IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, CASE NO.: SC08-1107

Complainant, TFB NO.: 2007-51,241(15G)

v.

RICHARD STUART SHANKMAN,

Respondent.
_______________________________/

THE FLORIDA BAR'S ANSWER BRIEF AND INITIAL BRIEF ON CROSS APPEAL

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<u>SYMBOLS AND REFERENCES</u>

In this Brief, the Complainant, The Florida Bar, will be referred to as “The Florida Bar” or “the Bar.” The Respondent, Richard Stuart Shankman, will be referred to as “Respondent.”

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC08-1107 held on April 17, April 24, May 8, May 22, and June 5, 2009. "IB" will refer to Respondent's Initial Brief. "TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by Respondent at the final hearing before the Referee. The Report of Referee dated June 30, 2009, will be referred to as "RR."

The Report and Recommendation of U.S. Magistrate Judge Elizabeth A. Jenkins, dated January 27, 2006, in *Pippin v. Playboy Entertainment Group, Inc.*, which was judicially noticed, will be referred to as "Report and Recommendation" or "Report." The Order of U. S. District Judge Elizabeth Kovachevich, dated March 31, 2006, in *Pippin v. Playboy Entertainment Group, Inc.*, which was judicially noticed, will be referred to as "Order."

“Rule” or “Rules” will refer to the Rules Regulating The Florida Bar. “Standard” or “Standards” will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE

On May 21, 2008, the Fifteenth Judicial Circuit Grievance Committee "G" found probable cause for violation of the Rules Regulating The Florida Bar. The Florida Bar filed its complaint on June 11, 2008. By Order dated June 20, 2008, the Honorable John Carassas was appointed as Referee. On October 30, 2008, Respondent filed a Petition for Review of Non-Final Order, requesting the Florida Supreme Court to review the Referee's Order granting judicial notice of the Report and Recommendation of U. S. Magistrate Judge Elizabeth A. Jenkins, dated January 27, 2006, in *Pippin v. Playboy Entertainment Group, Inc.*, and the Order of U. S. District Judge Elizabeth Kovachevich, dated March 31, 2006, approving the Report and Recommendation. The Florida Bar filed a motion to dismiss Respondent's Petition for Review. On January 22, 2009, the Florida Supreme Court issued an Order granting the Bar's motion, and dismissing Respondent's Petition for Review without prejudice.

A final hearing before the Referee was held on April 17, April 24, May 8, and May 22, 2009. Respondent testified on his own behalf and presented one witness, the video testimony of attorney Thomas DeBerg. Mr. DeBerg was proffered as an expert witness as to the application of the Bar rules as well as a fact witness. The Bar objected to any expert testimony by Mr. DeBerg as to whether or

not Respondent's conduct violated Bar rules. TR8 850. Bar counsel argued that such expert testimony was improper because the issue of whether Respondent's conduct violated the Rules Regulating The Florida Bar was a question of law to be determined by the Referee. TR8 851-52. *See* Florida Statutes § 90.702; *Seibert v. Bayport Beach and Tennis Club Ass'n, Inc.*, 573 So.2d 889 (Fla. 2d DCA 1990). The Referee overruled the Bar's objection and stated that he would weigh Mr. DeBerg's testimony the same way he would weigh any other witness's testimony. TR 850, 854-56.

On May 22, 2009, the Referee issued a ruling recommending that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: Rule 4-1.5(a) (clearly excessive fee); Rule 4-1.1(a lawyer shall provide competent representation to a client); Rule 4-1.4(b) (communication—a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 4-1.7(b) (Conflict of interest—duty to avoid limitation on independent professional judgment); and Rule 4-8.4(d) (conduct in connection with the practice of law that is prejudicial to the administration of justice). Respondent was found not guilty of violating Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

A Sanctions Hearing was held on June 5, 2009. Respondent did not attend

or present any evidence. His counsel appeared and argued that Respondent should not receive any sanction because he disputed the findings of guilt. TR9 1008-09. The Referee issued a Report of Referee on June 29, 2009, recommending that Respondent be suspended for 90 days. The Referee found no aggravating factors and several mitigating factors.

On July 23, 2009, Respondent filed a Petition for Review of the Referee's Report, challenging the Referee's factual findings, conclusions of guilt, and recommended discipline. On August 3, 2009, The Florida Bar filed a Cross-Petition for Review. Pursuant to Rule 3-7.7, the jurisdiction of this Court is invoked.

STATEMENT OF THE FACTS

The Report of Referee contains extensive factual findings and The Florida Bar will not repeat those facts here. A copy of the Report of Referee is included as Appendix "A" in the separately bound Appendix to this brief. The facts relevant to each point on appeal will be discussed in the appropriate section of this brief with citations to the record. Respondent's Initial Brief contains a lengthy Statement of the Facts. While it is not practical to respond to all of Respondent's factual representations, the most significant will be addressed in the appropriate section of this brief.

SUMMARY OF THE ARGUMENT

Respondent's client trusted him and each time he told her to fire a law firm and hire a new one, she believed him. He told her she would not owe attorney's fees to discharged counsel beyond the percentage in the fee agreement. Respondent betrayed his client's trust when, despite these representations, he filed a claim against her for attorney's fees that, if successful, would have left her with a 15 percent recovery. Respondent repeatedly ignored the advice of his more experienced co-counsel and failed to communicate this advice to his young client. Further, Ms. Pippin never fully understood her options or the risks of the litigation. When co-counsel tried to reason with him, he fired them. In a reckless desire to pursue his own agenda for the case, Respondent put his own interests before those of his client. Respondent's misconduct delayed Ms. Pippin's recovery and imposed a substantial burden on the judicial system.

The Referee correctly found that Respondent charged a clearly excessive fee, failed to provide competent representation, failed to adequately explain matters to his client, engaged in a conflict of interest by putting his interests before his client's interests, and engaged in conduct prejudicial to the administration of justice. The competent and substantial evidence supports the Referee's findings of guilt as to Rules 4-1.5(a), 4-1.1, 4-1.4(b), 4-1.7(b), and 4-8.4(d).

The Referee erred in finding Respondent not guilty of violating Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) on the basis that Respondent did not intend to deceive his client. The Referee misinterpreted the intent requirement under Rule 4-8.4(c) as established by this Court. In order to satisfy the element of intent under Rule 4-8.4(c), it must only be shown that the conduct was deliberate or knowing. Respondent deliberately and knowingly pursued a fee claim against Ms. Pippin despite his prior representations that he would pay any fees of discharged attorneys out of his fees.

The Referee also erred in failing to find any of the aggravating factors requested by The Florida Bar. The competent and substantial evidence supports a finding of the following aggravating factors: a selfish motive, pattern of misconduct, vulnerability of victim, refusal to acknowledge wrongful nature of misconduct, and actual harm to client or third parties.

Finally, the Referee's recommendation of a 90-day suspension does not have a reasonable basis in the case law and Standards for Imposing Lawyer Sanctions. Respondent engaged in a self-serving course of conduct that caused harm to his client and others. Given the seriousness of Respondent's misconduct and his multiple violations, the Bar submits that a suspension of at least six months is appropriate and better meets the goals of attorney discipline.

STANDARD OF REVIEW

The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *Fla. Bar v. Nicnick*, 963 So.2d 219, 221 (Fla. 2007). If the referee's findings are supported by competent, substantial evidence, then this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Fla. Bar v. Porter*, 684 So.2d 810, 813 (Fla. 1996).

Like other factual findings, findings of mitigation and aggravation carry a presumption of correctness that will be upheld unless clearly erroneous or without support in the record. A referee's determination that an aggravating factor or mitigating factor does not apply is due the same deference. *Fla. Bar v. Herman*, 8 So.3d 1100, 1106 (Fla. 2009) (citation omitted).

