IN THE SUPREME COURT OF FLORIDA

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The Florida Bar

Supreme Court Case No. SC10-332

Complainant

vs.

Brian Gerard Doherty

The Florida Bar File No. 2008-10,419 (20A)

Respondent

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ON APPEAL FROM A REPORT OF REFEREE

RESPONDENT BRIAN GERARD DOHERTY'S AMENDED INITIAL BRIEF

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In this Brief, the Respondent, Brian Gerard Doherty, will be referred to as either "Respondent," or "Mr. Doherty." The Florida Bar will be referred to as either "The Florida Bar" or "The Bar."

"TRT" will refer to the transcript of the trial before the Referee in Supreme Court Case No. SC10-332, held July 27 through July29, and August 2, 2010.

"TRSH" will refer to the transcript of the sanctions hearing in Supreme Court Case No. SC10-332, held December 8, 2010.

"PROR" will refer to the Preliminary Report of Referee dated November 12, 2010.

"AFROR" will refer to the Amended Final Report of Referee dated December 20, 2010.

"Ex." will refer to exhibits presented by The Florida Bar and by the Respondent during all proceedings before the Referee in Supreme Court Case No. SC10-332.

"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

In October of 2007, Stephen Spencer wrote a letter to The Florida Bar alleging improper conduct by the Respondent in the Respondent's legal representation of Audrey B. Smith. The Respondent filed a comprehensive response to the inquiry of The Florida Bar in November of 2007, as well as further information in December of 2007, after Stephen Spencer filed an additional letter with The Florida Bar.

In January of 2009, a Grievance Committee of the Twentieth Judicial Circuit found probable cause for further disciplinary proceedings against the Respondent. Probable cause was found on Rules 4-1.7 and 4-1.8 of the *Rules Regulating the Florida Bar*. In March of 2009, the same grievance committee found additional probable cause on Rule 4-8.4(a).

A hearing on the guilt aspect of this matter was held before Referee Emanuel Logalbo, Jr. on July 27, 28, 29 and August 2, 2010 in Sarasota County. In court testimony was offered by Mr. Doherty, Audrey B. Smith's two daughters, a witness to the execution of her will and other estate planning documents, and two expert witnesses who testified on various investment and the annuity contract considerations, and on the specific transactions Mr. Doherty proposed to his client.

Numerous documents were either marked for identification, or admitted into evidence, including affidavits from individuals acquainted with the Respondent who attested to his good moral character and fitness to practice law.

There was no evidence presented by The Florida Bar during the trial that indicated that any recognizable harm was occasioned by Respondent's conduct. In fact, in issuing his Amended Final Report, the Referee specifically stated that he did ". . . not place substantial weight on this issue." (AFROR, p. 15). While evidence was produced with respect to a certain financial obligation Mr. Doherty had to an insurance company, The Bar never proved the Respondent had improper intentions or motives, or that any violations of the Rules were intentional.

Indeed, the Referee in this matter in issuing his Preliminary Report on November 12, 2010, found that the evidence was insufficient to show a violation of the "adverse interest" clause of Bar Rule 4-1.8(a) (PROR, p. 23).

The Preliminary Report contains other findings favorable to the Respondent:

> **It may be urged that the facts do not clearly and unequivocally demonstrate a *mens rea,* or some lesser intent or motive on the part of Respondent. Respondent would have taken a 3% loss of commission by moving from Conseco products to Washington National products. It may be urged that Respondent made efforts to better Mrs. Smith's situation: the tangible difference that an 8% premium bonus that Washington National annuities would bring, together with whatever simplification would flow from fewer annuities during this time of declining health.** (PROR, p. 22).

The Referee's findings in his Preliminary Report do not dispute that Respondent advanced the interests of Ms. Smith by attempting to secure annuities and an estate plan consistent with her wishes. He also found that the Respondent's profit motives were not, in themselves, improper in a consideration of whether there was a substantial risk that the Respondent's representation of his client would be materially limited:

> **Engaging in a profession or business in order to make a Profit is proper. Making a profit through self-serving activities, in my view, is not improper under this rule where the client's interests are favorably secured as well. The profit motive should not be disfavored, and is not an issue in these proceedings in my view.** (PROR, 21).

The Referee made additional findings in his Preliminary Report which dispensed with certain allegations of the Bar:

> **We turn to Respondent's authorship of the educational trust. The result was an advance payment of a substantial amount for future services that might be anticipated to last nine years. In this regard, I do not find that Respondent knowingly acquired a pecuniary interest adverse to his client, notwithstanding that the up-front payment was exceptionally generous. In summary, I do not find from the totality of the circumstances presented in this case that Respondent knowingly acquired a pecuniary interest adverse to a client.** (PROF, p. 24).

However, the Preliminary Report of Referee did enter a finding of guilt as to violations of §§ 4-1.7 and 4-1.8 of the *Rules Regulating the Florida Bar*.

Accordingly, a hearing on sanctions was held on December 8, 2010. At the conclusion of the hearing, The Florida Bar requested the Referee recommend disbarment. The Respondent requested the Referee recommend an admonishment for minor misconduct.

The Referee issued his Final Report of Referee on December 17, 2010.

Additional issues were raised by both The Florida Bar and the Respondent (AFROR, pp.1-2, footnotes 1 and 2). Such resulted in the Referee issuing another report dated December 20, 2010, captioned "Amended Final Report of Referee." The Referee recommended that the Respondent be disbarred, but not permanently disbarred (AFROR, p 5).

The Referee retired from the Florida Judiciary on December 31, 2010, and his Amended Final Report recites that his work on this case was constrained by looming deadlines and time considerations. (AFROR, p. 2, footnotes 2, 3 and 4). The transcript of the proceedings indicates the Referee was having trouble addressing his obligations given the shortening period of his active judicial service, (TRSH, pp. 72 and 73).

The Respondent filed his intention to seek review in this Honorable Court of the proceedings before the Referee on February 15, 2011.

