IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs.

HENRY NISSIM ADORNO,

Respondent.
___________________________/

Supreme Court Case
No. SC09-1012

The Florida Bar File
No. 2006-71,062(11N)

ON PETITION FOR REVIEW

INITIAL BRIEF OF THE FLORIDA BAR

KASEY L. PRATO
Bar Counsel - TFB #12082
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445

KENNETH LAWRENCE MARVIN
Staff Counsel - TFB #200999
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR.
Executive Director - TFB #123390
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

TABLE OF CONTENTS

PAGE

Table of Contents ii

Table of Authorities iii

Symbols and References..iv

Statement of the Case and of the Facts 1-32

Summary of the Argument 33

Argument 34-48

A SIX (6) MONTH SUSPENSION IS APPROPRIATE GIVEN THE REFEREE'S FINDINGS THAT THE RESPONDENT'S MISCONDUCT IN SETTLING WITH THE INDIVIDUAL PLAINTIFFS TO THE DETRIMENT OF THE PUTATIVE CLASS UNDER THE FACTS OF THIS CASE WAS PREJUDICIAL, ILLOGICAL AND UNEXPLAINABLE.

Conclusion...49

Certificate of Service..50

Certificate of Type, Size and Style …………………….…………51

Index to Appendix……………………………………………....52

TABLE OF AUTHORITIES

CASES **PAGE**

Hawaii v. Standard Oil Co. of Cal.,
405 U.S. 251, 266 (1972) 42

Shelton v. Pargo, Inc.,
582 F.2d 1298, 1305 (4th Cir. 1978)...........................41

The Florida Bar v. Rodriguez,
959 So.2d 150 (Fla.2007)..45, 46

The Florida Bar v. Herman,
8 So.3d 1100 (Fla.2009)...46

The Florida Bar v. Carlon,
820 So.2d 891 (Fla.2002)..47

The Florida Bar v. Vining,
707 So.2d 670, 673 (Fla.1998).....................................48

OTHER AUTHORITIES

Florida's Standards for Imposing Lawyer Sanctions:

Standard 1.1...45

Standard 4.32...43

Standard 7.2...43

Rules Regulating The Florida Bar:

Rule 4-1.5...1, 2

Rule 4-1.7...1, 2

Rule 4-8.4...1, 2

SYMBOLS AND REFERENCES

For the purposes of this Brief, Henry Nissim Adorno will be referred to as "Respondent", The Florida Bar will be referred to as "The Florida Bar" or "the Bar", and the referee will be referred to as the "Referee". Additionally, the Rules Regulating The Florida Bar will be referred to as the "Rules" and Florida's Standards for Imposing Lawyer Sanctions will be referred to as the "Standards".

References to the Appendix will be set forth as "A" followed by the sequence number and the corresponding page number(s), if applicable. The final hearing before the Referee was held on January 12, 2010 and January 13, 2010. The January 12, 2010 transcript is numbered from pages 1 through 232. References to this transcript will be set forth as "TR. 1/12/10" followed by the corresponding page number(s). There are two separate transcripts from January 13, 2010. The first consists of testimony and argument by counsel and is numbered from pages 1 through 222. References to this transcript will be set forth as "TR. 1/13/10" followed by the corresponding page number(s). The second transcript from January 13, 2010 consists of the Referee's findings and is not cited in this Brief.

STATEMENT OF THE CASE AND THE FACTS

On January 8, 2010, the Referee entered a Final Order on The Florida Bar's Motion for Summary Judgment and Respondent Charles Mays Motion for Summary Judgment and Respondent Henry Adorno's Motion for Summary Judgment ("Summary Judgment Order").[1] (A1.) The Referee granted the Bar's Motion for Summary Judgment in part and denied it in part, finding that Respondent violated Rules 4-1.5, 4-1.7 and 4-8.4 of the Rules of Professional Conduct. The Referee expressly accepted The Florida Bar's Consolidated Statement of Undisputed Facts in Support of Summary Judgment and incorporated exhibits.[2] On January 12 & 13, 2010, the Referee conducted a hearing on the issue of discipline. The Referee made an oral recommendation on January 13, 2010 that Respondent receive a public reprimand.

On March 3, 2010, the Referee entered his Report of the Referee finding

[1] Charles Mays' ("Mays") case was consolidated with Respondent's case for the purposes of trial. The Bar is not appealing the Referee's recommendations regarding Mays.

[2] The Referee also accepted the statement of undisputed facts submitted by Respondent in support of his Motion for Summary Judgment noting that all parties conceded that there were no genuine issues of material fact which would have precluded summary judgment. The transcript from the summary judgment hearing consists of argument by counsel. As no testimony was presented, that transcript has not been filed with this Court. The Bar will cite to its Consolidated Statement of Undisputed Facts In Support of Summary Judgment which is included in the Appendix at A4. The Bar's Consolidated Statement of Undisputed Facts is supported by an additional appendix which was considered by the Referee and which is a part of the record before this Court. The Bar's Motion for Summary Judgment is included in the Appendix at A5.

Respondent guilty of violating Rules 4-1.7 and 4-8.4. (A2.) The Report does not address Rule 4-1.5. The Referee recommended in his Report of the Referee that Respondent receive a public reprimand and assessed the Bar's costs against Respondent. On March 4, 2010, the Bar filed The Florida Bar's Motion for Clarification of Report of Referee seeking to address the Referee's apparently inadvertent omission of Rule 4-1.5 in the Report of Referee. On March 10, 2010, the Referee entered an Order on Motion for Clarification of the Report of the Referee granting the Bar's Motion for Clarification and amending the Report to reflect that Respondent also violated Rule 4-1.5. (A3.)

The Florida Bar is seeking review of the Referee's recommended discipline. At the discipline phase, the Bar sought a six (6) month suspension. The facts of this case, the case law and the applicable Standards demonstrate that a six (6) month suspension is the appropriate discipline.

Background

On May 28, 1998, Eva Nagymihaly (as general partner of ETC Apartments), Gordon Willitts, Jean Prosper, Jocelyn Prosper, Kenneth Merker, Algie Didlaukis, and Tenants & Taxpayers United For Fairness, Inc. ("TTUFF") entered into an agreement with the law firm Atlas Pearlman whereby Atlas Pearlman would represent the interests of these persons as representatives in a class action law suit which would be filed against the City of Miami (the "Retainer Agreement"). The

Retainer Agreement specifically states, "It is contemplated that this matter will be brought as a class action." The Retainer Agreement further explains that TTUFF, and not the individual Plaintiffs, agrees to be solely responsible for all retainer fees and cost payments. (A4. at 1-2.)

TTUFF was an organization of taxpayers who were interested in challenging the propriety of a City of Miami Ordinance which authorized the imposition and collection of a fire rescue assessment against property owners in Miami (the "Assessment"). TTUFF actively engaged in the collection of funds from the general public in order to fund its legal fees. For example, a TTUFF Question & Answer Sheet states that, "The firm [Atlas] agreed upon a *fixed* retainer and costs to represent the Plaintiffs through trial and appeals, including the Florida Supreme Court. The agreement with the law firm provides that TTUFF is responsible for raising the necessary funds. The Plaintiffs have NO liability for attorney's fees. At the end of the litigation, if successful, and subject to court orders, contributors to the law suit may receive refunds of their contributions, and all affected taxpayers may receive refunds of their special assessment payments." (emphasis in original). Also by way of example, a January 1999 TTUFF Talk Bulletin states, "Don't forget – when this lawsuit succeeds, EVERYONE GETS A REFUND!" (emphasis in original). (A4. at 2.)

On May 15, 1998, Nagymihaly (as general partner of ETC Apts.), Jean Prosper, Jocelyn Prosper, Kenneth Merker, Gordon Willitts and Algie Didlaukis (the "Named Plaintiffs") filed an action against the City of Miami seeking *inter alia* a refund of monies paid to the City as a result of the impermissible Assessment (the "Underlying Litigation"). (A4. at 2-3.)

Plaintiffs Pursue Class Certification

On June 26, 1998, the Named Plaintiffs served Plaintiff's [first] Motion for Class Certification indicating that they were seeking to represent a class of all individuals subject to the Assessment. On September 28, 1998, the Named Plaintiffs served an Amended Complaint. The Amended Complaint reiterates that Plaintiffs are bringing the action seeking representation of a class pursuant to Fla.R.Civ.P. 1.220. Paragraph 20 states, "Plaintiffs and their counsel will fairly and adequately protect and represent the interests of each member of the class." (A4. at 3.)

Atlas Pearlman merged with Adorno & Yoss, P.A. ("Adorno &Yoss") in May, 2002 and Adorno & Yoss assumed this representation. On August 29, 2003, Adorno & Yoss served Plaintiffs' Amended Motion for Class Certification reiterating the arguments set forth in Plaintiffs' [first] Motion for Class Certification and in February, 2004, Adorno & Yoss served a Second Amended Motion for Class Certification. (A4. at 4.)

