IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BRIAN GERARD DOHERTY

Respondent.
_____/

CASE NO. SC10-332
TFB NO. 2008-10,419(20A)

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

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

"FH" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC10-332 held on July 27, 2010 through July 30, 2010 and August 2, 2010. "SH" will refer to the transcript of the sanctions hearing before the Referee held on December 8, 2010.

"PRR" with refer to the Preliminary Report of Referee dated November 10, 2010. "RR" will refer to the Amended Final Report of Referee dated December 20, 2010.

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No. SC10-332.

Respondent's Amended Initial Brief dated May 16, 2011, will be referred to as "IB."

"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 AND FACTS

The Bar filed a complaint against Respondent on February 19, 2010. A final hearing was held on July 27, 2010 through July 30, 2010 and August 2, 2010. On November 12, 2010, after considering the evidence and arguments, the Referee issued a Preliminary Report of Referee and found Respondent guilty of violating the Rules Regulating The Florida Bar. In particular, the Referee found Respondent guilty of the business transaction clause of Rule 4-1.8(a) and guilty of the substantial risk clause of Rule 4-1.7(a)(2). PRR 14, 22, 24. No findings were made regarding Rule 4-8.4(a). A sanctions hearing was held on December 8, 2010. On December 20, 2010, the Referee recommended disbarment in an Amended Final Report of Referee, which incorporated the Preliminary Report of Referee as part of the Final Report of Referee. In order to review the complete findings of the Referee, it is necessary to refer to both the Preliminary Report of Referee and the Amended Final Report of Referee. Respondent filed a Petition for Review on February 15, 2011, requested an extension of time to file his Initial Brief, which was granted, and filed his Initial Brief on April 21, 2011. Respondent's Initial Brief was struck on April 28, 2011. Respondent filed an Amended Initial Brief on May 16, 2011.

Respondent began his law career in 1978. He was admitted in Massachusetts in June 1978 and admitted to New Hampshire in November 1978.

About nine years later, Respondent was admitted in Florida on April 6, 1987. In or about 1996, Respondent was subject to disciplinary proceedings in New Hampshire. TFB Ehx. 30. The underlying conduct in the New Hampshire disciplinary proceeding involved Respondent commingling and converting funds of bankruptcy clients, and failing to comply with a court order to disgorge funds. TFB Exh. 30 - *In re Doherty's Case*, 703 A. 2d 261 (NH 1997). In February 1991, Respondent agreed to represent the Duceys in a personal bankruptcy action. *Id.* at 262-263. He accepted a $10,000.00 non-refundable retainer towards a total fee of $15,000.00. *Id.* at 263. Upon receipt of the $10,000.00, Respondent deposited the money in his general office account, rather than into a separate client trust account, and began expending the funds for his own purposes. *Id.* The bankruptcy court required Respondent to follow certain procedures in order to accept a fee in a bankruptcy action. *Id.* Respondent failed to do so, which included failing to ask for permission to accept the $10,000.00 fee and failing to disclose the acceptance of additional post-petition fees. *Id.* In July 1991, Respondent informed the Duceys that he was relocating to Florida. *Id.* The Duceys retained new counsel. *Id.* In September 1991, Respondent petitioned for leave to withdraw from the Duceys' case. *Id.* In October 1991, Respondent filed a Motion for Allowance of Attorney's Fees Nunc Pro Tunc, claiming fees and expenses of approximately $14,290.00. *Id.* The bankruptcy court granted Respondent's motion to withdraw,

but denied Respondent's claim for fees and ordered that Respondent return the $10,000.00 to the Duceys. *Id.* In April 1992, Respondent filed his own personal bankruptcy action, which sought to disallow the $10,000.00 debt owed to the Duceys. *Id.* "The bankruptcy court held that the debt was not dischargeable and that there was 'no such things as a non-refundable, earned-upon-receipt retainer for an attorney undertaking representation of a debtor' in a bankruptcy proceeding." *Id.* (citing to *In re Ducey*, 160 B.R. 465, 473 (Bankr. D.N.H. 1993), wherein the court emphasized that Respondent failed to segregate the Duceys retainer into a separate client-trust account, and failed to account for and disgorge the retainer when ordered to do so by the court). In February 1996, Respondent disgorged the funds, almost four and a half years after the order instructing Respondent to return the $10,000.00 fee to the Duceys. *Id.* at 263.