In reviewing a referee's recommended discipline, this Court 's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to determine the appropriate sanction. *Nicnick*, *supra*, at 224. However, this Court will generally not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. *Id*.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF GUILT AS TO RULES 4-1.5(a), 4-1.1, 4-1.4(b), 4-1.7(b), AND 4-8.4(d) ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND SHOULD BE APPROVED.

Respondent asserts that the Referee's findings are not supported by the record evidence and that the Referee erred in finding him guilty of any violation of the Rules Regulating The Florida Bar. During the evidentiary portion of the final hearing, which lasted four days, The Florida Bar presented extensive evidence to support each of the Rule violations charged. The practical effect of Respondent's argument is to urge the re-weighing of the evidence by this Court. Because the record reflects that substantial competent evidence supports the Referee's conclusions, this Court should not second guess the Referee's findings of fact.

A. The Referee correctly found that Respondent charged a clearly excessive fee in violation of Rule 4-1.5(a).

The Referee found that, in pursuing his fee claim against his client in federal court, Respondent claimed a maximum of a 45 percent contingency fee after Ms. Pippin had already paid 40 percent to other attorneys. Had Respondent's fee claim been successful, Ms. Pippin would have been left with only a 15 percent recovery. RR 5. The Referee found that by making the fee claim, in direct contradiction to his former representations to his client, Respondent violated rule 4-1.5(a). The

Referee found that although the federal district court did not award Respondent the full amount of his claim, his action in making the claim was clearly excessive in light of his prior promises to Ms. Pippin that she would not be responsible for multiple fees to multiple law firms. RR 5.

The competent and substantial evidence in the record supports these findings. Ms. Pippin testified that she always understood she was to receive 60 percent of the total recovery and her attorneys would receive 40 percent. TR1 44-45. Her stepfather, Shelton Keely, testified that he never worried about attorney's fees because Respondent always assured them that Ms. Pippin would receive 60 percent of the recovery. TR2 199-200. Mr. Keely testified that every time a law firm was fired, he asked Respondent if fees would be owed and Respondent assured him Ms. Pippin's recovery would not be affected. TR2 191, 199-200; TR4 442. Mr. Keely did not realize until the very end of the case that the 60 percent recovery was subject to the fee claims of discharged attorneys. This was explained to him by Art Tifford, the attorney who ultimately settled the case. Respondent did not explain to Mr. Keely that Ms. Pippin's share of the settlement might be at risk. TR2 191. Ms. Pippin also testified that it was always a concern of hers whether she would have to pay discharged attorneys, but Respondent always told her that it would come out of his money. TR1 50.

Respondent acknowledged that each time Ms. Pippin hired a new law firm, he advised her she would not be liable for a greater percentage of fees. TR4 446. However, when Respondent realized he could not get a fee unless he reneged on his promises to his client, he pursued the charging lien. *See* TR4 451-52; Report and Recommendation, p. 15, fn 16 (Appendix B). Respondent asserts he did not claim a specific amount against Ms. Pippin; however, at the quantum meruit fee hearing in federal court, Respondent's fee expert testified that Respondent's services were worth $350,000. TR6 711; TR7 755. Respondent acknowledged that he agreed with the language in the Report of Judge Jenkins that, if he were awarded the amount he was claiming pursuant to his quantum meruit fee claim, his client would be left with a 15 percent recovery. TR4 441-42. *See* Report and Recommendation, p. 37, fn 46 (Appendix B); Order, p. 2 (Appendix C).

Respondent refutes the Referee's finding of an excessive fee by claiming that the Bar failed to present any expert testimony as to the reasonableness of Respondent's fee, and instead relied on the "tainted" findings included in the federal order. IB 27. This argument misses the point. The Bar simply presented the facts of the fee claim, which were acknowledged by Respondent in his testimony. In order to prove a violation of Rule 4-1.5(a), it is not necessary to present expert testimony. Nor is it necessary that an attorney submit a bill to his

client in order to be found to have charged a clearly excessive fee. In this case, Respondent's fee claim was excessive on its face. It was excessive because of Respondent's repeated representations to Ms. Pippin and Mr. Keely that they would never have to pay more than 40 percent of the gross recovery in attorney's fees. It does not require an expert to say that it is not reasonable for an attorney to charge a fee when the fee charged in is contravention to his prior representations.

Respondent argues that his "expert," Thomas DeBerg, believed the fee was reasonable. IB 27. Mr. DeBerg stated that he did not believe Respondent sought an illegal, prohibited or clearly excessive fee in the Pippin case. Deposition of Thomas DeBerg, p. 39. The record reflects that Mr. DeBerg was proffered as an expert on the application of the Bar Rules to Respondent's conduct, but was never named as a fee expert. Deposition of Thomas DeBerg, p. 9. Had Mr. DeBerg been proffered as a "fee expert," the questions on cross examination would have been different. As discussed previously, Bar counsel objected to the testimony of Mr. DeBerg as an expert as to whether or not Respondent's conduct violated Bar rules. TR8 850; Deposition of Thomas DeBerg, p. 9. The Referee overruled the Bar's objection and stated he would weigh Mr. DeBerg's testimony the same way he would weigh any other witness's testimony. TR8 854-56. In finding that Respondent violated Rule 4-1.5(a), the Referee apparently gave more weight to the

other evidence presented, and this Court should not substitute its judgment for that of the Referee. *Fla. Bar v. Marable*, 645 So. 2d 438, 442 (Fla. 1994).

Respondent argues that his promise to cover the fees of prior counsel ended with his discharge as Ms. Pippin's counsel. This argument shows the flaw in Respondent's understanding of the lawyer-client relationship. He demonstrated a profound disregard for the trust placed in him by his young client. After failing to explain to his client that her recovery could be at risk from the claims of discharged counsel and after repeatedly assuring her that she would pay no more than 40 percent, Respondent then sued her in an amount that would have reduced her recovery to 15 percent.

In addition to making a fee claim, Respondent renegotiated his fee contracts with the successive hiring of law firms so that he received a higher percentage of the total contingency fee. *See* TFB Exhs. 8, 9, 10, 11, 12 (series of fee agreements); Report and Recommendation, p. 5, 8-9, 15 (Appendix B). The Referee found that this increase in fees was a violation of Rule 4-1.5(a).

B. <u>The Referee correctly found that Respondent failed to provide competent representation in violation of Rule 4-1.1</u>.

The Referee found by clear and convincing evidence that Respondent violated Rule 4-1.1 by failing to provide competent representation. The Referee

found that, although Respondent properly associated with more experienced co-counsel, he failed to take their advice and failed to communicate this advice to his client. RR 5-6. The Referee's findings are supported by the record. Two of Respondent's former co-counsel testified at the final hearing--John Vento, of the Trenam Kemker firm, and the Honorable Shields McManus, formerly of the Willie Gary firm. Both Mr. Vento and Judge McManus testified that Respondent rejected their firm's advice concerning numerous issues, including statutory interpretation, the advisability of filing for a preliminary injunction, the need to sue additional defendants, and the advisability of pursuing an early settlement.