Respondent spent significant time assisting with the Plaintiffs' damages model for the amount of the refund. According to the damages model prepared by Respondent and the firm's expert, Ted Hawkins, the range for the refund was approximately $23 million to $75 million. The City's model ranged from $5 or $6 million to $23 million. (A4. at 4.)

In support of the Motions for Class Certification, attorneys for Adorno & Yoss, Robin Campbell ("Campbell") and Mitchell Bloomberg ("Bloomberg"), and several of the Named Plaintiffs, filed affidavits. Each of the Named Plaintiffs' affidavits asserts that the Plaintiff is seeking to represent similarly situated individuals who owned property in the City of Miami and were subject to the Assessment. (A4. at 4.)

On February 17, 2004, a hearing was held before Judge Peter Lopez in the Underlying Litigation regarding Plaintiffs' Motion for Class Certification.[3] Respondent was present and spoke at the hearing. In part, the transcript reflects the following regarding the issue of class certification:

> Court: We have to address the refund issue first. Because to me, anybody that is a property owner within the operative time frame that was assessed a fee, if it's found to be refundable, this is a no-brainer, that's a class certification.

[3] For all intents and purposes, the Assessment had already been found to be illegal and summary judgment was subsequently granted to the Plaintiffs in this regard. Thus, on February 17, 2004, the issue of refund pertained not to the validity of the Assessment, but rather whether the City would be required to refund the Assessment in light of the City's affirmative defenses.

***

Court: Why don't I need to address – as I've said, the numbers are there. The class certification is not a big issue to me.

Mays:[4] And –

Court: Stop. Certifying the class at this moment doesn't help anything other than spend more money. If I rule against you on the refund issue, this case is over, right?

Campbell: That is correct, your Honor.

Court: Why are we wasting time with the certification today when we should be addressing whether or not, as I said, I'll make a finding, whether that's affirmed or not is always an issue. Once that is done, this case is ripe for certification, why do we need to address that today?

***

Court: You're misreading me. I plan to do it all at one time. If I find you're entitled to a refund, and I've gone through all those hoops, the issue of class certification is a no-brainer. Every homeowner is entitled to a refund, period, they've paid it on their Ad Valorem tax.

***

Court: Whoever got assessed from the tax rolls, that's an easy number of persons to determine. The key questions remains, are they entitled to a refund. That's not set for today, we're not here to rule on that. I don't want to put the cart before the Court horse. I am not going to spend all this time today unnecessarily, even though I think I know what the issues and the numbers are, but why am I going to put you through advertising, sending all the notices, doing all those issues when we may never get to that if I determine that you're not due a refund?

Campbell: That's fine, your Honor.

Court: We're in agreement with that.

[4] Mays was the Assistant City Attorney who handled the Underlying Litigation for the City.

Mays: Yes. That's my position. (A4. at 5-6.)

On March 19, 2004, the Named Plaintiffs served a Motion for Summary Judgment as to the City's Affirmative Defenses. The Motion quotes the Court's statement from the February 17, 2004 hearing regarding class certification being a "no-brainer". On May 4, 2004, the Court held a hearing on the issue of *inter alia* the City's Affirmative Defenses. In relevant part, the transcript states as follows with respect to the issue of class certification and with respect to what issue would be heard by the Court on May 26, 2004:

> Mays: What we have decided to do, with the Court's blessings of course, would be to do the following: Insofar as the apportionment issue we can address that further down the road. And we're also discussing this morning addressing further down the road the issue with respect to classification.
>
> Bloomberg: That will be the last thing we do, Judge. It's a no-brainer.
>
> Court: I thought I said that.
>
> Bloomberg: You did. But we don't need to do that now.
>
> Mays: No, we don't.
>
> Court: That's a simple issue once we get to the amount.
>
> ***
>
> Bloomberg: So what we do is we try the refund issue on the calendar.
>
> Court: Okay.
>
> Bloomberg: And you determine the amount of money to be refunded. Now, it may be that you may want to say don't refund it yet; let's wait

> and do the apportionment trial later, but you still determine the amount of the gross amount of money which is what we need to do. Then we come in and later on we do the apportionment and at the end we do the class. I mean, I think we've agreed that the class – (emphasis supplied.)(A4. at 6-7.)

At the May 4, 2004 hearing, the Court ordered the parties to attend mediation prior to the trial which was set for May 26, 2004. The issue going to trial on May 26, 2004 was the amount of money which would be refunded to the class of City of Miami taxpayers (the "Refund Trial"). In order to make this determination, the Court would need to determine which portion of the City's Assessment had been allocated to impermissible emergency medical services (as opposed to fire rescue services). (A4. at 8.)

Both the May 20, 2004 Adorno & Yoss mediation statements and the May 21, 2004 Trial Memorandum cite the Court's statement at the February 17, 2004 hearing that the issue of class certification is a "no-brainer". The Memorandum states that, "the sole issue to be tried is the amount of the refund due to the property owners of Miami." The conclusion states, "…Plaintiffs, on behalf of themselves and all others similarly situated, respectfully request that a final judgment be entered in their favor against the Defendant City of Miami, in the amount of $75,450,269.64, representing a refund of the illegally assessed portion of the Fire Rescue Assessment…." (A4. at 8-9.)

May 24, 2004 Mediation

On May 24, 2004, the parties attended mediation. Liability had already been determined and per Respondent's deposition testimony, "the only issue that was going to trial was the, you know, damages."[5] With respect to the initial mediation process, Respondent testified as follows:

> Q: Okay. And in the meeting with the clients, what do you recall being discussed?
>
> A: I pretty much ran that meeting, explained in general terms why we were there, and they had – it was necessary for us based upon the judge's requirement of mediation that we have a number to be able to settle. So most of the conversation was my telling them what I though that number should be. And I needed to get their permission, even though I explained to them that notwithstanding us agreeing to a number, this would have to go back to Judge Lopez for approval, but I wasn't authorized just to go in there and do it without some acquiescence from the class representatives.
>
> Q: Right. And the approval by Judge Lopez would be if it were a settlement of the class claims, correct?
>
> A: That's – at that time, that was the only conversation that we had.
>
> Q: Okay. So the numbers you were discussing with your clients had to do with, at that initial meeting, had to do with the numbers that they would approve for settling the class claims?
>
> A: Yes, sir.

---

[5] The Court ultimately held a trial on the issue of whether to set aside the settlement with the Named Plaintiffs. Respondent and Mays were deposed and testified in connection with this trial.

Q: Okay. And what did the clients give you authority to give a number to Mr. Mays?
A: 35 million.

Q: And that would settle the entire case?

A: That would start the process, yes.

Q: Strike that. That would settle the refund portion of the case?

A: That is correct. That is correct. We were mediating only, only the refund portion of that case. Everybody had already acknowledged that the issue of what I guess everybody refers to as the, you know, the apportionment was – was put off to another day.[6] The only hearing we were having in front of Judge Lopez was on the amount. (A4. at 9-10.)

Respondent further testified that at some point during the mediation, he stated that they would agree to settle the claims of the Named Plaintiffs only for $7 million. (A4. at 10-11.) Respondent testified as follows with respect to his discussion with the Named Plaintiffs regarding an individual settlement:

A: Could have come out of my mouth. Somebody – I don't, you know, I was just picking a number. I could have picked 20 million. I wouldn't have picked 20 million because it had to have some relationship to the 35 million that we had put on the table for our class settlement. It could have come out of my mouth, but it wouldn't have been based upon any formula or any analysis. I would have just said, here is the number. Then we had – then we had discussions saying since this is different than the fee arrangement that we had, I said we all need to agree among ourselves what would be our attorney's fees portion of that. We had some discussion and we agreed that we would

[6] The apportionment issue was unrelated to the refund issue. It refers to whether the City properly apportioned the Assessment among different property owners. It does not refer to the allocation of monies from the refund of the impermissible Assessment among class members.

get 2 million, which I guess would be a third. And I said okay. Got up, went back in to – don't recall if I went back into my office or whether there was another conference room and I said, we'll settle the – individually for 7 million. (A4. at 12-13.)

Respondent Brokers a Deal with the City Manager

Respondent handled the settlement negotiations from that point forward. Following the mediation, Respondent refused to speak with the City Attorneys. He testified that he only wanted to speak with the City Manager, Joe Arriola ("Arriola") because:

A: I wanted to talk to the businessman, I guess that's the best way to say it. I didn't want to talk to a lawyer, but a businessman. I wanted to talk in essence to the chief executive officer of the city to try to structure a business deal. (A4. at 13.)

