sought clarification or took remedial measures with Johnson to determine if his opinion was correct before he revealed it to the U.S. Attorney. In fact, he never told Johnson that he formed such an opinion or that he was going to reveal his opinion to the prosecutor. Respondent knew that it would be considered by the court and used against Johnson on his bond request. It was of benefit to respondent to keep Johnson in jail while engaging in efforts to extinguish his ownership interest in LWL. The fact that respondent was a personal friend of Judge Ferguson, who was reviewing the appeal, and believed that Judge Ferguson would give more weight to his testimony (RR 15-16) does not excuse respondent's conduct, but presents further evidence of his placing other interests above the interests of his client.

CONCLUSION

The referee erred in recommending respondent receive an admonishment as the disciplinary sanction because his findings of fact pertaining to Count I demonstrated that respondent's interests and the interests of Silver State and LWL were adverse to his client Johnson, and respondent took adverse action against Johnson that was intended to benefit himself and Silver State. Respondent viewed replacing Johnson as CEO of Silver State as an opportunity and invested considerable sums of his own money in the company. Respondent acted adversely to Johnson's interests when he decided that Johnson needed to be completely out of the business for the business to succeed. In the process, Johnson's 14.5 million shares in LWL were cancelled, which resulted in serious injury or potential serious injury to Johnson. Standing alone, these actions warrant the imposition of a suspension of at least 60 days and payment of the Bar's costs. This court is free to impose a sanction greater than 60 days if it deems it appropriate.

In addition, respondent should be found guilty of the charges set forth in Count II because he revealed confidential information to the Assistant U.S. Attorney, without his client's permission and to his client's detriment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief regarding Supreme Court Case No. SC07-369, The Florida Bar File No. 2005-50,263(15F) has been sent by regular U.S. mail to Peter David Ticktin, Esq., The Ticktin Law Group, P.A., 600 West Hillsboro Boulevard, Suite #220, Deerfield Beach, Florida 33441; Kevin P. Tynan, Co-Counsel for respondent, Richardson & Tynan, 8142 North University Drive, Tamarac, Florida 33321; and to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this _____ day of _____, 2008.

Michael David Soifer

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

Michael David Soifer, Bar Counsel