One of the major areas of contention was Respondent's insistence on filing for a preliminary injunction to stop the distribution of the video tapes. Mr. Vento testified that the Trenam Kemker attorneys believed it would be almost impossible to obtain a preliminary injunction. TR3 305. Mr. Vento consulted with his partners Stan Eleff, who had extensive experience with injunctions (TR3 305), and Bernard Silver, a personal injury and tort lawyer now serving as a Circuit Court Judge. TR3 291. In order to prove the element of irreparable harm, it would be necessary to show that Ms. Pippin had no adequate remedy at law. However, because Ms. Pippin's lawsuit sought monetary damages, she was alleging a remedy at law. TR3 305. Also, in order to show irreparable harm, Respondent wanted to

put Ms. Pippin's testimony in evidence at a pre-injunction hearing. The Trenam Kemker attorneys believed this would be harmful to the case because of certain facts in Ms. Pippin's background. TR3 308. Another requirement for obtaining a preliminary injunction is to show a likelihood of success on the merits. The Trenam Kemker attorneys believed this could potentially harm the tort claim in the event the court determined there was not a likelihood of success on the merits. TR3 306. Judge McManus, formerly of the Gary firm, also testified that the preliminary injunction matter was "a bone of contention" with Respondent. Judge McManus never thought the preliminary injunction would be granted because so much time had passed and because there were strong defenses to the injunction, including that Ms. Pippin had a monetary remedy. TR4 405-406; 419. In fact, stopping the distribution of the tapes could have been effected in a settlement without an injunction. At Respondent's insistence, the Gary firm filed a Motion for Preliminary Injunction, which was denied. R. Exh. 26; TR4 418-19.

The Trenam Kemker and Gary firms also disagreed with Respondent about adding additional parties as defendants. John Vento testified that Respondent delayed the filing of the case by insisting on suing numerous additional defendants without basis and causing the firm to research his countless legal theories. TR3 303. Judge McManus testified that adding additional defendants, as Respondent

insisted, would have slowed down the case for years and been a wasted effort, and would not have produced any better result in the long run. TR4 412-13.

Respondent's co-counsel believed the case was best settled early and that there were opportunities to do so. However, Respondent disagreed and refused to pursue these opportunities. John Vento testified that his firm determined that this was "a case that was best settled and best settled quickly." TR3 293. The Trenam Kemker firm had serious concerns about trying Ms. Pippin's case before a jury. TR3 295-96. Mr. Vento testified that the case could have been settled pre-suit. In the fall of 2002, the defendant provided several dates for mediation but Respondent would not allow Trenam Kemker to mediate the case. TR3 311, 329. Mr. Vento and Judge Silver tried to explain to Ms. Pippin and Respondent that this was a very difficult case involving untested law and was best settled. TR3 329. Respondent kept insisting the case was worth $50 billion and should settle for no less than $10 million. TR3 329-30.

The Gary firm also thought the case could and should be settled early. The Gary firm attorneys thought the case could be brought to conclusion in a matter of months. TR4 412. A settlement conference was scheduled in Ms. Pippin's case, but the Gary firm was discharged before it took place. TR4 414. Judge McManus believed it was in Ms. Pippin's best interest to settle the case prior to her deposition

being taken, not only because the deposition would be stressful to Ms. Pippin, but also because of a concern that she presented unsympathetically. TR4 415-16. Respondent disagreed with the Gary firm that the case should be settled before the trial court ruled on a pending motion for summary judgment. Judge McManus testified that the defendant was very concerned about the risk of proceeding under a new statute and wanted to settle the case before the court started to make rulings. TR4 427-28. Judge McManus believed that it hurt Ms. Pippin's case to keep changing lawyers because this signaled the other side that there is some problem with the plaintiff or with the case. TR4 430. Judge McManus testified that there are many benefits to a client of settling early, and he could see that Ms. Pippin was anxious to get on with her life. TR4 431. The Gary firm attorneys had verified that the defendants had $20 to $25 million in insurance coverage available to settle this type of claim. TR4 410. Although no actual settlement offer was made by the defendants, Respondent actively discouraged co-counsel's efforts to pursue settlement and fired them before they could do so.

Respondent not only ignored the advice of his experienced co-counsel about the advisability of settling the case, he did not even have a discussion with Ms. Pippin about the value of her case. Respondent testified that he did not know what the case was worth and the only way to find out was to try the case. TR7 758.

According to Respondent there was no reason to discuss money with Ms. Pippin until an offer was made by the defendants. TR7 756-58. This testimony demonstrates Respondent's incompetence and his misunderstanding of one of the fundamental obligations of a plaintiff's attorney.

As evidence of his competence, Respondent cites to his testimony that he settled the cases of several other young women (who remained as his clients after Ms. Pippin discharged him) for higher amounts than Mr. Tifford achieved for Ms. Pippin. TR6 726-27. Even if this is true, which cannot be determined because Ms. Pippin's settlement was confidential, it is not relevant to Respondent's conduct in this case and does not take into consideration the differences in the cases. Both Mr. Vento and Judge McManus testified regarding significant weaknesses in Ms. Pippin's case. TR3 295-96; TR4 415-16. Respondent's argument also underscores his lack of understanding of variants in cases.

Respondent's conduct went beyond a mere disagreement with co-counsel about legal strategy. Respondent insisted on pursuing his own agenda of taking the case to trial regardless of the risk to his client. He disregarded the advice of experienced co-counsel, and fired each law firm when they disagreed with him. This pattern repeated over and over again. By doing so, Respondent provided incompetent representation to his client.

C. The Referee correctly found that Respondent failed to explain matters to his client in violation of Rule 4-1.4(b).

The Referee found by clear and convincing evidence that Respondent violated Rule 4-1.4(b) by failing to fully explain important matters to his client, including what her case was worth and the potential costs of hiring multiple firms. The Referee also found that Respondent failed to communicate to Ms. Pippin what all her options were at the beginning of the case, and as the case progressed. RR 6.

The competent and substantial evidence supports the Referee's findings. Ms. Pippin testified that Respondent did not explain to her the potential risks of entering into the litigation. TR1 45. Ms. Pippin did not understand why the Trenam Kemker and Willie Gary firms had to be discharged. TR1 46. "I just knew that Richard Shankman told me that we had to fire them, and so that's what I did." TR1 55. Respondent kept information from Ms. Pippin and would not allow her to speak to her other attorneys. TR1 71-72.

Ms. Pippin testified that Respondent did not explain to her that she could owe fees to the different law firms that were discharged out of her recovery. She testified that Respondent did not explain to her what was going on and just kept "dragging it out through all of these different attorneys." TR1 72. "He didn't communicate with me in a way that would make me understand the way that the

process really worked. I was completely unaware until the end." TR1 72; TR2 123. Ms. Pippin "had no idea" she could end up having to pay the discharged attorneys out of her recovery. TR1 73. Towards the end of the representation, Ms. Pippin did not know what Respondent was doing or what was going on in her case despite her request for weekly updates. TR1 66-67; TR2 128.

Ms. Pippin's testimony is supported by that of her stepfather, Shelton Keely. Mr. Keely did not realize until the very end of the case that Ms. Pippin's share of the settlement might be at risk due to the fee claims of her prior attorneys. Respondent never explained this, Mr. Keely learned it from Mr. Tifford. TR2 191.

Respondent insists that he explained "quantum meruit" to Ms. Pippin and her stepfather on numerous occasions. IB 30. Mr. Keely testified that every time a law firm was discharged, he would ask Respondent whether fees would be owed. Respondent used the term "quantum meruit" and explained that if the attorneys made a claim for fees, a judge would decide what, if any, fees they would get. TR2 191, 200. Mr. Keely was told by Respondent that any fees awarded would come out of Respondent's portion of the fee, and that any such claim would not "hold up anything." TR2 191. What Respondent did not explain was that it was only Respondent's promise that he would pay prior attorney's fees that would protect Pippin's 60 percent recovery, not the law governing quantum meruit

awards. Respondent did not advise Ms. Pippin or Mr. Keely that he was not legally bound by his verbal promise. TR4 447.