SUMMARY OF THE RESPONDENT'S ARGUMENT

The Amended Final Report of Referee should be disapproved.

The points raised in this appellate review underscore that the Referee's recommendation of harsh discipline is unsupported by the record, and is unjustified as a matter of judicial fairness. The evidence presented at trial established clearly and convincingly that Respondent acted in the best interest of his client and sought to advance her specific directives. The evidence further established clearly and convincingly that nothing adverse to the interests of his client resulted from the Respondent's representation of Audrey B. Smith.

The Referee's recommendation of disbarment appears, partly, to be unreasonably based upon his finding that two sections of the *Rules Regulating the Florida Bar* were violated, while the Respondent argues that his conduct can clearly and convincingly be considered to be a violation of just one section of the Rules, 4-1.7. The Referee's finding of a violation of section 4-1.8 of the Rules is an erroneous application of the law.

Accordingly, the respondent argues on appeal that this Honorable Court accept the finding of the Referee that the Respondent engaged in conduct in violation of § 4-1.7 of the *Rules Regulating the Florida Bar* and:

- Impose discipline in the form of a Public Reprimand;

or

- Remand the matter to a Referee for further proceedings consistent with the *Rules Regulating the Florida Bar*.

ARGUMENT

Point One: The Referee abused his discretion by basing his findings and recommendations upon materials that were not in evidence.

This consideration begins with the assertion that a Referee's findings of fact and conclusions of guilt supported by competent, substantial evidence in the record will be upheld (*Florida Bar v. Jordan*, 705 So. 2d 1387 (Fla.1998). In quoting *Florida Bar v. MacMillan*, 600 So 2d 454 (Fla.1992), this court restated that where such findings are adequately supported, they must be upheld: "This Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." (*MacMillan, supra,* at page 459). Nevertheless, the Referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt (*The Florida Bar v. Shoureas*, 913 So. 2d 554 (Fla. 2005)).

The standard to be applied for review of the Referee's findings of fact and conclusions of guilt is abuse of discretion, a concept expressed as a test of reasonableness by this Honorable Court in its opinion in *Canakaris v. Canakaris*, 382 So 2d 1197 (Fla. 1980). And beginning with *Canakaris, supra,* this court has consistently applied the reasonableness test in abuse of discretion review cases. (*See: Ford Motor Co. v. Kikis*, 401 So 2d 1341 (Fla. 1981); *Mercer v. Raine*, 443 So 2d 944 (Fla. 1983); and, *Booker v. State*, 514 so 2d 1079 (Fla. 1987).

Simply stated, the Referee's findings of fact and conclusions of guilt in the instant matter are not supported by the record and are therefore unreasonable. In fact, an objective reading of the Referee's findings of fact and rulings in his Preliminary Report, factual findings and rulings specifically incorporated by reference in the Amended Final Report of Referee (AFROR, p 1), makes the Referee's eventual recommendation of disbarment of Mr. Doherty seem more than unreasonable, it actually seems to be odd. Because, while the Referee did find the Respondent guilty of violating two sections of the *Rules Regulating the Florida Bar*, (Rule 4-1.7 and 4-1.8; PROR, pp. 8 and 9), he specifically rejected The Bar's contention that the Respondent had acquired an interest adverse to his client, whether pecuniary or otherwise (PROR, pp. 23 and 24). The Respondent submits that a disbarment recommendation appears unjustifiably harsh, and accordingly unreasonable, particularly in light of the Referee's findings that Mr. Doherty

did not:

> **. . . demonstrate a *mens rea* or some lesser intent or motive. After All, he did take a 3% loss of commission in moving from Conseco products to Washington National products. It may be urged that Respondent made efforts to better Mrs. Smith's situation: the tangible difference that an 8% premium bonus that the Washington National annuities would bring, together with whatever simplification would flow from fewer annuities during this time of declining health.** (PROR, p. 22).

The Bar offered no evidence that the conduct of Mr. Doherty in his legal representation of his client produced actual harm: no funds were lost, no opportunities squandered, no rights compromised. Accordingly, how can a disbarment recommendation be justified?

Of course, the Respondent feels it is not justified and is unreasonable. In support of this assertion, he argues that the Referee based his recommendation upon documents not properly before him.

The Respondent urges that this Honorable Court focus on footnote 2 in the Referee's Amended Final Report. This footnote outlines that certain exhibits (19b, 19s, 19u and 33) were objected to by the Respondent. The footnote acknowledges that only portions of the exhibits were deemed admitted. The exact ruling of the Referee is found on page 80 of the transcript of the sanctions hearing:

> **THE COURT: All right. I'm going to admit them in the same vein that I did relative to others matters; and that is, 20A – 19B, 20A, 19S, T, and U, will be admitted because there's *testimony relevant to them and so much of the document that has been testified to will be admitted* (emphasis *added*).**
>
> **The remaining *will not be admitted* (emphasis *added*) without prejudice if something materializes that warrants reconsideration of admitting the *entirety* (emphasis *added*) any of these individual pieces of paper. Okay.**

Most unfortunately, it is clear the Referee acted as though the exhibits were admitted in their entirety, contrary to his own ruling. The specific exhibits that

are troubling to the Respondent (because the Referee appears to have based his harsh recommendation thereon) are 19S, T, and U; copies of applications for the Respondent's insurance agent's errors and omissions coverage. The *only* testimony elicited from the Respondent on Exhibits 19S, T and U were questions dealing with Mr. Doherty's suspension from the practice of law and that he did not prepare the applications. (TRSH, pp. 64-72).