On the evening of May 25, 2004 (the night before the Refund Trial), Respondent spoke with Arriola regarding a settlement of the class claims. Respondent testified that the "gist" of the conversation was as follows:

Q: What was the discussion?
A: Pleasantries. I hadn't seen – I hadn't spoken to him in a while. I told him first and foremost that I – that I know he just got dumped on, dumped with something. I wanted him to know that I had done everything in my power to try to get him involved in this thing at the earliest available day, moment, but because we were in litigation, I could not contact him directly; I could only go through counsel. That I had, in essence, noticed him for deposition as a way of having him become aware of what I thought was a significant exposure to the City, but the deposition had never occurred and I was sorry to, you know, to get him at the last second. I then said, Joe, let's cut the crap, no bullshit, you're -- we're going to go to trial tomorrow starting at 10 o'clock in the morning. Liability has been determined against you. You have waived all of your defenses. The only issue is what number

is Judge Lopez and I'm going to tell you you're going to get hit somewhere between 20 – low end; 23 high end, $75 million. I said, Joe, this has never been disclosed to your auditors, okay, its not a contingent liability anywhere. You haven't disclosed it to any of your rating agencies. You and – you and Manny just stood up there in the newspaper and announced how the bond rating for the City of Miami had just gone back up that, you know, to A or some other significant thing. You're going to get hit between the eyes and this is going to throw the City into absolute complete chaos. He then said, what do you mean? I said – I said, to settle the case it's $35 Million. He says, I can't pay that. I gotta know, Joe there was other things that were said in between here, but, you know. You know, can't pay that, I'm in a huge issue right now with our unions, there's no way the City can afford to pay $35 Million, is there any number that you can do less? I said no, because Joe, this has got to get approved by the judge and I have to be able to present to the judge a reasonable basis from which to, you know, to approve the settlement. Hey says, I'll give you $5 million. I said, Joe, if I wanted to take 5 million and my clients wanted to take the $5 million, there is no frigging way the Judge Lopez is going to approve $5 million. Nothing I can do. Joe says, don't have the money. I said okay, we'll just go to court tomorrow. It was, you know, nice talking to you. Sorry we, you know, I couldn't get you involved earlier. Last comment we said, you know what, let's all sleep on it and maybe we'll talk again the next morning. I paraphrased it, but that was – that was pretty much the gist of the conversation. (A4. at 13-14.)

Respondent further acknowledged that because of the pending class claims, he was in a superior negotiating posture with the City Manager.

Q: And you had him over a barrel, didn't you?
A: From a negotiating posture, I would think that we were in a superior position.
Q: All the discussions at that point were about the class claims?
A: If we're talking about the conversation on the evening of – or Tuesday evening, the answer is the only conversation was about a class settlement.

***

A: At some point Joe asked: Well, what was it going to take for me to get out of this pickle, mess, whatever words he used. I said $35 million.

He said: I can't pay the $35 million, I can't come close. I'm in the middle of a huge battle with unions at the time, pension funds. I was aware of that, I read that in the paper.

He said: Can't we settle if for 5 million?

And that was the first time that anybody at the City had made a counteroffer to our number.

You want me to continue the conversation?

Q: No, Sir. And basically the sum and substance of your response was: I can't do that, the judge would never approve that?

A: I said: even if I wanted to and even if the class members wanted to, there is no way that Judge Lopez is going to approve a class settlement for $5 million in light of the testimony that's in the record. (A4. at 14-15.)

On the morning of May 26, 2004, just before the Refund Trial was set to be heard before Judge Lopez, Respondent met with Arriola at the Latin American Cafeteria in Miami. Respondent testified as follows regarding that meeting:

A: It was strictly Joe – I honestly don't recall – I don't recall whether I called him or he called me, but we agreed to – to meet and hash it out one more time and we both agreed to – that – that place is convenient to our office and the City of Miami and I had – I had often seen them there and they'd often seen me there, so we said let's go there and have a cup, you know, a cup of, you know, cafe Cubano and let – let's talk about it. And so we agreed to meet there. I'm going to try to separate conversations just with him before Manny[7] showed up, but we kind of rehashed everything the night before. Joe is a pretty good negotiator and kept saying his, can you come down on the 35 million. I said, can't, it's not – just not going to be approved by the court. We – he may have gone up. I think he stuck to the $5 million, you know, trying to get me to the $5 million number. I said, no, I can't, it's just not going to happen. He asked whether we could – whether he could pay it over – pay the number over time. I said, A, I

[7] City of Miami Mayor Manny Diaz was present for a portion of this meeting.

didn’t have any authority to agree to that, but I thought that was, A, something that could be discussed if we could agree to the number; and B that would again have to be – he would be subject to court – the court approval, just like I knew that it would be subject to commission approval.

Q: So at this point with Mr. Arriola, the individual settlement concept still has not arisen?

A: No. Not – we – we hashed. Initially we rehashed a class settlement. At some given point, you know, Joe looked at me and basically said, okay, is there anything we can do to avoid court today. I said, yeah, I guess, you know, I guess you could. I guess you can, you know, settle with the individual plaintiffs. I mean, you know the exposure that you have with that, but the answer is you can live to fight another day. We can settle the individual plaintiffs. He said what’s the number. I said it’s $7 million. He may have said five; I said seven. He says, okay, but I got to have – I think he originally said three years. He originally said three years. I said, well, I don’t have authority to do that, but I’m prepared to recommend it, but Joe, you know, I assume you need it for budgetary reasons. He said yes. I knew what that meant. I said, let’s do it two years and I’ll – and I’ll tell you is I’ll go recommend that to the client. And, I mean, that basically was it as to that. We then went off on discussing – I told him, I said and by the way, Joe, I think you can recoup those 7 – those 7 million. He said how. I said, the – I believe that the consultants had gave you advice on the fire – the fire fee had a conflict of interest and I think you have viable claim. He said, are you bullshitting me? And I said no. He says, are you -- feel strongly enough about it that you’re willing to take it on a contingency? I said, subject to getting waivers from our clients to represent you, the answer is yes. Then I think we started talking about the Marlins.

Q: Okay. Then –

A: And at some point the Mayor called.

Q: And showed up at some point, right?

A: Yeah. After really we were – we were—well, there was some other issues that I discussed with him that I recall that would have had to occur before we went off discussing the Marlins. And they were that I had to have Joe’s commitment that he was going to recommend it to the City. Meaning, the City Commission. And that we had an

> agreement that in the event that for whatever reason the City Commission didn't approve it, that we, in essence, had a standstill. Meaning that we would be in the same position as we were today, no more additional discovery. Literally, we just have the judge set the case for trial and we would be trying our case. I didn't want to give up the, you know, the position that we were of really being ready to go where I didn't think the City was. (A4. at 15-16.)

May 26, 2004 Refund Trial

Later on May 26, 2004, the parties came before Judge Lopez and announced a settlement. Respondent stated, "The Plaintiffs and Defendant have agreed to settle this case subject to City Commission approval." After announcing the settlement to the Court, Respondent also stated that the parties intended to "maintain the status quo" with respect to the refund aspect of the case (no further discovery, etc.) pending the City Commission meeting in October, 2004. At the conclusion of Respondent's statement, Mays stated, "That's it." In response to the Court's question, "Is this a full and final settlement of this case or just the issue going to trial now," Respondent responded, "Just this issue." (A4. at 16-17.)

As is evident from the transcript of the February 3, 2005 hearing (addressed below) and Judge Lopez' March 17, 2006 Order, the Court did not understand from the May 26, 2004 hearing that the settlement which was announced applied only to the Named Plaintiffs and not the entire class of City of Miami taxpayers. (A4. at 17-18.)

Named Plaintiffs' Settlement

Also on May 26, 2004, the Named Plaintiffs, along with Judy Clark, Peter Clark,[8] TTUFF, and Adorno & Yoss, executed a Settlement Disbursement Schedule which indicated that the City of Miami would pay $3.5 million on or before December 5, 2004 and $3.5 million on or before December 5, 2005 for a total payment of $7 million. Adorno & Yoss was scheduled to receive $2 million per the Attorney-Client Agreement of May 28, 1998 and the agreement of Clients on May 26, 2004. (A4. at 19.)

The May 28, 1998 Atlas Pearlman Retainer Agreement was the only agreement in existence with the Plaintiffs. The Retainer Agreement does not set forth any contingency agreement, but instead states that in the event the case is successful, the firm would apply to the Court for an hourly fee as is typical with class actions. This would be awarded at the full discretion of the Court. (A4. at 20.)

Respondent acknowledged that the amount of money to be received by the Named Plaintiffs bore no relation to the amount they might have otherwise been entitled to in a class action.