Mr. Keely never worried about attorney's fees because "we were always told it was 60/40, and that's it." TR2 199. It is apparent from the testimony that while Mr. Keely was familiar with the term "quantum meruit," he never understood until it was explained to him by Mr. Tifford, that Ms. Pippin's 60 percent recovery could be subject to such fee claims. Respondent did not communicate to Ms. Pippin the concerns of the other attorneys about the weaknesses in her case or the advantages of an early settlement. Respondent testified that he did not discuss with Ms. Pippin and her family the value of her case. TR7 755-56. Nor did he have a discussion with her about whether she could negotiate a settlement that would include an agreement to achieve her goal of stopping the distribution of the tapes. TR7 757-58. Respondent kept his client walled off from co-counsel and insisted that all communication go through him. Mr. Vento testified that the Trenam Kemker attorneys had no direct communication with Ms. Pippin until about a week before they were discharged. TR3 328. Mr. Keely testified that, at the time the Trenam Kemker firm was fired, the family had "no clue" what was going on and just did what Respondent told them to do. TR2 188. At the time the Gary firm was discharged, the family had not personally talked to the firm about how things were

going. TR2 189. Respondent told the family not to have any contact with the Gary firm. The family decided to meet with the Gary firm because "we wanted to know what exactly was going on. We only heard [Respondent's] side, not anybody else's." TR2 221. Respondent's failure to communicate important matters to his client so that she could make informed decisions about the case is a clear violation of Rule 4-1.4(b).

D. <u>The Referee correctly found that Respondent violated Rule 4-1.7(b) by putting his own interests before the interests of his client</u>.

The Referee found that Respondent violated Rule 4-1.7(b) by putting his own interests before the interests of his client. The Referee found that by initiating the hiring and firing of a series of law firms, Respondent delayed the case, moved Ms. Pippin further away from her goal of settlement, and caused her to incur increased costs. The Referee also found that Respondent increased his fee with the hiring of successive law firms. RR 6-7.

Respondent argues that the evidence "unequivocally established" that the Ms. Pippin's goal was not to settle the case, but to stop the distribution of the tape. IB 35. Respondent is mischaracterizing the testimony. Ms. Pippin testified that her main goal was to stop the sale and distribution of the tapes (TR1 54), but she also testified that she wanted the case to settle. TR1 66-67; TR2 112. It was not

Ms. Pippin's goal to make more money. TR1 55; TR2 187. The Referee accepted Ms. Pippin's testimony and found that it was her goal to settle the case. RR 6-7. Respondent also overlooks the obvious—these two goals are not incompatible. An early settlement would not only have resolved the case, but could also have achieved Ms. Pippin's goal of stopping the distribution of the tapes. Respondent had a different goal. Respondent wanted to take the case to trial. He wanted to try a case of first impression and win a huge judgment. TR3 330; TR6 639, TR7 758. His insistence on pursuing a preliminary injunction to stop the distribution of the tapes had a low likelihood of success and risked harming the case. *See* Section I-B, *supra*.

Respondent's more experienced co-counsel strongly disagreed with him. Rather than following the advice of more experienced co-counsel, Respondent fired each successive law firm. Eventually Ms. Pippin fired Respondent and the case was settled by Mr. Tifford. However, the litigation was not over for Ms. Pippin. Respondent sued her for fees, which resulted in protracted fee litigation and delayed Ms. Pippin's recovery. TR1 68-69. If successful, Respondent's fee claim would have enriched him at the expense of his client, who had already paid 40 percent of her recovery in attorney's fees.

Respondent blames co-counsel for mishandling the case and failing to honor

Ms. Pippin's goal of stopping the distribution of the tapes. The record shows the opposite—that it was Respondent who delayed the case by insisting on pursuing unwise legal strategies and then firing counsel when they disagreed with him. Respondent acted to further his own interests by refusing to pursue opportunities for settlement, by increasing his fee with the hiring of successive law firms, and by subjecting Ms. Pippin to fee litigation that could have substantially reduced her recovery. By putting his own interests before those of his client, Respondent violated Rule 4-1.7(b).

E. The Referee correctly found that Respondent engaged in conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d).

The Referee found that Respondent's behavior in hiring and firing multiple law firms clearly caused a delay in the administration of justice. Each time Ms. Pippin changed lawyers, it delayed the case. The Referee found that the case could have been settled much earlier, thereby saving considerable time and effort on the part of many lawyers and judges. RR 7. The Referee specifically found that Respondent's inability to resolve conflicts with other attorneys and firms added to the time necessary to resolve the case and increased the cost to his client. RR 6-7. These findings are well-supported by the record. Both Mr. Vento and Judge McManus testified that their firms could have settled the case. Respondent refused

to pursue these opportunities. *See* Section I-B, *supra*.

Respondent's fee claim, which culminated in fee litigation, imposed a substantial burden on the parties and the court. Ms. Pippin testified that she went to court three or four times in the fee litigation and her funds were held up because of Respondent's fee claim. TR1 68-69. Judge Kovachevich found that the fee litigation was very time-consuming for the court given the scarcity of judicial resources. Order, p. 5 (Appendix C). Judge Jenkins found that, "due to [Respondent's] inability to resolve the fees dispute with his former client (unlike the Plaintiff's other former attorneys), this issue has consumed a substantial amount of time on the part of the court, the parties, and counsel including two evidentiary hearings lasting a total of four days, five status conferences, one show cause hearing . . . and numerous depositions and written submissions comprising a total of approximately 130 docket entries." Report and Recommendation, p. 2 (Appendix B). The Referee's finding of guilt as to Rule 4-8.4(d) is supported by the record and should be approved.

II. THE REFEREE ERRED IN FINDING RESPONDENT NOT GUILTY OF VIOLATING RULE 4-8.4(C) (DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION).

It is well established that in order to find that an attorney violated Rule 4-8.4(c), the Bar must show the necessary element of intent. *Fla. Bar v. Fredericks*,

731 So.2d 1249, 1252 (Fla. 1999). The Referee found Respondent not guilty of violating Rule 4-8.4(c) because the Referee found that the element of intent was not proven. RR 7. The Referee found no evidence that Respondent intended to deceive his client. The Bar submits that the Referee interpreted the intent requirement too narrowly according to the caselaw.

This Court has held that in order to satisfy the element of intent under Rule 4-8.4(c) it must only be shown that the conduct was deliberate or knowing. *Fredericks, supra*. In *Fla. Bar v. Riggs*, 944 So.2d 167 (Fla. 2006), this Court further explained the intent requirement. In *Riggs*, the respondent failed to pay off a mortgage with funds entrusted to him for that purpose. He blamed the shortage of funds in his trust account on his employee's mishandling of the account. Riggs disputed the referee's finding of a violation of rule 4-8.4(c), claiming that he did not have the requisite intent. This Court disagreed and upheld the referee's finding of guilt, stating:

> We agree that intent is an element of a violation of rule 4-8.4(c). We disagree, however, with Riggs's narrow interpretation of intent under the rule.
> . . . .
> In *Fredericks*, **the motive behind the attorney's action was not the determinative factor. Rather, the issue was whether the attorney deliberately or knowingly engaged in the activity in question**. Here, Rigg's failure to supervise his employee constitutes intent because he knowingly assigned his trust account responsibilities to [his paralegal] and then failed to manage her activities. Knowingly or

> negligently engaging in sloppy bookkeeping amounts to intent under rule 4-8.4(c).

944 So.2d at 171 (citations omitted) (emphasis added).

In this case, Respondent deliberately and knowingly asserted a fee claim against Ms. Pippin for a substantial fee after he had repeatedly promised her she would not have to pay any fees over 40 percent of her recovery. At the time he filed his charging lien, Respondent knew that Ms. Pippin had already paid 40 percent of her recovery to former counsel.