In the Amended Final Report of Referee, nine and one-half pages are devoted to the Referee's justification for recommending that Mr. Doherty be disbarred. (AFROR, pp. 6-15). More than five of those pages are devoted solely to matters on exhibits 19S, T and U; matters which were not properly before the Referee. (AFROR, pp. 9-14). Therefore, more the fifty percent of the Referee's justification for disbarment is improperly based. Nevertheless, the Referee has disregarded his own ruling and considered the documents in their entirety. It cannot be disputed that he very heavily relied on these documents in justifying his disbarment recommendation. No other conclusion can be drawn as his recommendation is based upon a highly detailed analysis of portions of those exhibits, such as:

a. The 08/01/06 to 08/01/07 application itemized that there was no currently held error and omission coverage; that Respondent was the applicant as identified by name and by his DBA, his address, phone number, fax number, and email address; that no professional

liability claims had been made against the applicant within the past 5 years; that $120,000.00 totaled the commissions for the preceding 12 months and $120,000.00 the expected commissions for the next 12 months; that the percentage of revenue was 50% life – individual, 25% fixed annuities, and 25% equity indexed annuities; that the top 3 companies with whom the applicant placed his business together with percentage of revenue for each were John Hancock – 50%, National Western Life – 25%, and NACOLAH – 25%; that the applicant had no current error and omission coverage; that the applicant chose not to have prior-acts coverage; and that the applicant had chosen specific amounts for limits on liability and deductible.

b. The form of the 08/01/07 to 08/01/08 application sought the same categories of information as did the form of application for the preceding year. The entries to the completed application contained the same information relative to identity of the applicant, the negation of professional liability claims against the applicant, the total commissions, and that the applicant chose identical limits on liability and deductible.

There were entries that were different from the preceding year's application: for example, that the percentage of revenue had changed to 50% life – individual, 10% fixed annuities, and 40% equity indexed annuities from the same top 3 companies, John Hancock – 50%, National Western Life – 10%, and NACOLAH – 40%; and that the applicant did have current error and omission coverage through Houston. Interestingly, an entry indicated a request for prior-acts coverage.

c. The form of the 08/01/08 to 08/01/09 application sought the same categories of information as did the form of application for the preceding two years. The completed application contained much the same information as the preceding years' applications, except the percentage of revenue had changed to 75% life – individual, 5% fixed annuities, and 20% equity indexed annuities, and the number of companies increased to 5 with the result that the percentage ratio

> **decidedly changed as follows: John Hancock - 35%, National Western Life - 5%, NACOLAH - 25%, AVIVA - 20%, and Midland National - 15%; and there was an entry that showed that there was error and omission coverage, with OMEGA rather than with Houston Casualty.** (AFROR, pp. 9, 10 and 11).

POINT ONE CONCLUSION

There was never ***any*** questioning of the Respondent on ***any*** of the issues on which the Referee obviously so heavily relied. Conclusions made by the Referee can be considered nothing more than simple juncture, as there was ***no evidence*** presented on the source of that information. Accordingly, the Referee's recommended sanction is unreasonably based and should not be endorsed by this Honorable Court.

Point Two: The Referee's recommendation of disbarment is not supported by the evidence and is not consistent with the Standards for Imposing Lawyer Sanctions.

In reviewing a Referee's recommended discipline, this Honorable Court's scope of review is broader than that afforded to the Referee's findings of fact because, ultimately, it is this Court's responsibility to order the appropriate sanction (*The Florida Bar v. Anderson*, 538 So. 2d 852 (Fla. 1989). (See also: Article V, § 15, of the *Florida Constitution*.) Nevertheless, as this Court has stated in *The Florida Bar v. Temmer*, 753 So. 2d 555 (Fla. 1999), it will not second guess a Referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. (See also: *The Florida. Bar v. Valentine-Miller,* 974 So. 2d 333 (Fla. 2008)).

The Respondent argues that the Referee had no reasonable basis for his recommended sanction of disbarment.

The Board of Governors of The Florida Bar adopted an amended version of the American Bar Association Standards for Imposing Lawyer Sanctions, which provide a format for bar counsel, Referees and the Supreme Court of Florida to consider before recommending or imposing appropriate discipline:

(1) duties violated; (2) the lawyer's mental state;

(3) the potential or actual injury caused by the lawyer's misconduct;

and, (4) the existence of aggravating or mitigating circumstances.

The Florida Bar uses these standards to determine recommended discipline to Referees and to this Honorable Court in determining pleas under Rule 3-7.9.

The Respondent believes it is most important to note the position consistently repeated by this Honorable Court in matters of aggravation and mitigation under the Standards for Imposing Lawyer Discipline. Again, the Referee's findings are entitled to a presumption of correctness that should be upheld ***unless*** such are clearly erroneous and/or are without support in the record (*See: The Florida Bar v. Arcia,* 848 So 2d 296 (Fla. 2003); *The Florida Bar v. Morse,* 784 So 2d 414 (Fla. 2001); and, *The Florida Bar v. Bustamonte,* 662 So 2d 687 (Fla. 1995)). Only a few of the Referee's findings and rulings with respect to the Standards are correct and are supported by the record.

A list of the black letter rules applicable to the Standards and how such relate to the matter involving Mr. Doherty is set out below.

1. **"Injury"** is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury. Reference to "injury" alone indicates any level of injury greater than "little or no" injury.

Applicability to the instant matter: The Respondent believes this consideration of whether harm occurred as a result of the Respondent's conduct should be of great concern in the determination of an appropriate sanction. First of all, The Bar did not even attempt to produce evidence that Audrey B. Smith, the Respondent's client, had ever suffered any actual injury as a result of the Respondent's legal representation of her. The term "actual" is used to mean that no funds were stolen or misappropriated; no one's legal rights were compromised; no opportunities were lost; truly nothing adverse to the interest of his client resulted from the Respondent's representation of Mrs. Smith. The Bar attempted to manufacture harm via the introduction of the testimony of Debra L. Spencer, the daughter of Respondent's client, during the hearing on sanctions. In offering Mrs. Spencer's testimony that she was troubled that she did not see condolence cards sent at the time of her mother's death, and that she was embarrassed to learn that a certain retail store bonus program was no longer in her deceased mother's name (TRSH, pp. 138, 139; and 144, 145), The Bar seemed to be asserting that personal affronts which might result from an attorney's conduct could constitute "harm" that the *Rules Regulating the Florida Bar* should recognize. The Respondent not only takes strong issue with this contention, he wishes to point out that the Referee

found such considerations were not entitled to substantial weight (AFROR, p.15). 2. **"Intent"** is the conscious objective or purpose to accomplish a particular result. 3. **"Knowledge"** is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

Applicability to the instant matter: Both of these considerations have essentially no negative connotation with respect to the Respondent's conduct. He testified, assertions uncontroverted by The Bar, that he did not intend to violate the *Rules Regulating the Florida Bar* (TRSH, p. 193). Indeed, he testified that he did not know that §1.8 (b) of said Rules required a written disclosure. The Respondent's violations of the *Regulating the Florida Bar* were unintentional. 4. **"Negligence"** is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard care that a reasonable lawyer would exercise in the situation.