> Q: If I represent to you that for all of the plaintiffs including – all of the plaintiffs plus Judy Clark it's less than $100,000, that would be

---

[8] Peter and Judy Clark were not Named Plaintiffs, but were involved with TTUFF. Each received a portion of the settlement proceeds under the Settlement Disbursement Schedule.

along the lines of what you knew?
Feinberg: Object to the form.
Witness: I don't know. I don't know that I know it was not a significant amount of money. If the issue is whether a significant amount of money versus the amount of money that they got? Obviously it wasn't.

***

Q: And you don't know where that number came from?
A: I can't tell you who said $6 million.
Q: It's not based on any analysis?
A: No, Sir, it's a number pulled out of thin air. For all practical purposes. It could have been five, could have been four, could have been 15.
Q: You were aware that the named plaintiffs had claims significantly less than that, correct?
A: Oh yes, Sir, yes, Sir. (A4. at 20.)

Respondent also testified that the Named Plaintiffs were just following the advice of counsel in accepting the $7 million settlement.

Q: Do you think any of the original plaintiffs have done anything wrong here?

Feinberg: Object to the form.

Witness: They just let -- I mean, they just took advice of counsel. At least dealing with us.

Williams:
Q: Did you provide them with any advice as to any obligations or duties that they had in any respect with regard to this settlement?
A: We told them that they could settle individually.
Q: And take the money and do what they wanted with it?
A: I don't recall having the conversation. You know, it wouldn't be my business what our clients do with the money that they receive. I wasn't – I don't recall being asked to render an opinion on that. But that doesn't mean the conversation was – you mean as to whether they

could give the money to somebody else? I don't recall participating in that, but that doesn't mean that it wasn't discussed. I just don't recall. (A4. at 21.)

Non-Disclosure Agreements

On May 26, 2004, Adorno & Yoss sent a letter to Mays confirming the agreement to settle the "refund" portion of the litigation. The letter sets forth the settlement terms and states that "our clients will sign an appropriate non-disclosure agreement." Upon receipt of the letter, Mays circled the non-disclosure language and handwrote "no". Thereafter, a second letter was prepared and signed by Respondent's partner, Bloomberg, and Mays without the non-disclosure language. Mays testified in the Underlying Litigation that he wrote "no" because a governmental entity cannot enter into a secret settlement. Mays further testified that he didn't recall requesting that Adorno & Yoss have the clients execute non-disclosure agreements. (A4. at 22.)

Mays believed that if the matter was not heard by the City Commission until October, 2004, the statute of limitations would expire on the remaining class claims thereby saving the City millions of dollars. (A4. at 22-23.)

Although Respondent testified that according to Bloomberg, the City wanted the non-disclosure agreements, Respondent did not oppose the idea.

Q: Did you oppose the nondisclosure?
A: No. I wouldn't have opposed it.
Q: Did you ask him why the City wanted it?
A: No, I didn't. I figured that one out by myself.

Q: What – what did you figure out?
A: The City? Because the City – it was clear that the City was settling in the hopes that nobody would ever find out about it. The nondisclosure would have been a way or, quote, unquote, doing that. I never understood why the City would do that because if that ever became public, that's probably a violation of the law.
Q: And what law do you think it would be a violation of?
A: I don't believe that the City should be entering into secret negotiations or telling people – having them sign nondisclosure. And I don't think that we ever actually signed them or we actually turned them over. It didn't make any sense. It didn't make – and it also didn't make any sense, I do recall Mitch [Bloomberg] telling me that the nondisclosure was only up to October. Or until the City Commission approved it, which I thought was to be October. So they only wanted to kind of keep our people quiet until the commission approved the settlement. In the most cases you sign a nondisclosure as to the settlement terms, but it's – it's for the life of the agreement.
Q: Right
A: Not for a --
Q: Right. Are you – were you aware back then that it was the City's position that, or that Mr. Mays believed that the statute of the limitations would run on claims in September?
A: Not at that time. There weren't any discussions about statute of limitations.

***

A: Whatever I know about the nondisclosure would have come from – from Mitch [Bloomberg]. I don't recall – well, there would be no reason that we would want a nondisclosure. Quite the contrary. We would want to stand up and scream it from the – love to call a press release since we had just done such a good job for our clients, but …. (A4. at 23-24.)

In mid-June 2004, the Named Plaintiffs executed Non-Disclosure Agreements prepared by Adorno & Yoss. The Agreement states that the settlement, "shall be maintained completely and entirely confidential until such time as the settlement is presented to the City Commission…If any of the Parties

are questioned or are involved in a discussion regarding the status of the Action, the Parties shall merely state that the Action has been reset to the Court's non-jury calendar in November, 2004." Mays testified at his deposition that he was unaware that the Named Plaintiffs signed Non-Disclosure Agreements. (A4. at 24.)

Respondent Seeks to Represent the City

Pursuant to his discussions with the City Manager, Arriola, Respondent prepared a retention agreement between the City of Miami and Adorno & Yoss dated June 8, 2004 whereby the firm would represent the City in its claims against the consultants who worked with the City to implement the Assessment. The firm would receive a contingency fee in the event of recovery on the City's claims. The agreement discusses the inherent conflict of interest in representing the City and states in relevant part as follows:

> As you know, we have represented plaintiffs in the case styled *Nagymihaly v. City of Miami* ("Nagymihaly") which asserts several claims arising out of the implementation and enforcement of the fire rescue assessment. One of those claims is a claim for refund and another is a claim that apportionment of the assessment was not fair and reasonable. We have agreed to a settlement of the refund claim which, if approved by the City Commission, will result in payments being made to our clients in Nagymihaly in 2004 and 2005. Additionally, that settlement does not resolve the apportionment claim which, if it is not resolved, by agreement will proceed to trial at some time in the future. If we represent the city in the connection with the Consultant Claims, a conflict of interest with our clients in the Nagymihaly case will arise. We believe that our representation of the City in this matter will not adversely affect our responsibility to and

> relationship with our other clients. In order for us to proceed with the representation of the City, our clients in Nagymihaly, will waive any conflict and will agree to allow us to proceed with the representation of the City in connection with the Consultant Claims. The City by execution of this letter agreement, consents to our representation of our clients in Nagymihaly and waives any conflict of interest arising out of our representation of the plaintiffs in Nagymihaly, whether it be in connection with the apportionment or refund claims. Additionally, our firm has other matters in which we represent clients both in litigation matters and non-litigation matters adverse to the City of Miami. The City, by execution of this letter, waives any such conflict which currently exists or which may exist in the future. In other words, the City, by execution of this letter agrees that our representation of the City of Miami in connection with the Consultant Claims does not in any way, shape or form, prevent us from representing clients adverse to the City of Miami in any other matter now or in the future including but not limited to the class action claims related to or arising out of the Fire Rescue Assessment. (A4. at 25-26.)

In furtherance of Respondent's attempt to represent the City, the firm sent a letter dated June 8, 2004 to the Named Plaintiffs requesting that each Named Plaintiff waive the conflict of interest resulting from the firm's proposed representation of the City of Miami. The letter also acknowledges the conflict of interest inherent in the firm pursuing claims on behalf of the class. Although most of the Named Plaintiffs signed the waiver letter, Ms. Nagymihaly did not. (A4. at 27.)

At this point, the Named Plaintiffs had already settled their refund claims thereby precluding them from acting as class representatives with respect to the refund issue. As such, the Named Plaintiffs could not have waived any conflict of

interest on behalf of the class regarding the refund issue. (A4. at 26.)

Had Respondent been successful in representing the City's claims against the consultants, Adorno & Yoss stood to gain a much larger fee than would have been possible under the original Retainer Agreement with the Plaintiffs.

> Q: And based upon the consulting firm and any malpractice done by that firm and/or the attorneys involved in it rendering this advice in reference to the EMS fee, 25-percent agreement in reference to retainer would have spelled out to $1.75 million additional for the firm of Adorno & Yoss?
> A: Are we assuming a $7 million recovery?
> Q: Yes, because didn't you tell Mr. Arriola you felt it was a very good case?
> A: Still is.
> Q: Still is?
> A: Yes.
> Q: And 25 percent of that $7 million would be 1.75?
> A: If your math is correct, it is, but I actually thought we would recover more, because there was a breach-of-contract claim, I think that was there, and one of the other damages we would have recovered is: Give us the money back because you didn't give us anything of value, the actual damage would have been higher than 7 million. (A4. at 27-28.)

City Commission Approval

On October 19, 2004, Mays issued an internal memorandum regarding the proposed settlement with the Named Plaintiffs. The memorandum recommends that the City settle the "refund" portion of the lawsuit with the Named Plaintiffs for $7 million to be paid in two yearly installments. In part, the memorandum states, "In view of an exposure of approximately $24 million, the City Manager and the City Attorney were able to negotiate this proposed settlement with the named

plaintiffs. Because of the passage of time, no other property owner will be able to maintain a refund action against the City." At the City Commission meeting on October 28, 2004, the Resolution regarding the settlement was deferred. On November 4, 2004 and November 16, 2004, Jorge Fernandez ("Fernandez"), the City Attorney, sent internal memoranda to the City Mayor and City Commission again recommending approval of the $7 million settlement as being in the best interest of the City. (A4. at 28-29.)