The Referee found that Respondent's fee claim against Ms. Pippin was in direct contradiction to the promises he made to her telling her that she would not be responsible for multiple fees to multiple law firms. RR 5. Ms. Pippin was induced to hire the Gary and Tifford firms in reliance on Respondent's representation that he would pay fees of prior counsel. She testified that Respondent always told her that the hiring and firing of different law firms would not affect her recovery, and that she would not have to pay them any money. She put her trust in him and relied on what he told her. TR1 72.

It is not necessary to show that Respondent intended to deceive Ms. Pippin, only that he deliberately or knowingly engaged in the activity in question. *Riggs, supra*. Respondent acted intentionally when he told Ms. Pippin each time she fired a law firm that she would not owe that firm any attorney's fees. Respondent acted

intentionally when he failed to advise Ms. Pippin that he was not legally bound to his verbal promise to pay other attorneys' fees out of his fees. Respondent intended for Ms. Pippin to believe him and rely on him even though he knew or should have known he was not bound by his promise. Ms. Pippin relied on his representations to her detriment. Respondent acted intentionally when he failed to tell Ms. Pippin that his agreement to pay the fees of discharged counsel was conditioned on him still being her attorney at the time of settlement. TR4 452. Respondent knowingly omitted explaining these risks to his client. Despite his prior representations, Respondent deliberately and knowingly pursued a fee claim against Ms. Pippin. This conduct was intentional within the meaning of Rule 4-8.4(c).

It is not necessary to show that Respondent intended to deceive his client. Because Respondent's actions were deliberate and knowing, the element of intent is satisfied. Therefore, the Referee erred in finding Respondent not guilty of violating Rule 4-8.4(c).

III. THE REFEREE PROPERLY TOOK JUDICIAL NOTICE OF THE FEDERAL COURT REPORT AND ORDER.

Respondent argues that the proceedings were tainted and that he was irreparably harmed by the Referee improperly taking judicial notice of Magistrate Jenkins's Report and Recommendation and Judge Kovachevich's Order approving

the Report and Recommendation. Respondent claims that he was unable to present evidence to dispute the findings contained in these documents, and that the Bar relied on the findings of the federal court and failed to present any competent evidence to prove its case. Respondent's claims are totally without merit. The Referee was entitled to take judicial notice of the Report and Order and to consider them as he would any other relevant evidence. This did not relieve the Bar of the burden of proving its case.

In requesting judicial notice, the Bar made clear that it was not asking the Referee to adopt the Report and Order as conclusive proof of misconduct. *See* Transcript of Hearing, September 26, 2008, p. 42. *See also* <u>The Florida Bar's Memorandum of Law in Support of Request for Judicial Notice</u>, filed October 3, 2008. Contrary to Respondent's assertion in his brief, the Bar never argued that judicial notice was mandatory. The Referee repeatedly instructed that the Bar must prove its case by clear and convincing evidence regardless of his ruling on the Order. In granting the Bar's request for judicial notice, the Referee stated that judicial notice was not conclusive proof of the elements of the Report and Order and the Bar must prove those elements by presenting evidence at trial. *See* Transcript of Pretrial Hearing, October 17, 2008, pgs. 8-9. During the final hearing, the Referee stated: "I took judicial notice of that order, but each count has

to be proven by the Florida Bar, and we have discussed that." TR4 487.

During the final hearing before the Referee, the Bar presented extensive evidence to prove the Rule violations charged in the Complaint, including the testimony of four witnesses and numerous exhibits. Respondent was never prevented from presenting any evidence in defense of the Bar's allegations. Respondent himself testified extensively. He presented only one witness, the deposition of Thomas DeBerg.

Despite his repeated objections to the Bar's use of the Report and Order, during the sanctions hearing argument, Respondent's counsel repeatedly cited to the Report and Order to support his arguments. TR9 1012, 1013, 1014, 1016, 1020. Bar counsel objected to Respondent's reliance on the findings of the federal court, in light of the Referee's ruling regarding the use of the judicially noticed Report and Order. TR9 1023. The Referee stated: "First, as to that order, which has been an issue from the beginning of this case, I'm going to base my decision on the facts and the evidence that I have had presented here to me today. . . . I'm going to look at what I actually heard and saw during the trial to make my ultimate determination." TR9 1025-26.

The Referee issued his Report of Referee, stating: "As to the Report and Order that were judicially noticed, I considered only the portions that were referred

to during the final hearing in testimony." RR 4. With respect to each Rule violation, the Referee specifically found in the Report of Referee that Respondent violated the Rule by clear and convincing evidence. Contrary to Respondent's assertions, the Referee did not accept the federal court's findings as proof of misconduct and the Bar was not relieved of its burden of proving Respondent's violations by clear and convincing evidence.

The Referee could have admitted the Report and Order into evidence and weighed them as he would any other evidence. However, it was within the Referee's prerogative to take judicial notice of the Report and Order and give them whatever weight he deemed appropriate. Pursuant to this Court's decision in *Fla. Bar v. Tobkin*, 944 So.2d 219 (Fla. 2006), the Referee was authorized to consider the findings of the federal court and to take judicial notice of the Report and Order. In *Tobkin*, this Court held that the referee properly relied upon facts included in an opinion of the Fourth District Court of Appeals (DCA).   *Id*. at 224. Tobkin argued that the referee's findings in the disciplinary case were improperly based on hearsay language contained in *Rose v. Fiedler*, the Fourth DCA opinion, and that such evidence cannot be considered clear and convincing evidence. *Id*. at 224. The disciplinary proceeding involved Tobkin's conduct as an attorney while representing his client Rose, the plaintiff in a civil case. Tobkin was not a party in

the underlying proceeding relied upon by the referee when making findings of fact. This Court rejected Tobkin's argument and held that the referee properly relied upon facts in the Fourth DCA opinion. This Court held that, because disciplinary proceedings are quasi-judicial rather than civil or criminal, the referee is not bound by the technical rules of evidence. *Id*. "Consequently, a referee has wide latitude to admit or exclude evidence, and may consider any relevant evidence, including hearsay and the trial transcript or judgment in a civil proceeding." *Id*. (citations omitted). This Court further held that even if the rules of evidence did apply strictly, the referee's consideration of the Fourth DCA's opinion nevertheless would have been proper pursuant to Section 90.201, Florida Statutes, which provides that a court shall take judicial notice of decisional law. *Id*.

As cited in *Tobkin*, Florida Statute, § 90.201(1), entitled “Matters which must be judicially noticed”, provides that “[a] court shall take judicial notice of: [d]ecisional, constitutional, and public statutory law and resolutions of the Florida Legislature and the Congress of the United States.” A federal district court order is “decisional law” and therefore must be judicially noticed according to Florida’s evidentiary code.

Section 90.203 entitled "compulsory judicial notice upon request" also provides authority for the Referee to take judicial notice of the Order. Section

90.203 states that a court shall take judicial notice of any matter in Section 90.202 when a party requests it and the requesting party (1) gives each party timely written notice of the request, proof of which is filed with the court; and (2) furnishes the court with sufficient information to enable it to take judicial notice of the matter. One of the matters listed in § 90.202 is "[r]ecords of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States." *See* Florida Statutes § 90.202(6). In this case, the proper procedures were followed. A written notice was filed and a hearing was held during which sufficient information was provided to the Referee to enable the Referee to take judicial notice.