Applicability to the instant matter: The Respondent no longer contests that his numerous activities on behalf of his client that provided the opportunity for his independent professional judgment to be compromised. He acted as Mrs. Smith's lawyer, financial advisor and insurance broker. Undertaking these multiple roles

simultaneously was inappropriate and the respondent was negligent not to be responsive to the matter of professional concern.

5. **"Potential injury"** is 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.

Applicability to the instant matter: As mentioned, there was no harm either real or potential.

4.3 FAILURE TO AVOID CONFLICTS OF INTEREST

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanction is generally appropriate in cases involving conflicts of interest:

4.34 Admonishment is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no injury or potential injury to a client.

Applicability to the instant matter: Admonishment for minor misconduct is the starting point for the imposition of discipline in the Respondent's case. This position was advanced by Respondent's counsel before the Referee (TRSH, p.247).

9.0 AGGRAVATION AND MITIGATION

9.1 GENERALLY

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

9.3 MITIGATION

9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32 Factors which may be considered in mitigation. Mitigating factors include:

(b) absence of dishonest or selfish motive.

Applicability to the instant matter: There was no evidence which shows that Respondent had any dishonest or improper selfish motive in this matter. At no time during the trial of the guilt phase of this matter, nor during the sanctions hearing, did The Florida Bar produce any competent evidence that the Respondent was motivated by a dishonest or selfish motive. While there was testimony that the Respondent had a certain financial obligation to an insurance company, it was never competently established that this constituted a motive of dishonesty or selfishness. In fact, at page 21 of his Preliminary Report, the Referee found:

> **Engaging in a profession or business in order to make a profit is proper. Making a profit through self-serving activities, in my view, is not improper under this rule where**

> **the client's interests are favorably secured as well. The profit motive should not be disfavored, and is not an issue in these proceedings in my view.**

Nevertheless, the Referee's findings and recommendations in this regard are confusing. In his Preliminary Report, the Referee, in referencing that Mr. Doherty's recommendation to his client would have resulted in his commission being decreased by 3%, the Referee asserted, "It may be urged that Respondent made efforts to better Mrs. Smith's situation . . ." (PROR, p. 22). But, in his Amended Final report, he maintains aggravation under this standard: "I find selfish motive on the part of the respondent . . ." (AFROR, p.16). Such inconsistency is not explained, nor is it justified, by the record.

(d) timely good faith effort to make restitution or to rectify consequences of misconduct.

Applicability to the instant matter: After he was made aware of the allegations in the Bar inquiry, Respondent took steps in good faith to insure his compliance with the *Rules Regulating the Florida Bar* (TRSH pp. 200-202). The evidence indicated a consequence of the Respondent's conduct was that certain dictates of the Rules *Regulating the Florida Bar*, most notably the requirements associated with "business transactions" with clients were not followed. The Respondent testified he has already adjusted his office practices in this regard, and

two affidavits from clients were admitted into evidence which indicated how the clients had been appropriately advised (Sanction Hearing Exhibits; affidavits of Owen and Charrier). The Respondent further testified that he acknowledged an understanding of the factors that led to the Referee's finding of a violation of the general conflict of interest prohibitions of the Rules Regulating the Florida Bar and would be appropriately focused in the future (TRSH, pp. 205-207). The Referee found that these assertions were "undercut" (AFROR, p.17), but cites no specific basis for such an assertion.

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

Applicability to the instant matter: Although he consistently took the position that the rules were not violated and that any violations were unintentional, it is beyond dispute that the Respondent fully and freely cooperated during all proceedings; and The Florida Bar has never asserted otherwise. Nevertheless, without ***any*** conclusive evidence to support his finding, the Referee actually found aggravation under this standard, writing; "I find that any assertion from respondent that there has been a cooperative attitude in these proceedings to be severely undercut" (AFROR, p.17).

(**g) character or reputation.** Respondent has an excellent character and reputation in the community and produced testimony and evidence to substantiate this contention at the sanctions hearing. The Respondent submitted to the Referee five affidavits from various individuals, all of who have known Mr. Doherty for many years and who had been apprised of all issues surrounding his background, disciplinary matters, and his fitness to practice law. All affiants attest to that fitness, and The Florida Bar offered no testimony or evidence to contradict Mr. Doherty's evidence. It is noteworthy that Bar Counsel did not ask any of its witnesses whether they thought Mr. Doherty was fit to be a member of The Florida Bar.

Applicability to the instant matter: These matters were uncontroverted by the Bar and the Referee's Amended Final report is silent on this consideration. This standard should be a mitigating factor in favor of the Respondent.

(j) interim rehabilitation. After Respondent was made aware of the allegations in the Bar inquiry, he took steps in good faith to insure his future compliance with the *Rules Regulating the Florida Bar* (TRSH, pp. 200-202). A definite consequence of the Respondent's conduct was that the requirements associated with "business transactions" with clients were not followed. The Respondent testified he has already adjusted his office practices in this regard, and

As referenced in regard to subparagraph (d) above, two client affidavits were admitted into evidence indicated how they had been appropriately advised.

Applicability to the instant matter: These matters were also uncontroverted by the Bar and the Referee's Amended Final report is silent thereon. Accordingly, this standard should be a mitigating factor in favor of the Respondent.