At the November 18, 2004 meeting, the City Commission approved the Resolution regarding the settlement. In part, Resolution R-04-0748 states that the settlement will be, "in full and complete settlement of any and all claims and demands against the City of Miami, its officers, agents and servants, in the 'refund' portion of the Nagymihaly, et al v. The City of Miami, in the Miami-Dade County Circuit Court, Case No. 98-11208 CA-01…." (A4. at 29.)

In December, 2004, the Named Plaintiffs executed Partial Releases acknowledging payment of the first installment of $3.5 million. Each Release states in part, that it "does not have any impact or effect on nor release the Second Party [the City] from the First Party's [Named Plaintiffs] apportionment claim which is being litigated…."[9] (A4. at 29.)

[9] As the unrelated apportionment claims survived and the second $3.5 million refund installment had not yet been paid, the case was not dismissed.

Adorno & Yoss Opposes New Plaintiffs' Intervention

On February 3, 2005, the Court held a hearing regarding an Ex Parte Petition for Leave to Intervene filed by Miami residents Carl L. Masztal, Joseph A. Graupier, Juana Martinez, and Marisol Fernandez.[10] As is evident from the transcript, the Court learned for the first time at this hearing that the refund portion of the case had been settled for $7 million with respect to the Named Plaintiffs only and not the entire class. It is also apparent from the transcript that Adorno & Yoss opposed the intervention of new class representatives. Adorno & Yoss did not oppose the intervention on the grounds that the firm intended to proceed as class counsel. Instead, Adorno & Yoss even suggested that the new class representatives file their own suit. In part, the transcript states as follows:

> Bloomberg: Let me give the case that really relates to the intervention. Back last spring Your Honor will recall we had a Motion for Class Certification issue. We were to figure out if they're entitled to a refund after we deal with the class certification issues. That's what we did. You ordered mediation.
>
> Court: It was that simple, it was a no brainer.
>
> Bloomberg: Right, it was a no brainer. But let's figure out if they're entitled to a refund and then we can deal with the class certification. You ordered mediation before trial. We mediated. We didn't settle it that night at mediation, but we came on the morning of trial and the city made a proposal to our four individual plaintiffs on an individual basis, on the refund claim, because all we were dealing with was the refund claim, not the apportionment claim.

---

[10] Mays was not present at this hearing as he was no longer employed with the City Attorney's office. Warren Bittner ("Bittner") appeared on behalf of the City.

***

Bloomberg: It went before the commission. It does not have to go before the Court because it's not a class action settlement. It's a settlement only with the individual plaintiffs.

Court: It was a pending class motion. I don't think you can pick off the plaintiffs at this stage without coming before me.

Bloomberg: Well, I believe that in --

Court: I'm not sure. But anyway.

***

Bloomberg: That's okay. So that settled, as far as we are concerned, the refund claim involving the plaintiffs who are named in the complaint.

The apportionment claim, we have been negotiating to try to resolve the apportionment claim, which would just involve basically the city coming -- no money, the city coming forward and potentially reconsidering the apportionment.

That's what we probably, for everybody involved, request how the city would reapportion the claim. That's where we are in this particular -- how I would reapportion the assessment against the various classes of property.

Where we are is there is nothing, as far as our perspective is concerned, there is nothing left to try on the refund claim on which the plaintiffs could intervene.

That's certainly not saying the plaintiffs can't bring a lawsuit. I have contrary authority, Judge. But we don't believe there's anything on which they can intervene. (emphasis supplied.)

***

William: But, Your Honor what about the class members? What about the property owners in the city of Miami? What about the people that for nearly six years now have -- I grant you, to some extent this is a legal fix.

But it is -- you know what it is, it is what we do here, what about the people that have been relying on this putative class action.

Now, the rules relating to intervention -- I don't mean to be telling basic stuff to the Court, but there is a presumption in favor of liberal allowance of intervention. I've got cases. I mean, our interest are absolutely identical, Judge. We are clearly members of the class.

I have some affidavits that I think are being filed right now, or perhaps I have them in hand right here, from a couple of the plaintiffs reciting that they in fact are members of the class. I don't know if the original has been filed.

***

William: Yes. My concern about bringing a separate action is first, Your Honor, I think I'm entitled to be here. I think my clients are entitled to be here, with all respect to everybody present.

But if we are put in the position of having to bring a separate action, which I already have done, I've already filed it, but I haven't served it, it's on behalf of the same plaintiffs, then I'm likely to be met with various objections by the city that I don't think are appropriate. Because this has already been litigated.

I respectfully submit, Your Honor, that this is a discretionary thing, although you know the cases out there are pretty strong. And I've got a bunch of them that I could recite to the Court. I think we have to come in to this case, Judge.

And that's something I almost never say to a judge. But I just -- it is so compelling, Judge. This is a case, it's a class action. It's been going on for six years.

The case has never been certified. And now it's settled on an individual basis. The settlement amount is $7 million. And it's five individual plaintiffs. And what about the property owners in the city of Miami?

***

Bittner: But I am prepared to state our objection to intervention by new plaintiffs. Four years have passed on the – from the time that this assessment was made. Their claims, if they have filed a new lawsuit, would be barred.

William: No.

Bittner: I don't know the appropriate thing to do with regard to the class certification. Maybe the Court should certify the class and require the proceeds to be distributed that way with these class individuals. I don't know the answer to that.

Court: Well, I have to determine whether or not the settlement that they've entered into is binding and appropriate when a pending Motion for Class Certification is pending. And I already indicated I

would be granting it. I couldn't have been any clearer that the motion should or would have been granted. But, I wasn't going to waste my time till we got to the next hearing. But to me, it was a no brainer, as I said previously. Whether I still need to have a fairness hearing or not, based on this case law that I've read that a settlement offer to one cannot moot the entire class action, once the certification motion is sought doesn't mean – had it not been requested at all, you can probably pick off the plaintiffs any time you want. Once the motion was filed I think plaintiffs' counsel has an obligation to move the issue forward. But at this point I'm not getting in the middle of that settlement. The city may be required to pay twice.

William: Judge, if I could suggest a middle road that lets the parties have the freedom to contract, which they obviously chose to do.

Court: I'm not sure they can. But we'll deal with that issue down the road. It's my understanding a class action – I still have to resolve and approve any and all final settlement once the certification motion is pending, albeit at a fairness hearing.

If the 7 million was purported to be a class settlement for all of the as yet undesignated members, I might have had to pass on that. But I haven't given that opportunity. Whether I need to or not, that's a different issue.

But certainly, based on what I've seen in this Echevarria case citing a lot of federal cases, that this is not an opportunity to pick off the five plaintiffs and somehow extinguish the remaining class claims that are pending. I find that this case tells me that intervention is appropriate. Based on that, I'll grant the motion.

***

Court: Anyway, bottom line is I'm allowing the intervention. Whether your new action can stand if his case is dismissed because the statute of limitation I think has run could become the legal issue that I fear you are worried about in the new action.

So whether I can let you intervene – and this relates back and keeps the statutes going, as some of this federal case law says, it doesn't moot out of the class action, so to speck, we'll deal with that issue later.

I'm still not comfortable with what the plaintiffs' position is. And we'll need further resolve and further case law whether I have to

approve settlement or not once they have designated themselves as potential class reps.

And then after a certification motion is pending, which you've already announced, I will grant, but for technical reasons did not, suddenly it gets yanked out from the rest of the punitive class members. We'll deal with that issue at the appropriate time.

***

Bloomberg: Judge, if you're allowing the intervention.

Court: I am.

Bloomberg: I understand that. If you're allowing the intervention, then the class – then there really would be no reason to deal with the individual settlement because the class is protected. Even under any stretch of the imagination.

Court: I'm not sure that – my take on it was once a certification motion is pending I need to have a fairness hearing no matter what. That's my understanding of the case law.

***

Court: On the refund issue, we'll deal with that down the road. This catches me a little by surprise because I gave you my position. $7 million to five plaintiffs seems to be like a very generous settlement.

***

Bloomberg: I'm not sure he's objecting to – I'm not sure they're objecting to the settlement.

William: I think if it were 7 million to settle the claim of this case, I think it's too low, frankly.

Court: I don't know. Well, the number was never determined. That's a different issue. We were looking at what was the actual refund issue versus the number of taxpayers on the roll. And that was the number I was going to have litigated. The city's position is it was 20 head, their position was hundred per head.