As a result of Respondent's conduct involving the Duceys, he was suspended in New Hampshire for two years (effective December 4, 1997), in Florida for two years (effective July 3, 1998), and in Massachusetts for two years (effective April 6, 1998). On August 31, 2000, Respondent was reinstated in New Hampshire. On March 13, 2001, he was reinstated in Florida. However, Respondent was not reinstated in Massachusetts. By Order dated June 11, 2001, Respondent's application for reinstatement in Massachusetts was denied. TFB Exh. 33 - *In Re: Brian G. Doherty*, No. BD-98-002 (Mass. June 11, 2001).

Respondent petitioned for reinstatement in Massachusetts on May 5, 2000. A hearing was held on August 14, 2000 wherein testimony was heard and exhibits presented. In its Order, the Massachusetts Supreme Judicial Court stated "**the evidence as presented at the hearing establishes a pattern of lack of candor and deceit, if not outright dishonesty**." TFB Exh. 33 - *In Re: Brian G. Doherty*, No. BD-98-002, at *4 (emphasis added). The Massachusetts Court found that Respondent made misrepresentations and omissions on required forms for licensure as a securities salesperson with the National Association of Securities Dealers, Inc. Respondent's omissions and misrepresentations pertained to whether he had been disciplined or the subject of disciplinary proceedings for any state regulatory agency. The Massachusetts Court considered evidence pertaining to Respondent's licensure as an attorney, licensure as a securities salesperson, and his licensure as a financial planner. The Massachusetts Court further found that Respondent made false statements or omissions to the Certified Financial Planners Board of Standards, Inc. in 1997. Respondent also failed to disclose to many regulatory agencies a federal tax lien. The Massachusetts Court also reviewed Respondent's testimony at his reinstatement proceedings in New Hampshire and considered some of his responses to be "**misleading and deceptive at best**." TFB Exh. 33 - *In Re: Brian G. Doherty*, No. BD-98-002, at *6 (emphasis added).

In the instant case, when questioned at the sanctions hearing about his

previous dishonesty in revealing tax liens and prior suspensions, Respondent admitted that he did not disclose tax liens on his Uniform Application for Securities Industry Registration (Form U-4) in 1992 through 1995. SH 44; TFB Exh. 29. When asked at the sanctions hearing if he had learned something from failing to disclose his suspension on the Form U-4, Respondent stated: "Yes, sir I did." He went on to state:

> I learned a very, very serious and sincere lesson, that absolutely everything positively should be disclosed. It there's any question about it, it should be disclosed. Words should not be parsed, loopholes should not be sought out, escape hatches should not be looked for. You should just simply disclose everything, be candid, be honest, and let the parties make their own decision.

SH 56-57. He further confirmed that he had learned a similar lesson in relation to the denial of reinstatement by the Massachusetts Supreme Court. SH 57-59.

Despite this testimony, Respondent obtained Errors and omissions insurance for his annuity sales practice in the amount of one million dollars based on applications which reflected a negative response to the question, "Has the applicant ever had any professional license terminated or suspended?" Respondent obtained three separate policies on the basis of three false applications during the years 2006 through 2009. TFB Exh. 19B, question 13; TFB Exhs. 19S, 19T, and 19U. Respondent testified that these policies were in relation to his sales of annuity products and often are required in order to be authorized to sell certain annuities.

SH 60-61; TFB Exh. 19B. Respondent notified the insurer of a potential claim involving the attempted sale of annuities to Audrey B. Smith, which is the subject of this disciplinary proceeding. TFB Exh. 19U.

Respondent has continued to misrepresent the fact that he was suspended from the practice of law and that he had tax liens subsequent to the June, 2001 Massachusetts denial of reinstatement. These misrepresentations were identified in Exhibit TFB 34, a Stipulation and Consent Judgment entered into by Respondent and the Florida Department of Banking and Finance, in which Respondent failed to disclose prior tax liens to the State of Florida in relation to an application filed on July 16, 2001, for designation as Registered Investment Advisor. This filing was made the month after Respondent had been denied reinstatement in Massachusetts for failing to disclose tax liens and prior suspension of his law license. TFB Exh. 33.