(k) imposition of other penalties or sanctions. These Bar proceedings have negatively affected Respondent's practice. In addition, Respondent is a sole practitioner and a suspension would likely cause him to suffer the loss of his other state licenses. This Honorable Court has determined that application of this mitigating factor requires the imposition of a formal penalty or sanction (*The Florida Bar v. De la Torre*, So. 2d 1032 (Fla. 2008) and *The Florida Bar v. Hagendorf*, 921 So. 2d 611 (Fla. 2006). The Respondent has suffered such a penalty, as the Certified Planner Board of Standards has suspended his right the use the Certified Financial Planner ™ trademarks, an action will become permanent if the Respondent is disbarred. While the letter appearing as Appendix C was issued after the proceedings below were concluded, the CFP® action letter would be offered in mitigation in a rehearing.

Applicability to the instant matter: This standard was never addressed by the Referee. The respondent is suffering an actual loss as a result of this

matter, one which arose as a result of the issuance of the Referee's recommendation. This standard should also be a mitigating factor in favor of the Respondent.

(l) remorse. Respondent is remorseful for his actions and testified about his remorse at the sanctions hearing (TRSH, pp. 205-207). The Respondent testified openly and sincerely on his understanding of his conduct and how it was inappropriate under the *Rules Regulating the Florida Bar*. The Florida Bar offered no evidence that the Respondent lacked remorse.

Applicability to the instant matter: While this matter was also uncontroverted by the Bar, the finding of the Referee is that the record supports this standard actually being an aggravating factor against the Respondent (AFROR, p.16). The Referee's finding in this regard is troubling and truly crystallizes the Respondent's concerns expressed during this appeal. The Referee's basis for claiming aggravation is rooted in his apparent

Concern with the circumstances surrounding Exhibits 19s, T and U ("I find that respondent's sworn sanctions – hearing disavowal of the representations to professional liability carriers severely undermines his other sanctions-hearing testimony . . ."), a quote appearing on page 16 of the Amended Final Report of Referee. As previously argued, there was no testimony from the Respondent on

these matters other than his true statement that he did not prepare the documents. Pursuant to the Referee's ruling, those portions of the exhibits were not in evidence because there was no testimony thereon. Accordingly, the Referee's Amended Final Report finding is a non-starter because the Respondent was never questioned about the matters on which the Referee based his findings. How can the Referee claim lack of candor (or outright untruthfulness) when the Respondent was never asked to respond on those matters? If the Referee were troubled by this consideration, he was free to question the Respondent himself, from the bench. He did not do so. The record of the proceeding shows that the Respondent is remorseful, and he openly and truthfully testified thereto (TRSH, pp. 205-207). This standard should be considered a mitigating factor in his favor.

(m) remoteness of prior offenses. This Honorable Court has stated that the remoteness of a lawyer's prior discipline may be considered as a mitigating factor. In *The Florida Bar v. Norvell*, 685 So. 2d 1296 (Fla. 1996), this court specifically approved the Referee's finding of remoteness of prior offenses as mitigation in favor of the Respondent.

The Florida Bar attempted to use Respondent's suspension in New Hampshire as aggravation, a contention improperly adopted by the Referee. While the Referee found "similarities" in Respondent's conduct in the instant matter to

the conduct that gave rise to Respondent's discipline in New Hampshire (AFROR, p. 7), such a conclusion is unsupportable by the record. The Respondent's New Hampshire suspension involved the mischaracterization and handling of a client retainer; the instant matter does not involve any allegation of misconduct relating to client funds. The attempt by the Referee to invoke the New Hampshire proceeding against the Respondent as an aggravating circumstance is unwarranted and not supported by the record. The Referee found there was "a similarity between the 'earned-upon receipt' bankruptcy retainer and the fees respondent billed Mrs. Smith for future services related to the educational trust . . ." (AFROR, p. 7). There cannot possibly be any such similarity because the allegations of The Florida Bar in the instant matter do not involve financial improprieties. Accordingly, the Referee's apparent assertion that the Respondent's conduct established a pattern of behavior is also not supported by the record. This Honorable Court has consistently held, that in order for prior discipline to constitute an aggravating factor under the Standards, the ***same conduct*** must be present to establish the pattern necessary to invoke the aggravating factor (*The Florida Bar v. Germain*, 957 So 2 613 (Fla. 2007)).

The facts giving rise to the New Hampshire suspension occurred in 1991, almost 20 years ago, and the suspension was imposed in December of 1997.

Massachusetts and Florida began reciprocal disciplinary proceedings for the same conduct shortly thereafter. The Respondent was reinstated in New Hampshire in 2000 and on March 13, 2001 in Florida. The nearly 20 years since the incident took place, and the nearly 10 years Respondent has practiced without incident since his reinstatement, must be considered as significant mitigation under the Standards. The conduct alleged in the 1991 New Hampshire matter did not involve any allegations of misrepresentation or other similar conduct and was completely unrelated to the alleged conduct in the instant matter.

The Referee also apparently wishes for the Respondent to continue to be disciplined for the New Hampshire proceeding. On pages 7 and 8 of the Referee's Amended Final Report, this contention is addressed. On page 8, the following appears: "I find this course of conduct reflects poorly on Respondent's fitness to practice law. It displayed a disregard for the judicial process." Such an observation and insertion into the instant matter is unwarranted and prejudicial. Mr. Doherty accepted the findings of the New Hampshire Supreme Court and successfully completed the discipline imposed. He was reinstated to practice law in New Hampshire and was reinstated to practice law in Florida. The Referee

appears to be suggesting in this particular portion of his findings that both courts were wrong in readmitting Mr. Doherty. The respondent makes no statement with regard to the wisdom of such a position.