***

William: Judge, if I could raise one residual issue. I do have the worry that the class certification motions might be withdrawn and having been withdrawn, that then the case would be dismissed.

Court: Counsel, all this –

William: May we ask for a stipulation from Mr. Bloomberg that the plaintiffs will not do that pending your resolution of all of these issues?

Bloomberg: I have a feeling if I withdraw the class certification motion I'd probably be here looking at contempt citation. (A4. at 30-34.)

The Court requested the parties submit memoranda on the issue of whether a fairness hearing was required regarding the settlement of the Named Plaintiffs' claims and issued an Order granting the Ex Parte Petition for Leave to Intervene. (A4. at 34.)

On February 23, 2005, Adorno & Yoss served Plaintiffs' Memorandum of Law in Compliance With Court Order of 2/3/05. The firm took the position that there was no requirement that the Court approve the settlement of the individual putative class representatives and the City which occurred prior to class certification. The Memorandum also states that, "Even though the class representatives have settled their individual claims with the City, the class was not prejudiced by the settlement. Indeed, on February 3, 2005, this Court granted intervening Plaintiffs', Carl L. Masztal, Joseph A. Graupier, Juana Martinez, and Xiomara Arias (collectively the "intervening plaintiffs"), ex parte motion to intervene." Despite its opposition to the intervening plaintiffs' motion to intervene, as evidenced by its arguments at the February 3, 2005 hearing, Adorno

& Yoss takes the position in its Memorandum that it is this intervention that prevented the class from being prejudiced by the settlement. (A4. at 35.)

On April 21, 2005, Adorno & Yoss served Plaintiffs' Memorandum of Law in Response to Defendant, City of Miami, Florida's Position Paper in Compliance with Court Order of February 3, 2005. The firm's Memorandum notes that the City is seeking relief from the settlement agreement with the Named Plaintiffs in order to remedy prejudice to prospective class members. Again, the firm argues that the class is not prejudiced because the action will continue as a result of the intervention of four new prospective class representatives (which the firm opposed). (A4. at 36.)

**<u>Proceedings Following Judge Lopez' Order
Setting Aside the Settlement</u>**

On March 17, 2006, following the trial on the issue of whether the settlement should be set aside, Judge Lopez entered a Final Order on Defendant's Motion to Set Aside or Vacate the Settlement and Recover Monies Paid Toward Same. The Order set aside the settlement agreement on the grounds of unilateral mistake concluding that the City did not know the settlement was only as to the Named Plaintiffs. Judge Lopez further found that the parties had treated the case as a class action from its inception, that all parties were aware that the class had been determined and that although a class certification order had not been entered, the parties were proceedings as if one had been. The Court concluded that the

parties were seeking to avoid a fairness hearing and ordered that all funds paid be disgorged, including the Adorno & Yoss fees. (A4. at 39.)

On April 4, 2006, the Court entered an Order on the November 10, 2005 Class Certification Hearing granting the Masztal intervenors' motion to unsubordinate their claims, and certifying the class with the new representatives and class counsel. (A4. at 39.)

On August 8, 2007, the Third District Court of Appeals affirmed Judge Lopez' March 17, 2006 Order concluding *inter alia* that the settlement amount of $7 million was patently unfair and compromised the claims of the underlying class. The opinion also states that, "from the outset of this case, the original plaintiffs and Adorno & Yoss proceeded on behalf of the class. Class certification here was inevitable, and represented nothing more than a ministerial act, the failure of which cannot be used to circumvent or undermine a fiduciary relationship." The Court relies upon a series of cases expounding on the nature of a fiduciary duty. The Court further finds: "Nor do we agree with Adorno & Yoss that the settlement did not prejudice the class. It defies any bounds of ethical decency to view class counsel's actions as anything but a flagrant breach of fiduciary duty." Finally, the majority concludes: "Furthermore, at no time did Adorno & Yoss exercise candor before the trial court to explain the nature of the settlement. This reprehensible

conduct alone is more than sufficient to establish a breach of fiduciary duty." (A4. at 39-40.)

On December 20, 2007, the intervening plaintiffs served a Fourth Amended Complaint which named Adorno & Yoss as a defendant. Count I sues Adorno & Yoss for negligent representation of the class claims. (A4. at 40.)

On January 8, 2008, the Third District Court of Appeals denied Adorno & Yoss' and the Named Plaintiffs' motions for rehearing en banc, motions for certification of conflict and motions for certification as a matter of great public importance. (A4. at 40.)

On January 17, 2008, the intervening plaintiffs filed a Notice of Filing Proposed Settlement Agreement & Release. Pursuant to the Settlement, Adorno & Yoss was obligated to pay $1.6 million into the Common Fund to be established as part of the settlement of the Class with the City of Miami. On October 29, 2008, the Court entered its Order Certifying Class and Class Representatives; Approving Settlement Agreements Between the City of Miami, Adorno & Yoss, LLP and the Class, and Awarding Costs and Fees. (A4. at 40.)

SUMMARY OF THE ARGUMENT

Respondent acknowledged that he was representing the putative class throughout the course of the Underlying Litigation and further understood that he owed certain obligations to those class members. Respondent's conduct was knowing; not merely negligent. The Referee's Summary Judgment Order reflects the same. Section 4.3 of the Standards deals with an attorney's failure to avoid conflicts of interest. Section 7.0 addresses violations of other duties owed as a professional. The Referee relied upon subsections 4.33 and 7.3 of the Standards in recommending a public reprimand in his Report of Referee. These subsections contemplate negligent conduct. The appropriate subsections are 4.32 and 7.2 which deal with an attorney's "knowing" conduct and which require suspension. A public reprimand is entirely inadequate as discipline for Respondent's conduct. The Standards and the case law as presented herein support a six (6) month suspension.

ARGUMENT

A SIX (6) MONTH SUSPENSION IS APPROPRIATE GIVEN THE REFEREE'S FINDINGS THAT THE RESPONDENT'S MISCONDUCT IN SETTLING WITH THE INDIVIDUAL PLAINTIFFS TO THE DETRIMENT OF THE PUTATIVE CLASS UNDER THE FACTS OF THIS CASE WAS PREJUDICIAL, ILLOGICAL AND UNEXPLAINABLE.

The record is replete with evidence that Respondent knowingly advocated on behalf of the entire class of City of Miami taxpayers. Once he consciously determined that it would be in the best interest of Adorno & Yoss to settle for the individual Named Plaintiffs, he struck a business deal with the City Manager to settle those claims for a $7 million gross windfall from which Adorno & Yoss would receive a $2 million fee without Court approval. Respondent acted with full awareness that the Court had previously determined that the class would be certified at such time as the Court ruled that a refund would be owed and that the Court was delaying the certification only in the interests of judicial economy.

Respondent testified that he agreed with the Court's assessment that the class certification was a "no-brainer".

> Q: But you're well aware from reading the transcripts of the May 4th, 2004 hearing that the judge and Mr. Bloomberg indicated that certification was a no-brainer?
> A: And you can add me to that group.
> Q: And yourself –
> A: Yeah.
> Q: --to the group, indicating that certification of the class was a no-brainer?
> A: Absolutely. (A4. at 7-8.)

Per Respondent's trial testimony, he was clearly representing the entire class at the mediation, at the May 26, 2004 hearing and purportedly when he sought to represent the City of Miami in related litigation against the consultants who drafted the Assessment.

> Q: And at that point [mediation], even though the class wasn't certified, you were representing the interests of the entire class?
> A: No question about that. (A4. at 10.)
>
> ***
>
> Q: I'm a little bit confused, Mr. Adorno, perhaps it's just me. On May 24th, the date of the mediation, was the Adorno firm representing itself as the attorneys for the class?
> A: Yes, Sir.
> Q: On May 26th, at the time the settlement was announced to Judge Lopez, was the Adorno firm holding itself out as attorneys for the class, non-certified?
> A: The answer is no and yes. We didn't announce the settlement to Judge Lopez. The transcript speaks for itself. That wasn't the purpose of that hearing.
> And yes, we were still class counsel.
> Q: On June 8th, when the letter was sent to the manager, was the Adorno firm still representing itself as class counsel?
> A: Yes, Sir. (A4. at 24-25.)

Respondent also knew that the Court intended to determine the refund issue for the entire class at the May 26, 2004 hearing.

> Q: What issue was going to be tried on May 26th of '04 before Judge Lopez?
> A: The amount of the refund.
> Q: For who?
> A: The – it would have – in my view? It would have been for the entire – the entire – all property owners. (A4. at 8.)

Despite Respondent's admitted knowledge of these facts, in the days between the mediation and the Refund Trial, Respondent deliberately sought out the City's "businessman", Arriola, to "structure a business deal." (A4. at 13.) Ultimately, Respondent was able to leverage the strength of the class claims for the sole benefit of the Named Plaintiffs and Adorno & Yoss.