Respondent has continued to make the same misrepresentations regarding his prior discipline, as recently as the 2008 errors and omissions applications, despite the Massachusetts opinion denying reinstatement and other state security licensure problems in Illinois and Connecticut caused by his failure to disclose prior discipline. This continued misrepresentation reveals a pattern of Respondent attempting to conceal his prior discipline and is consistent with the finding by the Massachusetts Court that Respondent has engaged in "a pattern of lack of candor

and deceit, if not outright dishonesty." TFB Exh. 33.

After the conduct involving the Duceys, but prior to the entry of discipline, Respondent moved to Florida in October 1991. TFB Exh. 30 - *In re Doherty's Case*, 703 A. 2d 261, 263 (NH 1997); FH 527-528; SH 18. Respondent became licensed as a Certified Financial Planner in 1992. TFB Exh. 30 - *In re Doherty's Case*, 703 A. 2d 261, 263 (NH 1997); FH 527-528. He began selling financial products.

Respondent met Howard and Audrey Smith in or about 1994. The Smiths became clients of Respondent, who served as a financial planner and insurance agent selling annuity products to the Smiths for many years. FH 528-532. Respondent's authority to sell financial products was solely limited to the sale of annuities and life insurance. FH 666; 725-726; SH 85-94; TFB Exh. 34. Mr. Smith died June 13, 2006. FH 542, 621; Answer ¶ 5. Respondent continued to provide services to Mrs. Smith. Audrey Smith had been diagnosed with terminal cancer. FH 90-101. Following Mr. Smith's death, Ms. Smith made several changes to her estate planning documents with the legal advice and assistance of Respondent. TFB Exhs. 2, 5, 6, 7, 8, 9, and 10. On or about August 10, 2006, a new will was created along with two trusts (the Real Estate Trust and the Educational Trust). TFB Exhs. 2, 7, and 8. On August 10, 2006, Respondent received upfront payment for both the Real Estate Trust ($16,000) and the

Educational Trust ($13,500) for legal fees and advance fees for serving as future trustee. On August 15, 2006, an amendment was made to Mrs. Smith's Restated Trust. TFB Exh. 6. The will appointed Respondent as her personal representative, and all trusts appointed Respondent as successor trustee. The Restated Trust gave Respondent, as successor trustee, "final and uncontestable authority to decide whether Mrs. Smith's estate planning methods had been successful." TFB Exh. 6; PRR 6. The Real Estate Trust instructed that annuities be purchased from the proceeds generated from the sale of Mrs. Smith's residence and gave Respondent the sole discretion to select the annuities to be purchased. TFB Exh. 7. At the time the Real Estate Trust was drafted, annuities were the only financial product Respondent held a license to sell. There was nothing prohibiting Respondent from purchasing annuities with the proceeds from himself as the selling agent, thus generating additional commissions and a financial benefit long after Mrs. Smith's death.

In addition to making changes and additions to Ms. Smith's estate planning documents, Respondent sought to exchange the annuities owned by the Smiths. In July 2006, Respondent sought to sell Conseco products to Mrs. Smith for the stated purpose of simplification of assets from six annuities to three in order to decrease the amount of documentation Mrs. Smith would have to keep track of. FH 674. On or about July 16, 2006, Respondent submitted paperwork to Conseco to

purchase three annuities. TFB Exhs. 12, 14, 14A, 14B, and 15. These annuities would have provided Respondent with a 10% commission. However, the annuities contained a chargeback provision that would have caused Respondent to forfeit and return the commission if Mrs. Smith died within one year of the issue date of the policy. FH 717-718. On or about July 28, 2006, Respondent withdrew the Conseco applications. TFB Exhs. 16 and 17. Respondent admitted that he withdrew the Conseco application, in part because of the chargeback process. FH 690-694; 717-725. A few days later, on or about August 1, 2006, Respondent submitted paperwork to purchase three annuities from Washington National, a subsidiary of Conseco. These annuities would have provided Respondent with a 7% commission, Mrs. Smith with an 8% premium bonus fully vested upon purchase of the annuities, and there was no chargeback clause upon an early demise. TFB Exhs. 18, 19A, 19B, 19C, 19G, 19I, 19J, and 19K.