Standard 6.11. On page 16 of the Amended Final Report of the Referee, it is stated: "Under Standard 6.11, I find that Respondent, with intent to deceive the court, knowingly made a false statement." Absent certain circumstances, the respondent acknowledges disbarment to be the appropriate discipline under such a circumstance. The standard:

6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION

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 conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.11 Disbarment is appropriate when a lawyer:

(a) with the intent to deceive the court, knowingly makes a false statement Or submits a false document; or
(b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

However, the Referee's conclusion in this regard is simply unsupportable with reference to the record. First of all, the Referee's finding is completely silent

on which statement, or statements, of the Respondent he is basing his finding. There is simply no way to review whether this finding is an abuse of his discretion. Nevertheless, the Respondent would argue that it is such an abuse, particularly so if the Referee's frame of reference is to documents not in evidence; or matters on which the Respondent was not questioned.

POINT TWO CONCLUSION

Standard 1.1 of the *Florida Standards for Imposing Lawyer Sanctions* makes it very clear that the purpose of Bar disciplinary proceedings is to encourage attorney compliance with the Rules, deter future misconduct, and protect the public.

The record in this matter establishes that the Respondent's violations of the *Rules Regulating the Florida Bar* were ***unintentional***. In addition, it was not controverted that he complied with his client's clear wishes and properly sought to advance her interests. The evidence properly established that Mr. Doherty altered his professional practices once he learned of Bar Rule violations and will avoid future misconduct. Furthermore, there was no harm to the client or the public.

The Respondent feels the following disciplinary cases are helpful in determining the proper discipline for Mr. Doherty, none of which compel a finding that disbarment is warranted.

In *The Florida Bar v. Kramer*, 593 So 2d 1040 (Fla. 1992), Kramer was found guilty of violating Rule 1.8(a) for failing to disclose the actual nature of a transaction in which the lawyer loaned money to the client for fees and costs associated with the client's acquisition of rights to mortgage payments; and Kramer obtained a deed to client's property while the client thought it was just a mortgage. While Kramer contended that he was acting in his client's best interest, it was clear he violated the clear provisions of the *Rules Regulating The Florida Bar* relating to business dealings between a lawyer and his client. Similar to the instant matter, *Kramer* involved facts indicating the lawyer neither gave the client an opportunity to consult independent counsel, nor did he obtain the client's written consent before finalizing the transaction. Under these circumstances, this court imposed a Public Reprimand.

The Respondent also urges this court to review *The Florida Bar v. Black*, 602 So. 2d 1298 (Fla. 1992). Black was found guilty of a violation of Rule 1.8(a) for borrowing funds from the client, leaving the client completely unsecured in the transaction, failing to advise the client of his right to separate representation, promising to pay the client a usurious rate of interest, never informing the client of the illegality of the transaction, and using the client in an effort to obtain a personal loan. This Honorable court imposed a Public Reprimand.

Lastly, in *The Florida Bar v. Ticktin*, 14 So. 3d 928 (Fla. 2010), a complex set of factual circumstances was presented via which Ticktin represented multiple parties while he actively participated in the parties' business affairs. One client was actually incarcerated while Ticktin was operating, and clients lost funds as a result of Ticktin's misconduct. This Honorable Court found that Ticktin's extraordinary misdeeds were egregious, caused injury to the parties and constituted serious violations of the rules governing every Florida lawyer's professional conduct. Such misconduct warranted a ninety-one-day suspension. However, this court noted in footnote 16 of the decision:

> **Standard 4.34 provides: "Admonishment is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no injury or potential injury to a client."**

This footnote is relevant to the matter involving Mr. Doherty, as the record supports the contention that his violation of §4-1.7 of the *Rules Regulating the Florida Bar* were the product of his negligence. Furthermore, the seriously aggravating circumstances of Ticktin's conduct are simply not present in Mr. Doherty's case.

A review of the transcript of the hearings: analysis of the findings in the Preliminary Report of Referee as well as those in the Amended Final Report of

Referee; the Florida Standards for Lawyer Sanctions; and the applicable professional discipline case law, compels one certain conclusion: disbarment of the Respondent is unreasonable and the Amended Final Report of Referee should be rejected by this Honorable Court.

Point Three: The Respondent's attempt to broker annuities on behalf of his client did not constitute a "business transaction" with a client within the meaning of §1.8 of the *Rules Regulating the Florida Bar.*

The Florida Bar alleged that the Respondent violated the *Rules Regulating the Florida Bar* by engaging in a business transaction with a client without advising the client, in writing, of the desirability of seeking independent legal counsel on the transaction. The Referee found that The Bar had successfully proved this allegation against the Respondent (PROR, p. 8).

The Rule in question is as follows:

Rule 4-1.8 Conflict of Interest; Business Transactions with Client:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The Florida Bar established that the respondent sought to broker several annuities to his client, Audrey B. Smith. An investment in an annuity involves substantial documentation and paperwork, including: product brochures and disclosures; an application; suitability and other documentary items exploring whether the financial product advanced the client's financial interest. All such extensive documentation was utilized in the transaction proposed to Mrs. Smith, which was signed by her in numerous places (Ex. 14 A and B; 18A and 19I and K).

On May 22, 2006, just two months before the contemplated transactions, an amendment of the *Rules Regulating the Florida Bar* as Ordered by this Honorable Court became effective; specifically, the Rule 4-1.8(a)(2) requirement that an attorney notify a client, in writing, that the client might wish to consult with an another attorney before entering into a business transaction with the original attorney. It was admitted by the Respondent that he did not provide such a writing to Mrs. Smith.

The Respondent argues on appeal that the Referee's finding that this particular provision of the *Rules Regulating the Florida Bar* is applicable to the facts of the instant case (PROR, p.8) is erroneous and that any sanctions recommendation based on a Rule 1.8 violation is improper and must be set aside.