> Q: Sir, you would agree with me, because you were in such an advantageous position with the City on May 26th of 2004 with regard to how this case had been litigated, you were able to get the City to pay $7 million to four people with claims worth about $83,000?
> A: Yeah, I would agree with that. (A4. at 38.)

Respondent was also aware that he owed certain obligations to the entire class whom he admittedly undertook to represent. Respondent testified that both the representative parties in a class action and the class counsel must adequately protect the interests of the class.

> Q: Are you aware – you're not aware, Sir, that a representative party in a class action must adequately protect the interests of those he purports to represent?
> A: No, I would agree with that.
> Q: Okay, would you agree, Sir, that that requirement applies both to the named plaintiffs and to class counsel?
> A: Yes.
> Q: And would you agree, Sir, that because all members of the class are bound by the res-judicata effect of a judgment, a principal factor in determining the appropriateness of a class certification is the forthrightness and vigor with which the representative party can be expected to assert and defend the interest of the members of the class?
> A: I agree with that too.
> Q: And would you agree that, when dealing with class certification, the analysis encompasses two separate inquiries: whether any substantial conflicts of interest exist between the representatives

and the class, and whether the representatives will adequately prosecute the action?

You would agree with that?

A: I think I would agree with that too. (A4. at 27.)

***

Q: Do you know – can you tell us as we sit here today what the duties are of attorneys who represent putative class?

A: Not any different than they are, I would assume—the answer is, if there's a set of different standards, I would – I would assume that the same standards I would apply to any client of the firm's or any client of mine. (A4. at 36.)

The record demonstrates that neither Respondent, nor anyone else at Adorno & Yoss, took action to pursue the class refund claims from May, 2004 until the time of the intervention in February, 2005. To the contrary, Adorno & Yoss had the Named Plaintiffs sign non-disclosure agreements which instructed them to conceal the settlement from any person who may inquire about the case. Adorno & Yoss then sought lucrative representation of the City in related claims against the consultants who drafted the Assessment. Thereafter, Adorno & Yoss opposed the intervention of the new plaintiffs without ever indicating that the firm intended to pursue the class claims. The evidence demonstrates that the class refund claims had been completely abandoned; however, even at best, Respondent admitted that he intended to shelve the class claims in favor of the Named Plaintiffs' claims (and the $2 million fee) for *at least* the better part of 2004. At his deposition, Respondent testified as follows:

Q: Why didn't you try the rest of the claims for the class?

> A: The rest of which claims?
> Q: The class claims.
> A: Well, we had a settlement on the [refund][11] and the second thing of all, we would - - I would not have done it until such time as the – when the named plaintiffs would have been paid and then we will have continued to have litigated the class claims.
> Q: Why would you have waited?
> A: Because I'm not a stupid individual and the minute that the City knew that we could proceed with that, that they would have done exactly what they did and not make the second payment and I wanted to make sure that my clients received both of their payments and there was no prejudice to the class. (A4. at 36-37.)

The Named Plaintiffs were not due to be paid the second installment from the City until December, 2005 (almost two years after the settlement was reached with the Named Plaintiffs in May, 2004 and over seven years since the inception of the class action lawsuit in May, 1998). (A4. at 37.)

Respondent's testimony at the trial in the Underlying Litigation differed from that at his deposition regarding the prosecution of the class claims. At trial, Respondent stated as follows with respect to his intentions to pursue the class claims:

> Q: You heard Mr. Bloomberg talk about the duties of class counsel. One of them was to move the case along?
> A: I would agree with that. I don't recall Mr. Bloomberg testifying along those lines, but I would agree with that concept.
> Q: And the four named plaintiffs in this case had an interest in getting their money as soon as possible, didn't they?
> A: That was one of the – well, obviously that was one of the concerns, but not their paramount concern.

[11] Although the transcript reads "apportionment" Respondent later clarifies that he misspoke and meant to say "refund".

Q: Like in any case?

A: I agree, in any case, if people think they're owed money, I can't imagine anybody who wouldn't want it sooner rather than later.

Q: The class had an interest in getting its money?

A: Like anybody who thinks they're owed money, I can't imagine anybody saying: Gee, don't pay it as soon as you can.

Q: Sir, in fact after the individual settlement you were not going to seek to get the class its money until after the second payment was made, isn't that correct?

A: No, that is not correct.

Q: You don't recall saying that at our deposition?

A: I do recall saying that at the deposition. Under the context of what I now know of the City's argument that it is the statute of limitations, had I known that I would have waited until the second payment.

But not in the context of the way you just asked the question, what would we have done in –

Q: Sir, you would agree with me that, didn't you tell us that you were going to wait until the first payment and the second payment was made in December of '05 before you were going to seek any money in a refund on behalf of the class?

A: If I had known that the City's position was that they settled with me, not to avoid the hearing that day, but based upon this theory of the statute of limitations –

Q: Well, let's leave the statute of limitations out of it.

A: You mean take that out of my mind? The answer is we would have continued the class action on the refund almost as soon as practical after the City Commission approved the settlement.

We couldn't do anything on the refund under our agreement until the City Commission approved it.

Q: Well, let's step back. You agreed to wait on the class-refund claims until the Commission approved the individual claims?

A: Yes, that we did.

Q: And you agreed to make the class-refund claims sit until at least October 1st?

A: Or thereafter. I think the, I think the end date, Mr. Cole, would have been December 5th

I mean, it wasn't that the Commission could have kept putting off the issue ad infinitum, there would have been a time period that they would have said they're not going to do it or do it timely.

> But, yes, that time period between May 24th and the Commission approving it would have been a time period we would not have proceeded, and yes, we would not have been prosecuting the refund case.
>
> So that time frame, under your theory of: Gee, let's get the money to them as quickly as possible, we did give that up. (emphasis supplied.) (A4. at 37-38.)

Respondent repeatedly states that there was no prejudice to the class, but by his own admission, he was under an obligation to move the class claims forward and he chose not to do so. Respondent expressly stated that they "did give that up" for a significant period of time.

Both Respondent and his partner, Campbell, testified at the discipline hearing that the Adorno & Yoss attorneys were well prepared to proceed with the Refund Trial on May 26, 2004 and that had they proceeded as planned they would have been successful. Respondent was thus aware at the time he brokered the Named Plaintiffs' settlement, that he was foregoing the benefit of having the refund issue expeditiously and favorably adjudicated. Campbell testified as follows:

> Q. Ms. Campbell, with respect to the refund issue, were you prepared to go to trial on that issue on May 26, 2004?
> A. Well, we were prepared to have the Court determine the amount of what the – the allocable amount of the EMS portion of the total assessment was, yes, we were.
> Q. Okay. In your estimation, had you gone to trial on that issue that day, would you have been successful?
> A. Well, we believe we would have had the Court determine an amount—the number that was consistent with our expert's analysis. (TR. 1/13/10 at 97-98.)

Although Respondent testified that he believed the $7 million settlement to be in the best interests of all involved parties (i.e. the Named Plaintiffs, TTUFF, and the putative class), he agreed with Campbell's assessment of the situation on May 26, 2004.

> A. I would agree that we were prepared to go to that hearing and that the likely outcome – put it this way: I think Mitch [Bloomberg] and Robin [Campbell] would have been surprised if that outcome would have been anything other than the judge agreeing that the appropriate number was 23.7 [million]…. (TR. 1/13/10 at 162.)

The Referee stated in the Summary Judgment Order that, "it is the totality of the circumstances one must examine in determining Respondent Adorno's conduct. Settling with seven individual plaintiffs to the detriment of the undetermined/putative class -- under the facts of this case was prejudicial, illogical, and unexplainable. As a result of Respondent's prejudice to the class, it follows Respondent took an excessive and indefensible attorney fee." (A1. at 9.) In support of his ruling, the Referee cited Shelton v. Pargo, Inc., 582 F.2d 1298, 1305 (4th Cir. 1978) for the proposition:

> …by asserting a representative role on behalf of the alleged class, these appellees voluntarily accepted a fiduciary obligation towards the members of the putative class they thus have undertaken to represent. They may not abandon the fiduciary role they assumed at will or by agreement with the appellant, if prejudice to the members of the class they claimed to represent would result **or** if they have improperly used the class action procedure for their personal aggrandizement. This has been declared in repeated decisions. (emphasis in Summary Judgment Order.)

Moreover, class actions enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. See Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972). It is obvious from the facts of this case, that the City of Miami taxpayers had a much stronger litigation position proceeding as a class. It is also evident from the record that Respondent knowingly utilized this superior position to negotiate a windfall for the Named Plaintiffs and Respondent's firm. Without the class claims, Respondent could never have struck the deal he did with the City. After using the class strength to his benefit, Respondent abandoned the class refund claims and then concealed the grossly disproportionate settlement from the Court and the class whom Respondent had purported to represent.