At the time Respondent proposed the purchase of these annuities to Mrs. Smith, Respondent owed Conseco $86,370.54 due to prior chargebacks. FH 723-725. Conseco had been attempting to recapture commissions (i.e. chargebacks) from Respondent since 2001. In March 2006, Conseco and Respondent reached a settlement agreement in relation to the chargeback amount owed. The agreement provided Respondent with authority to sell Conseco products provided that he pay $10,000.00 up front and agreed to have 50% of any commissions generated be

applied towards paying down the debt owed to Conseco. If Respondent did not make commissionable sales for six months or carried a balance as of March 1, 2008, interest would begin to accrue at a rate of 12% per annum and the debt would be due in full. Annuity sales from Conseco or Washington National would have paid down the debt because Washington National was a wholly-owned subsidiary of Conseco. TFB Exh. 41 at 1-13, 20-21; TFB 42 at 61-62; TFB Exh. 45.

In or about July 2006, Mrs. Smith's health was declining rapidly. She was terminally ill with cancer. Respondent was fully aware of Mrs. Smith's health status. FH 695-699, 150-152, 282-286. Respondent set forth on a course to "secure whatever monetary advantage that was available for him from her assets prior to her death, the most significant of which, given his past experience with [chargebacks] against prior commissions, was the vesting of commissions for annuities sold to Mrs. Smith and/or her estate." PRR 19-20. Mrs. Smith died on August 19, 2006. Answer ¶ 7-9. She died before the purchase of annuities could be consummated, and the pending sale was stopped due to her death. TFB Exh. 35.

In his dealing with Mrs. Smith, Respondent assumed multiple and simultaneous roles that were "interweaving and interlocking" and "restrictive and manipulatable." PRR 21. Additionally, Respondent made "his own personal

pecuniary interest[s] become just as paramount as his client's." PRR 21. Respondent sought to make "a profit through self-serving activities." PRR 21. The representation Respondent gave to Mrs. Smith was exposed to a risk or danger that was materially limited by Respondent's own interests in violation of Rule 4-1.7(a), Rules Regulating The Florida Bar. Respondent admitted that the benefits he received or may have received from his services provided to Mrs. Smith amounted to a personal interest. FH 749-751.

Moreover, Respondent engaged in a business transaction with his client, failed to disclose, in writing, that he would receive a commission and the contract agreement with Conseco to her, and failed to obtain the required written disclosures under the Rules Regulating The Florida Bar. Respondent admitted that he did not make any written disclosures to his terminally ill client about his financial interest in the proposed transactions and has asserted he is not required to make such disclosure. FH. 717-718; Answer ¶ 90, 91. Respondent admitted that he violated Rule 4-1.8 by failing to advise his client in writing to seek independent counsel before proceeding with the proposed transactions. FH 661-662, 672-673; Answer ¶ 21, 119, 120. "The selling of annuities by an agent/attorney could become *ipso jure* functionally related to the practice of law." PRR 13. Respondent would have received a commission for the sale of the annuities had they been consummated. "The fact that the sale was never consummated [is]

immaterial." PRR 14. Mrs. Smith had a desire to work with Respondent as her attorney and financial planner. However, this desire does not negate Respondent's responsibility to comply with the Rules Regulating The Florida Bar. Respondent engaged in a business transaction with Mrs. Smith and failed to comply with the written disclosure requirements of Rule 4-1.7 and Rule 4-1.8, Rules Regulating The Florida Bar.

Respondent had a poor relationship with Debra Quinn, one of the two daughters of Audrey B. Smith. FH 162-164, 774-775. He thought the estate planning changes prepared by him might lead to litigation challenging the changes from the son of Audrey B. Smith's deceased husband. FH 746-748. Respondent recognized that the circumstances created a perception of undue influence over Audrey B. Smith and recognized that it was a "sensitive" situation in which everything needed to be done "appropriately." FH 664-666, 746-747. Despite these concerns, Respondent failed to make the required disclosures.