This Court has frequently ruled that referees may consider court records in disciplinary proceedings. For example, in *Fla. Bar v. Calvo*, 630 So.2d 548 (Fla. 1994), this Court rejected Calvo's contention that the referee improperly took notice of SEC and federal cases that arose out the misconduct in question. *Id*. at 449-550. This Court agreed with Calvo that SEC disciplinary proceedings are subject to a different standard of review than Bar proceedings, but found that this difference goes only to the weight accorded the information in a disciplinary proceeding, not to its admissibility. "We find no error in the way the referee admitted and considered this information, especially in light of the overwhelming

case against Calvo in the SEC proceedings." *Id*. at 550.

Similarly, in *Fla. Bar v. Rood*, 620 So.2d 1252 (Fla. 1993), Rood contended that the referee should not have considered the trial transcript and the amended final judgment from a related civil case, *Alverson v. Rood*, which involved the same facts and circumstances that gave rise to the disciplinary proceeding. *Id*. at 1255. This Court held that referees in disciplinary proceedings are not bound by the technical rules of evidence and are authorized to consider any evidence, such as the trial transcript or judgment from the civil proceedings, that they deem relevant in resolving the factual question. *Id*. This Court found that the referee in *Rood* reviewed the findings of fact made by the trial judge in the civil case and found those facts to be proven by clear and convincing evidence. *Id*.

In determining whether Respondent's conduct constitutes an ethical violation, the Referee may consider any relevant evidence. *Tobkin, supra*. This Court has stated that “[d]isciplinary proceedings are not concerned with the issues addressed in criminal or civil proceedings. Rather, disciplinary proceedings are concerned with violations of ethical responsibilities imposed on an attorney as a member of The Florida Bar.” *Fla. Bar v. Garland*, 651 So. 2d 1182, 1183 (Fla. 1995). The Report and Order were highly relevant to the focus of these proceedings. The Referee properly took judicial notice of the Report and Order

and properly considered the findings of the federal judge and magistrate.

IV. THE REFEREE ERRED IN FINDING THAT NO AGGRAVATING FACTORS APPLY.

At the final hearing on sanctions, The Florida Bar argued that a six-month suspension was the appropriate sanction. Respondent waived his appearance at the sanctions hearing and did not submit any evidence. His counsel argued that Respondent should receive no sanction. The Bar argued that a number of aggravating factors applied, including a dishonest or selfish motive, pattern of misconduct, refusal to acknowledge wrongful nature of conduct, vulnerability of victim, and actual harm to client. The Bar argued that two mitigating factors applied: absence of a disciplinary record and inexperience in the practice of law. The Referee recommended a 90-day suspension, found no aggravating factors and found several mitigating factors, including the absence of prior discipline, inexperience, and remorse. The Referee further found in mitigation that "Respondent had a genuine but misguided desire to obtain the resolution he thought was best for his client." RR 9.

This Court has held that a referee's findings of mitigation or aggravation carry a presumption of correctness that will be upheld unless clearly erroneous or without support in the record. A referee's determination that an aggravating factor

or mitigating factor does not apply is due the same deference. *Fla. Bar v. Herman*, 8 So.3d 1100, 1106 (Fla. 2009). The Bar submits that the record supports a finding of the following aggravating factors: 1) a selfish motive, 2) a pattern of misconduct, 3) vulnerability of victim, 4) refusal to acknowledge, and 5) actual harm to client.

A. Respondent acted with a selfish motive. (Standard 9.22(b)).

Respondent put his own interests before the interests of his client by insisting on a resolution only by trial or a huge settlement, by firing a series of more experienced co-counsel, walling off his client, and by negotiating an increase in the percentage of his fee split each time a new law firm was hired. Respondent kept his client in the dark so that he could pursue his personal agenda of taking the case to trial and making millions of dollars. Respondent had a selfish motive for refusing to settle the case. He believed the case was worth billions of dollars and would settle for $10 million. TR3 330.

The Referee's findings reflect that Respondent acted with a selfish motive. In finding a violation of Rule 4-1.7(b) (conflict of interest), the Referee found that Respondent put his own interests before the interests of his client by the continuous hiring and firing of a series of law firms, which only moved Ms. Pippin further and further away from her goal of settling the case and also caused her to incur

additional costs. RR 6-7. The Referee also found that Respondent engaged in a conflict of interest by increasing his share of the fee with the hiring of successive law firms. RR 6-7. In finding that Respondent violated Rule 4-1.5(a) (excessive fee), the Referee found that Respondent's fee claim was in direct contradiction to the promises he made to Ms. Pippin that she would not be responsible for multiple fees to multiple law firms. RR 5. The Referee's findings, which are supported by the record, support the aggravating factor of a selfish motive.

B. Respondent engaged in a pattern of misconduct. (Standard 9.22(c)).

Respondent engaged in a pattern of hiring and firing successive law firms. Each time, he refused to accept the advice of more experienced counsel to the detriment of his client. Each time, he promised his client she would not have to pay the fees of discharged counsel out of her recovery. Each firing exposed Ms. Pippin to a potential fee claim, a risk which was not explained to her. Each time a firm was fired, Respondent instructed his client not to talk to discharged counsel or she would owe fees. With all but one successive fee contract, Respondent increased his share of the fee. These were not isolated or aberrational incidents. *See Fla. Bar v. Ticktin*, 2009 WL 1406251 (Fla.). Respondent's representation of Ms. Pippin lasted approximately two years and Respondent's fee claim against Ms. Pippin took another two years to resolve. The record supports a finding that

Respondent engaged in a pattern of misconduct.

C. Respondent took advantage of a vulnerable client. (Standard 9.22(h)).

Monica Pippin (DOB 5/21/84) was a teenager at the time she sought Respondent's assistance. TR1 38; RR 2. The Referee found that, considering Ms. Pippin's age and inexperience, Respondent did not fully communicate important information to her. RR 6. Because of her youth and inexperience, she was especially dependent on Respondent to provide competent legal advice. Respondent not only failed to do so, he actively discouraged her from communicating with the more experienced attorneys working on her case. TR1 71-72; TR3 328. Although Ms. Pippin's step-father, Shelton Keely, participated in a number of discussions with Respondent, he also testified that the family was not fully informed. TR2 188, 191, 199-200, 221. It was Ms. Pippin whose interests Respondent had the duty to protect.

D. Respondent has consistently refused to acknowledge the wrongful nature of his misconduct. (Standard 9.22(g)).

Throughout the underlying case, the fee litigation, and the disciplinary proceedings, Respondent has continued to insist that he was right and all the other more experienced attorneys were wrong. According to Respondent, he was the only one acting in Ms. Pippin's best interests. Respondent also blames Magistrate Jenkins and Judge Kovachevich for wrongly accusing him of misconduct in the

Report and Recommendation and the Order approving the Report. Respondent blames the entire fee litigation and disciplinary proceedings on the actions of others.

While Respondent is entitled to present a defense, his protestations go beyond a refusal to admit alleged misconduct. *See Fla. Bar v. Germain*, 957 So.2d 613, 622 (Fla. 2007). Respondent's accusations demonstrate a pattern of accusing and blaming others. Respondent's attitude shows a fundamental misunderstanding of what it takes to effectively function as a lawyer and advocate. Respondent failed to recognize that he engaged in conduct that created a clear conflict between his interests and those of his client. The Referee specifically noted Respondent's inability to resolve conflicts with other attorneys and firms. RR 7. Respondent's witness, Thomas DeBerg described him as "intense and fairly close to compulsive." Deposition of Thomas DeBerg, p. 22. Mr. DeBerg further stated that Respondent was "very direct and outspoken . . . . If he feels someone's wrong, he criticizes them." Deposition, p. 37. These traits are indicative of Respondent's inability to accept a viewpoint other than his own, including to acknowledge the wrongfulness of his own conduct.