At no time during these proceedings has Respondent acknowledged any wrongdoing in this matter. In a letter to the Bar dated September 23, 2007, Respondent's counsel concluded as follows with respect to his conduct:

> Beyond the fact that no actual prejudice occurred, it is equally clear that there was no potential for prejudice. For it was Respondent's very action of settling without a requirement for dismissal of the class action complaint that paved the way for the unnamed putative class members to share in the class action settlement. While he asks for no credit for discharging his ethical responsibilities to the unnamed class members, he does insist on vindication from the unfounded allegations and insinuations of dishonesty and unethical conduct…. (A4. at 41.)

At the discipline hearing, Respondent reiterated that he does not have any

remorse.

> A. I looked up the definition of remorse. It's feeling guilty about past mistakes. I've spent five years, Monday morning, Tuesday, Wednesday, Thursday, Friday, all seven days of the week quarterbacking what transpired in this case. I can't tell you how many hours Mitch and I and Robin and other lawyers have looked into this. And we just come back to the same thing; we didn't do anything wrong. So it's very difficult to acknowledge guilt on something that you don't think you did wrong. I can't bring myself to do that. Would I like not to be here? Yes, sir. I'd like to take George Knox' quote, you know, do we have lamentations or do we lament being here, okay, and do I wish that I could have done something to make this disappear or whatever? But it's not because I'm going to say I have remorse. I don't think myself, any of the lawyers of the firm, did anything wrong with regard to our clients or the putative class or the public at large. (TR. 1/13/10 at 159-160.)

Florida's Standards for Imposing Lawyer Sanctions

The Referee relied upon Standards 4.33 and 7.3 in recommending a public reprimand. These Standards contemplate negligent conduct. As demonstrated by extensive record evidence, Respondent's conduct was knowing; therefore, the appropriate Standards to be considered are 4.32 and 7.2 which require suspension.

Standard 4.32 states: "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." Standard 7.2 states: "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 Standards define "knowledge" as, "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Respondent clearly had the requisite conscious awareness of the circumstances attendant to his conduct when he chose to place the interests of Adorno & Yoss and the Named Plaintiffs above those of the putative class whom Respondent had admittedly undertaken to represent.

The Standards also define "potential injury" as, "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." Although the class was ultimately able to settle its refund claims against the City, this was achieved only because new class representatives with new counsel successfully intervened in the Underlying Litigation. Adorno & Yoss vigorously opposed this intervention and there is no evidence that Respondent, or anyone else at Adorno & Yoss, intended to actually pursue the class refund claims. To the contrary, the record evidence demonstrates that the class claims were at worst, completely abandoned by Respondent or, at best, shelved for a significant period of time in favor of the Named Plaintiffs' and Adorno & Yoss' pecuniary interests. But for the intervenors, the class likely would have received no recompense for their claims.

The Referee acknowledged the potential or actual injury in his Report finding that, "by settling with individual plaintiffs to the detriment of the undetermined/putative class the Respondent left thousands of potential plaintiffs unable to effectively pursue their claims against the City of Miami. Further, the settlement ultimately was appealed, set aside and the litigation renewed causing unnecessary delay and expense to the parties." (A2. at 5-6.)

Standard 1.1 states: "The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly." As noted by the Referee at the discipline hearing, attorneys owe a duty to the public at large and the Underlying Litigation involved public money. (TR. 1/12/10 at 192-197.) Given the public nature of this case, the $7 million settlement for just the Named Plaintiffs becomes even more egregious. In addition, the perception of the legal profession is all the more easily harmed in a case where the misconduct directly affects so many members of the public. Accordingly, pursuant to the Standards, a suspension is warranted.

Applicable Case Law Regarding Discipline

A six (6) month suspension is the appropriate discipline under the circumstances of this case and the applicable case law. In The Florida Bar v.

Rodriguez, 959 So.2d 150 (Fla.2007), this Court held that a two-year suspension, rather than a public reprimand, was the appropriate sanction for an attorney's engaging in actions that directly conflicted with the interests of his clients. In Rodriguez, the attorney became an agent for an opposing party while still representing his clients against that party when he entered into a secret engagement agreement with the opposing party whereby his firm agreed, for a fee, not to bring future cases against that party. Id. The attorney failed to disclose the conflict of interest, exposing his clients to potential harm, while also potentially harming the public and the legal system. Id. at 160. This Court held that a suspension is appropriate in a conflict of interest situation which rises above mere negligence. Id. The Court relied upon Standards 4.32 and 7.2. Id. Like Respondent, Rodriguez was found guilty of violating Rules 4-1.5 (prohibited fees) and 4-1.7 (conflict of interest) as well as several other Rules not applicable to the instant case. Id. at 157. As the conduct in Rodriguez is more egregious than in the present case, a shorter six (6) month suspension is proper.

In The Florida Bar v. Herman, 8 So.3d 1100 (Fla.2009), this Court held that an 18-month suspension was appropriate for similar violations of Rules 4-1.7(a)(conflict of interest), 4-8.4(a)(prohibiting violations or attempts to violate the Rules), and 4-8.4(c)(dishonesty, fraud, deceit or misrepresentation). Herman was also found guilty of violating Rule 4-1.8 which is not applicable here. Id. at 1103.

In Herman, the attorney represented a client at the same time he represented his own company, which was his client's competitor, without obtaining the client's consent in violation of Rule 4-1.7(a). Id. at 1104-1105. This Court further held that Herman's failure to inform his client of the conflict and obtain the client's consent was dishonest and deceitful in violation of Rule 4-8.4(c). Id. at 1106. The Court relied upon Standards 4.32 and 7.2. Id. at 1107. In imposing a lengthier suspension, this Court considered aggravating factors not found applicable in the instant case including dishonest or selfish motive, refusal to acknowledge the wrongful nature of the conduct and actual harm to the client with the sole mitigating factor being the absence of a prior disciplinary record. Id. at 1104.

While not directly on point, The Florida Bar v. Carlon, 820 So.2d 891 (Fla.2002) demonstrates this Court's willingness to impose a rehabilitative suspension for violations of Rule 4-1.5 (excessive fees) in the absence of additional Rule violations. Carlon was found guilty of two instances of violating Rule 4-1.5 for inflating his client invoices. Id. at 898. Carlon was suspended for 91 days. Id. at 899.

In light of the Standards, this Court's case law, and the extensive record evidence demonstrating that Respondent's conduct was "knowing", the Referee's recommendation of a public reprimand is inappropriate. Although the Referee's disciplinary recommendation is presumptively correct, it should not be followed

when it is "clearly off the mark." The Florida Bar v. Vining, 707 So.2d 670, 673 (Fla.1998). This Court's scope of review regarding the actual discipline imposed is broader than the review afforded to a Referee's factual findings as this Court has the ultimate responsibility and authority to order an appropriate sanction. Id.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's recommendation of discipline is too lenient and that Respondent should receive a six (6) month suspension.

KASEY L. PRATO
Bar Counsel
Florida Bar No. 12082
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445

KENNETH LAWRENCE MARVIN
Staff Counsel
Florida Bar No. 200999
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR.
Executive Director
Florida Bar No. 123390
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
Tel: (850) 561-5600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of The Florida Bar were sent via electronic mail to the Honorable Thomas D. Hall, Clerk, at e-file@flcourts.org, and via Federal Express Mail (809685807376) to Supreme Court Building, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and a true and correct copy was sent via electronic mail to Andrew Scott Berman, Attorney for Respondent, at aberman@ybkglaw.com, and via regular mail to 17071 West Dixie Highway, Miami, Florida 33160, and to Bruce S. Rogow, Attorney for Respondent, at brogow@rogowlaw.com, and via regular mail to 500 East Broward Boulevard, Suite 1930, Ft. Lauderdale, Florida 33394; and via regular mail only to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this ________ day of April, 2010.

____
KASEY L. PRATO
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

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

____
KASEY L. PRATO
Bar Counsel

INDEX TO APPENDIX

A1. Final Order on The Florida Bar's Motion for Summary Judgment and Respondent Charles Mays Motion for Summary Judgment and Respondent Henry Adorno's Motion for Summary Judgment dated January 8, 2010.

A2. Report of the Referee dated March 3, 2010.

A3. Order on Motion for Clarification of the Report of the Referee dated March 10, 2010.

A4. The Florida Bar's Consolidated Statement of Undisputed Facts in Support of Summary Judgment dated November 23, 2009.[12]

A5. The Florida Bar's Motion for Summary Judgment dated November 23, 2009.

---

[12] Although not included in the Appendix attached hereto, a binder was presented to the Referee as an appendix to the Bar's Consolidated Statement of Undisputed Facts and is a part of the record before this Court.