Factual Considerations. The disclosures provided to Mrs. Smith as part of the proposed annuity transaction were very extensive and numerous documents were acknowledged by Mrs. Smith in writing, as noted above. The Respondent argues that paragraphs (1) or (3) of Rule 4-1.8 were not violated by the Respondent in this matter, and the Referee made no specific findings with respect to the subparagraphs of the Rule, finding only a violation of the Rule in totality (PROR, pp. 8 and 9). Whereas the Respondent acknowledges that he failed to notify his client, in writing, of the desirability of obtaining independent legal counsel, he continues to argue that a threshold consideration exists before any provision of Section 4-1.8 of the *Rules Regulating the Florida Bar* can be considered applicable to the instant case: Did the facts establish that the Respondent entered into a business transaction with his client?

The Respondent argued during the trial, and continues to argue, that the legislative history of the disciplinary consideration now embodied in Rule 4-1.8, and the intent of this Honorable Court in adopting the rule language promulgated by the American Bar Association, suggests that the conduct engaged in by the Respondent ***is not*** the type of troubling lawyer conduct that the Rule seeks to regulate and prohibit. While the Referee rejected the arguments of the Respondent, some of his justification for that finding is perplexing. In his Preliminary Report of Referee, he wrote at page 13:

> **In my view, judgments that are developed solely from a cognitive premise producing conclusions of a *per se* nature are burdened with a limitation: the premise assumes functionalities in a purely theoretical sense. Such a methodology is so circumscribed as to define functionalities solely in isolation, devoid of any facts that, in the course of adjudication, could provide underpinnings from which an *ipso jure* determination could be made that discrete, even divergent, functions have, in reality, been employed in harmony so as to attain a single result, fully formed by the melding of the discrete functionalities. Therefore, it is in this sense that I find that the selling of annuities by an agent/attorney could become *ipso jure* functionally related to the practice of law.**

The Respondent is at a loss as to how the above language justifies the findings of the Referee. However, a simple review of the statute, its legislative history and some cases suggests a different finding.

The text of (a) of 4-1.8 states: "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client . . . " Accordingly, a portion of the statute requires the acquisition by the lawyer of an interest ***adverse*** to the client. Had the transactions as proposed gone forward, the respondent would have received a commission from the company issuing the index annuity, and the client would have received a guaranteed insurance policy from an insurance company licensed to transact business within the State of Florida. The commissions in an

index based annuity contract are not paid directly from the client's funds, according to expert witness testimony (TRT, p.447). The respondent functioned as an insurance salesperson and received no interest in the policy, or any ability to affect Mrs. Smith's future rights therein. Such cannot be credibly argued to constitute an adverse interest. Accordingly, a key requirement of Rule 4-1.8 is not triggered in this matter. Irrespective of his overall finding on the issue of whether a business transaction within the meaning of the Rules existed, the Referee found that the respondent ***had not*** acquired an interest adverse to his client (PROR, p.23).

There is very little case law on the existing rule as it requires a writing to advise of the desirability of seeking independent counsel, but there is substantial legislative history and commentary available on Rule 4-1.8, generally. The litigation section of the American Bar Association assembled a task force that reviewed this area of the practice of law, and the task force issued an extensive report, which is part of the basis of Rule 1.8 as adopted by the American Bar Association; and subsequently, by the Florida Supreme Court as Section 4-1.8 of the *Rules Regulating the Florida Bar*. The report is available on the Internet (***www.abanet.org/litigation/ethics/abareport.pdf***). This specific report was referenced in arguments before the Referee and, despite its critical value in

evaluating the Respondent's argument, the Referee maintained it was ". . . not necessary to apply the principles set forth therein to the underlying facts of this disciplinary proceeding . . ." (PROR, p. 14). This disregard by of the Referee of an important consideration is not proper.

The concepts and considerations present in the report suggest that the concerns the rule seeks to address are simply not present in the case involving the respondent. It would appear for the rule to be invoked, the complained of "business transaction" must involve "law-related" services, which he *Rules Regulating the Florida Bar* allow.

The predecessor statute to Rule 1.8 was Disciplinary Rule 5.7. The American Bar Association commentaries to Disciplinary Rule 5.7 (contained in the referenced task force report) provide considerable guidance to lawyers in this area:

> **The term "non-legal services which are ancillary to the practice of law" refers to those services which satisfy all or most of the following indicia: (1) are provided to clients of a law firm (or customers of a business owned or controlled by a law firm); (2) clearly do not constitute the practice of law; (3) are readily available from those not licensed to practice law; (4) are functionally connected to the provisions of legal services; (5) involve intellectual ability or learning and (2) have the potential for creating serious ethical problems (3) in the lawyer-client relationship, such as compromising the independent professional judgment of lawyers; creating conflicts of interest; threatening the clients' (or customers') expectations of confidentiality and/or causing confusion on the part of clients or customers.**

While the sale of an insurance contract would satisfy some of these provisions (2, 3 and 5), such a sale would not rise to the level of discernment the rule seeks to control. People do not go to law firms to buy insurance; and most importantly, the acquisition of an annuity is not functionally related to providing legal services. There is little (or no) potential for such a sale to compromise the lawyer's judgment, threaten confidentiality or cause confusion the mind of the client. Accordingly, the proposed purchase of annuities by Mrs. Smith should not be considered a non-legal service which is ancillary to the practice of law, and Rule 4-1.8(2) should not be applicable.

The Respondent argues that the sale of an annuity is not the type of transaction between lawyer and client which the Rule contemplates and seeks to regulate; therefore, it should be considered a "business transaction" within the scope of the Rule.

The Respondent's consistent position has been that Rule 4-1.8 is inapplicable to his disciplinary case because he believes that Rule was, and is, intended to regulate circumstances in which the lawyer is ***in business*** with the client, as opposed to an isolated transaction which is subject to regulation and control by other regulatory authorities.

This position, which the Respondent believes is fully supported by the case law, did not persuade the Referee, as he had little trouble finding a "business transaction" would have existed between Mr. Doherty and his client. In his Preliminary Report, he found "participat[ion] in a business or financial transaction (p. 11). And that " . . . the phrase 'entering a business transaction with' . . . as a matter of law . . . could, within the meaning of [Rule 1.8], include the circumstances where the lawyer engages in a sale of an annuity to that client" (p. 12). The Respondent argues that the Referee focused solely on the language of the Rule, and took no steps to probe the intent of this Honorable Court to regulate specific lawyer conduct when it adopted Rule 4-1.8. Indeed, the Referee stated that he "did not find it necessary to apply the principles set forth [in the American Bar Association Report] . . ." (PROR, p. 14).