E. Respondent caused actual harm to clients and third parties. (Standard 12.1(b)).

Respondent's misconduct caused actual harm to Ms. Pippin and others. *See*

Fla. Bar v. Herman, 8 So.3d 1100, 1107 (Fla. 2009). Respondent's continual firing and hiring of law firms delayed the litigation and his client's recovery. The Referee specifically found that Respondent's inability to resolve conflicts with other attorneys and firms added to the time necessary to resolve the case and increased the cost to his client. RR 6-7. Mr. Vento testified that Ms. Pippin incurred over $22,000 in costs with his firm alone. TR3 326. Because of Respondent's insistence on taking the case to trial, Ms. Pippin was subjected to a lengthy and embarrassing deposition. TR1 60-62. Mr. Keely testified that the Gary firm should not have been discharged because of the time the case took and "the pain and suffering we all went through to get it done." Mr. Keely wished they had stayed with the first law firm. TR2 190. After Mr. Tifford settled the case, Respondent subjected Ms. Pippin to protracted fee litigation, further delaying her recovery.

Respondent's misconduct also caused actual harm to third parties. The Referee found that the case could have been settled much earlier, which would have saved considerable time and effort on the part of the many lawyers and judges involved in the case. RR 7. Judge Jenkins found that due to Respondent's inability to resolve the fees dispute with his former client, "this issue has consumed a substantial amount of time on the part of the court, the parties, and counsel . . . . "

Report and Recommendation, p. 2 (Appendix B).

The record supports a finding in aggravation that Respondent's misconduct caused actual harm not only to his client, but to numerous third parties involved in the protracted litigation.

V. RESPONDENT'S CONDUCT WARRANTS A SUSPENSION OF SIX MONTHS RATHER THAN 90 DAYS AS RECOMMENDED BY THE REFEREE.

It is the Bar's position that, given the seriousness of Respondent's misconduct, a 90-day suspension as recommended by the Referee is not supported by the Standards for Imposing Lawyer Sanctions and the case law. The Florida Bar requests the Court to impose a six-month suspension.

Florida Standards for Imposing Lawyer Sanctions

The Florida Standards for Imposing Lawyer Sanctions (Standards) provide a format for Bar counsel, Referees, and the Supreme Court to determine the appropriate sanction in attorney disciplinary matters. Several Standards are applicable to the Respondent’s misconduct and support a suspension in this case:

4.5 LACK OF COMPETENCE

> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:

4.52 Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence, and causes injury or potential injury to a client.

The Commentary to Standard 4.52 explains that "[i]n order to protect the public, a suspension should be imposed in cases when a lawyer engages in practice in areas in which a lawyer knows that he or she is not competent." Here, Respondent recognized that, due to his inexperience, he needed to associate with more experienced counsel. As the Referee found, however, "Respondent's problems began when he hired more experienced, competent law firms to help him and then decided not to take the advice of these firms." RR 5. The Referee further found that Respondent failed to take the advice of co-counsel seriously and communicate it to his client. RR 6. A lengthy suspension is appropriate here because Respondent's incompetence caused injury and potential injury to his client. Respondent's hiring and firing of a series of law firms delayed Ms. Pippin's case and postponed any opportunity for settlement. RR 6. This conduct also exposed Ms. Pippin to multiple fee claims from discharged counsel. Respondent's fee claim had the potential of substantially reducing Ms. Pippin's recovery. RR 5.

7.0 VIOLATIONS OF OTHER DUTIES OWED AS A PROFESSIONAL

7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and

> causes injury or potential injury to a client, the public, or the legal system.

The Commentary to Standard 7.2 states that "[s]uspension is appropriate when the lawyer knowingly violates a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system, **even when a lawyer does not intentionally abuse the professional relationship by engaging in deceptive conduct**." (emphasis added). Thus, pursuant to Standard 7.2, a suspension is appropriate even if the attorney did not engage in deceptive conduct. Although the Standards do not provide guidance on the length of suspension that is appropriate, the Bar submits that a longer suspension is warranted here because Respondent violated multiple duties owed as a professional and caused injury and potential injury to multiple parties. Not only did Respondent cause harm to his client as discussed above, his conduct caused injury and potential injury to the legal system. As found by the Referee, Respondent's hiring and firing of multiple law firms clearly delayed the administration of justice, involving considerable time and effort on the part of many lawyers and judges. RR 7.

<u>Caselaw</u>:

It is the Bar's position that the Referee's recommendation of a 90-day suspension does not sufficiently address the seriousness of Respondent's

misconduct. While no cases were found that are factually identical to the instant case, this Court has addressed similar misconduct in cases involving conflict of interest, failure to provide competent representation, and charging a clearly excessive fee. The following cases support the imposition of a six-month suspension.

A violation of the conflict of interest rules frequently results in a rehabilitative suspension, even in cases where there is no history of prior discipline. For example in *Fla. Bar v. Mastrilli*, 614 So.2d 1081 (Fla. 1993), an attorney received a six-month suspension for representing clients with adverse interests and was found guilty of violating Rules 4-1.7(a) and (b). In recommending a six-month suspension, the referee noted that Mastrilli showed no remorse for his actions. This Court rejected Mastrilli's argument that he was merely negligent in failing to discover the conflict of interest. This Court held that Mastrilli either knew or should have known of the conflict of interest and approved the six-month suspension. Here, Respondent was found guilty of violating not only the conflict of interest rule, but also Rules 4-1.5(a), 4-1.4(b), 4-1.1, and 4-8.4(d). Even though the Referee in the instant case found no aggravating factors and several mitigating factors, while the referee in *Mastrilli* found a lack of remorse, the additional rules violations here warrant a similar sanction.

In *Fla. Bar v. Sofo*, 673 So.2d 1 (Fla. 1996), an attorney was suspended for 91 days for representing two corporations in which he owned stock with adverse interests. Sofo was found guilty of violating three conflict of interest rules, Rules 4-1.7(b), 4-1.8(b), and 4-1.9(b). The Referee recommended a one-year suspension, considering in mitigation Sofo's lack of a prior disciplinary record, and in aggravation a dishonest or selfish motive and substantial experience in the practice of law. The Court imposed a 91-day suspension. In the instant case, Respondent not only violated the conflict of interest rule, he also committed additional serious rule violations, and his misconduct spanned a period of several years. Although the Referee find no aggravating factors and several mitigating factors, Respondent should receive a rehabilitative suspension given the seriousness of his misconduct and the number of violations.

In a recent case, *Fla. Bar v. Herman*, 8 So.3d 1100 (Fla. 2009), an attorney with no history of prior discipline was suspended for 18 months for engaging in a conflict of interest with a client. While representing a corporation and its president, Herman formed his own company which competed directly with his client and solicited his client's customers. Herman did not disclose the conflict to his client and request a waiver. Herman was found guilty of violating Rules 4-1.7(a) (conflict of interest); 4-1.8 (a) (knowingly acquiring an ownership or other

pecuniary interest adverse to a client); 4-8.4(a) (violate the rules of professional conduct); and 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation). The referee found four aggravating factors and one mitigating factor. The aggravating factors were a dishonest or selfish motive; substantial experience in the practice of law; a refusal to acknowledge the wrongful nature of the conduct; and actual harm to the client. The sole mitigating factor was the absence of a prior disciplinary record. *Id*. at 3. The referee found that Herman was motivated by monetary concerns and that his failure to inform his client of the conflict was dishonest and deceitful. *Id*. at 2. The referee recommended a 90-day suspension. Both parties appealed, the Bar arguing that a two-year suspension was appropriate and Herman arguing that his conduct warranted a public reprimand. *Id*. at 6. This Court imposed a suspension of 18 months, noting that this Court "has moved towards stronger sanctions for attorney misconduct" in recent years. *Id*. at 7, quoting *Fla. Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2003).

Like Herman, Respondent engaged in a conflict of interest by putting his own interests before those of his client. Like Herman, Respondent has no record of prior discipline. The Bar submits that, like Herman, Respondent acted with a selfish motive, refused to acknowledge the wrongful nature of his conduct, and caused harm to his client. *See* Section IV, *supra*. Because Respondent was a

young attorney, the aggravating factor of substantial experience in the practice of law does not apply here. Although Respondent was not found guilty of violating Rule 4-8.4(c) as was the attorney in *Herman*, the Bar submits that the Referee erred in failing to find a violation of this rule. *See* Section II, *supra*. Even if this Court declines to find a violation of Rule 4-8.4(c) or the additional aggravating factors requested by the Bar, a six-month suspension is appropriate in this case relative to the 18-month suspension imposed in Herman.

In recommending a 90-day suspension, the Referee relied on this Court's decision in *Fla. Bar v. Maurice*, 955 So.2d 535 (Fla. 2007). The responding attorney in *Maurice* received a 90-day suspension for violating Rules 4-1.1 (competence); 4-1.3(diligence), 4-1.4(a) (communication), 4-3.2(failure to expedite litigation), and 4-1.7(b) (conflict of interest) in relation to her handling of an estate matter. The Florida Bar submits that *Maurice* does not provide a reasonable basis for the Referee's recommendation of a 90-day suspension because Maurice's misconduct was far less serious than that of Respondent.

Maurice provided incompetent representation by unnecessarily opening a probate estate where most of the deceased's property was exempt or transferred upon death. Maurice failed to explain this to her clients, the heirs. She opened an estate because she wanted to give the deceased's caretaker an opportunity to

purchase the deceased's condominium. The condominium had already been deeded to the deceased's son and grandson. The referee found that Maurice's duty to the heirs was limited by her interest in helping the caretaker. *Id*. at 540. Maurice's improper actions delayed the transfer of the estate assets, but she did not profit from her misconduct. The referee did not find that Maurice opened probate in order to generate fees, and did not find a violation of Rule 4-1.5(a) (excessive fee). *Id*. at 539. In mitigation, the referee found that Maurice had no disciplinary history. *Id*. at 542. This Court suspended Maurice for 90 days, finding that she was motivated by "a genuine but misguided desire" to fulfill what she believed to be the deceased's wishes. *Id*.

Maurice's conflict of interest arose from her attempt to balance the interests of the heirs (her clients) with the interests of the deceased's caretaker. She was not acting in her own self-interest. In contrast, Respondent's conflict of interest resulted from putting his own interests before those of his client. In addition, unlike Maurice, Respondent acted to increase his fee and was found guilty of charging a clearly excessive fee. Because Respondent's misconduct was more egregious, he should receive a harsher sanction.

Charging an excessive fee alone can result in a rehabilitative suspension. In *Fla. Bar v. Richardson*, 574 So.2d 60, 62 (Fla. 1990), this Court suspended an

attorney for 91 days for charging clearly excessive fees. Richardson charged $10,550 to probate an estate consisting of one piece of real property valued at approximately $22,000 and $1,444.93 to prepare simple wills for a married couple. *Id*. at 60-61. The referee recommended a public reprimand, finding in mitigation that Richardson was a young, hard-working attorney who had never been disciplined previously and who "made a serious error in judgment and let greed force him off the correct professional path." *Id*. at 62. This Court disapproved the referee's recommendation, finding that Richardson's misconduct warranted a 91-day suspension. This Court stated:

> Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. *The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar.* It does more than that; it brings the court into disrepute and destroys its power to perform adequately the function of its creation.

574 So.2d at 62, quoting *Baruch v. Giblin*, 164 So. 831, 833 (Fla. 1935) (emphasis in original).

Like Richardson, Respondent exposed his client to a charge for an excessive and disproportionate fee. Respondent's fee claim, if successful, would have resulted in Ms. Pippin receiving a 15 percent recovery. Unlike Richardson, who was found guilty of one rule violation, Respondent committed numerous

violations. Respondent's misconduct warrants a more severe sanction.

Respondent's actions strike at the heart of the practice of law—trust. He took advantage of his client to further his own interests. Respondent was determined to push the case to trial, despite Ms. Pippin's desire to settle the case. When co-counsel disagreed with him, Respondent fired them and hired new counsel. This pattern was repeated over and over again, until finally Ms. Pippin discharged Respondent. Each time he promised Ms. Pippin she would not have to pay fees to discharged counsel, and she trusted him. After the case settled, Respondent filed a charging lien against Ms. Pippin, seeking a fee that, if granted would have left her with a 15 percent recovery.

Throughout the disciplinary proceedings and the underlying litigation, Respondent continued to insist that he was right and all the other more experienced attorneys were wrong. Respondent blamed the entire fee litigation and disciplinary proceeding on the actions of others. Respondent continues to insist that Magistrate Jenkins and Judge Kovachevich wrongly accused him of misconduct in the Report and Recommendation and the Order approving the Report. Respondent remains unable to see any viewpoint but his own. As aptly stated by Justice Barkett in the dissenting opinion in *Fla. Bar v. Wishart*: "Of necessity, an attorney must be required to recognize those instances in which his or her professional judgment is

impaired. . . . [T]he lack of this capacity itself is a serious indicator of unfitness to practice law." 543 So.2d 1250, 1253 (Fla. 1989) (Barkett, J. dissenting).

Respondent's refusal to accept the advice of experienced co-counsel, his reckless pursuit of victory at trial regardless of the risks to his client, and his failure to communicate these risks to his client, demonstrate a dangerously willful attitude and a serious lack of judgment. Respondent was determined to pursue his own agenda for the litigation at any cost, even to the detriment of his client. He alienated everyone he dealt with, including multiple attorneys he co-counseled with, judges, and ultimately his own client. Ms. Pippin would not have found herself in the midst of fee litigation with multiple claims from discharged counsel but for Respondent's self-serving actions in the case.

Respondent has engaged in serious misconduct that undermines the integrity of the legal profession. The facts of this case, considered in light of the applicable Standards for Imposing Lawyer Sanctions, the relevant case law, and requested aggravating factors, support a sanction of a six-month suspension.

CONCLUSION

The Referee's findings of fact and conclusions of guilt as to Rules 4-1.1, 4-1.4(b), 4-1.5(a), 4-1.7(b), and 4-8.4(d) are supported by competent and substantial evidence and should be approved. The competent and substantial evidence also

supports a finding that Respondent violated Rule 4-8.4(c). The Referee properly took judicial notice of the federal court Report and Recommendation and Order and this Court should approve the Referee's ruling. This Court should disapprove the Referee's finding of no aggravating factors and find the following aggravating factors: a selfish motive, pattern of misconduct, refusal to acknowledge wrongful nature of misconduct, vulnerability of victim, and actual harm to client or third parties. As to discipline, the Referee's recommendation of a 90-day suspension should be disapproved and Respondent should be suspended from the practice of law for at least six months and be assessed the costs of this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by UPS Delivery, Tracking Number K1574330998 to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to **John M. Klawikofsky**, Counsel for Respondent, at Williams, Ristoff & Proper, PLC, 4532 U.S. Highway 19, New Port Richey, FL 34652; by regular U.S. mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _______ day of September, 2009.

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Karen Boroughs Lopez
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CERTIFICATION OF FONT SIZE AND STYLE
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Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

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