However, the cases which address the existing rule seem to indicate the conduct which is considered problematical and accordingly subject to regulation by Rule 4-1.8 is that conduct in which a lawyer is engaged ***in business*** with a client; a relationship in which the lawyer can exploit the client by virtue of the lawyer's superior training and specialized knowledge and in turn take advantage of the client. Specifically, decisions of this Honorable Court finding a violation of

Rule 4-1.8 (a) support the notion that there must be a business transaction in which the attorney stands to gain an unfair advantage over the client for Rule 4-1.8 to be applicable.

In *The Florida Bar v. Black*, *supra*, Black was found guilty of a violation of Rule 4-1.8(a) for borrowing funds from the client, leaving the client completely unsecured in the transaction, failing to advise the client of his right to separate representation, promising to pay the client a usurious rate of interest, never informing the client of the illegality of the transaction, and using the client in an effort to obtain a personal loan. This case clearly illustrates improper attorney conduct in the sense of unfair advantage which should not go unpunished.

In *The Florida Bar v. Kramer*, *supra*, Kramer was found guilty of violating Rule 1.8(a) for failing to disclose the actual nature of a transaction in which the lawyer loaned money to the client for fees and costs associated with the client's acquisition of rights to mortgage payments; and Kramer obtained a deed to the client's property while the client thought it was just a mortgage. Again, clear improper attorney conduct is illustrated,

vis a vis the attorney's superior position, which this Honorable Court maintains must be punished.

In *The Florida Bar v. Ticktin, supra,* a set of factual circumstances was presented via which Ticktin utilized his superior knowledge and legal training in representing multiple conflicting parties while he actively participated in the parties' business affairs. One client was actually incarcerated during the misconduct, and clients lost funds as a result of Ticktin's misdeeds. This constituted conduct which this Honorable Court felt was improper and subject to discipline under several of the *Rules Regulating the Florida Bar*, including Rule 4-1.8.

However, it cannot be credibly argued that the factual circumstances present in the *Black, Kramer or Ticktin* cases, the ability to take advantage of his client in an ongoing manner, are present in Respondent's attempted sale of annuities to his client, Mrs. Audrey B. Smith.

First, no ongoing relationship would have existed between Respondent and Mrs. Smith as a result of an annuity sale. There would have been an ongoing business relationship between ***Mrs. Smith and the insurance company*** if it had issued the annuities, but not with Respondent.

Second, the possibility in the instant matter of an opportunity for Respondent to take advantage of the client is also not present. The terms of the annuity were not

subject to negotiation or alteration by Respondent, either at the time of sale, or in the future. All terms are contractually dictated by the insurance company and have been specifically authorized by the State of Florida's Commissioner of Insurance.

Respondent believes an important consideration suggesting the inapplicability of Rule 4-1.8 is the fact that the proposed transaction, the sale of an annuity, involved a contract specifically regulated and approved for sale by the State of Florida, through the auspices of the state's Commissioner of Insurance. Accordingly, there existed threshold protections for the client which could not be altered or adjusted by the Respondent in any way.

Lastly, it is clear from the record in the instant matter that Respondent fully complied with Mrs. Smith's wishes in assisting her in applying for the transfer of the annuities and this was separate and apart from his responsibilities as a lawyer.

POINT THREE CONCLUSION

As previously suggested, the sale of an insurance policy in which the lawyer functions as a broker and has no future interest in the client's rights in the policy and has no ability to influence decisions in regard thereto is simply not the type of activity which Rule 4-1.8 seeks to regulate. Accordingly, the Referee's finding that the Respondent's dealing with his client constituted a "business transaction" was erroneous and must be set aside.

CONCLUSION AND PRAYER FOR RELIEF

The Referee abused his judicial discretion by basing his recommended sanctions on information that was not in evidence; by not properly applying the Florida Standards for Imposing Lawyer Sanctions; and, by improperly concluding that § 4-1.8 of the *Rules Regulating the Florida Bar* was applicable to the facts presented. These points underscore that the Referee's recommendation of harsh discipline is unsupported by the record, and is unjustified as a matter of judicial fairness.

Accordingly, the respondent argues on appeal that this Honorable Court set aside the Amended Final report of Referee and enter a finding that the Respondent engaged in conduct in violation of § 4-1.7 of the *Rules Regulating the Florida Bar.* The Respondent prays that This Honorable Court impose discipline as suggested by previous rulings of this court: A Public Reprimand.

In the alternative, the Respondent prays that this matter be reassigned to a Referee for further proceedings consistent with the *Rules Regulating the Florida Bar*.

Respectfully submitted,

Brian Gerard Doherty, *Pro Se*

Dated: May 16, 2011

__/s/__Brian Gerard Doherty_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Respondent's Initial Brief, including Appendices A, B and C, was sent this day via United Parcel Service Second Day Delivery to: Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399.

In accordance with this Honorable Court's Administrative Order, AOSC 04-84, a copy of Respondent's Initial Brief, including Appendices A, B and C, was sent this day, via e-mail to: e-file@flcourts.org.

A true and correct copy was also sent this day via United States mail, postage prepaid, to:

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__/s/__Brian Gerard Doherty_____
Brian Gerard Doherty

CERTIFICATION OF FONT SIZE, STYLE AND VIRUS SCAN

I HEREBY CERTIFY that this brief is submitted in 14 point proportionally spaced Times New Roman font, and the computer on which this brief was prepared, as well as the actual file containing said brief, has been scanned and found to be free of viruses, by AVG Antivirus for Windows.

Dated: May 16, 2011

__/s/__Brian Gerard Doherty_____
Brian Gerard Doherty

Contents of Appendix