The Referee found Respondent guilty of the business transaction clause of Rule 4-1.8(a); and guilty of the substantial risk clause of Rule 4-1.7(a)(2). PRR 14, 22, 24. Respondent is contesting the Referee's findings of fact as to Rule 4-1.8 and the recommended sanction of disbarment. IB 43. The Referee recommended disbarment in accordance with the Standards of Imposing Lawyer Sanctions and relevant case law. RR 5.

SUMMARY OF THE ARGUMENT

The Referee found Respondent Guilty of the Business Transaction clause of Rule 4-1.8(a) and Guilty of the Substantial Risk clause of Rule 4-1.7(a)(2). PRR 14, 22, 24. The record supports the Referee's findings. Disbarment is the appropriate sanction in the instant case. The Referee found four aggravating factors and no mitigating factors.

Respondent created new and modified existing estate planning documents of his terminally ill client and sought to sell her one million dollars of annuities in a company with a history of financial instability. Respondent also drafted trust documents that gave him unlimited authority to buy and sell only annuities on behalf of the trust, upon the death of his client. Respondent was only licensed to sell annuities. Respondent did not obtain informed consent in writing.

Respondent was suspended from the practice of law in New Hampshire for two years (effective December 4, 1997). He received reciprocal discipline in Florida for two years (effective July 3, 1998) and in Massachusetts for two years (effective April 6, 1998). Respondent was reinstated in New Hampshire on August 31, 2000 and in Florida on March 13, 2001. He was denied reinstatement in Massachusetts on June 11, 2001 due to a pattern of misleading and deceptive conduct.

STANDARD OF REVIEW

The party seeking review of the Referee's findings must demonstrate that the report is "erroneous, unlawful, or unjustified." Rule 3-7.7(c)(5); *Fla. Bar v. Centurion*, 801 So. 2d 858 (Fla. 2000). "A party challenging the Referee's findings carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record clearly contradicts those conclusions." *Centurion*, 801 So. 2d at 861. Pointing to contradictory evidence is not enough to overturn a Referee's findings on appeal. *Fla. Bar v. Head*, 27 So. 3d 1 (Fla. 2010).

This Court has held that the Referee is in a better position to evaluate the demeanor and credibility of witnesses. *Fla. Bar v. Marable*, 645 So. 2d 438, 442 (Fla. 1994) The Supreme Court "neither re-weighs the evidence in the record nor substitutes its judgment for that of the Referee so long as there is competent substantial evidence in the record to support the Referee's findings." *Id.* The Referee's findings should be upheld "unless clearly erroneous or lacking in evidentiary support." *Id.* Respondent has failed to meet his burden.

This Court gives greater scrutiny to a Referee's recommendation of discipline than to a Referee's findings of fact. *Fla. Bar v. Cox*, 794 So. 2d 1278, 1281 (Fla. 2001). Nevertheless, this Court will typically not disapprove of a Referee's recommended discipline, provided that the recommended discipline has a reasonable basis in existing case law. *Id.*, at 1281-1282.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS OF GUILT ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD

A Referee's findings of fact regarding guilt carry a presumption of correctness that will be upheld unless clearly erroneous or without support in the record. If the Referee's findings are supported by competent, substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Rue,* 643 So. 2d 1080, 1082 (Fla. 1994). The party contending that the referee's findings of fact and conclusions of guilt are erroneous "carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." *Id.* (citations omitted). Respondent has alleged numerous errors in the Referee's findings of fact, but has failed to meet this burden as to any of the alleged errors. Each of the Referee's findings of fact and recommendations as to guilt is strongly supported by the record. The Referee properly found by clear and convincing evidence that Respondent breached the following Rules Regulating The Florida Bar: the business transaction clause of Rule 4-1.8(a) and the substantial risk clause of Rule 4-1.7(a)(2). PRR 14, 22, 24. Respondent is challenging the Referee's findings as to Rule 4-1.8(a).

Respondent argues that the Referee based his findings and recommendations on "materials that were not in evidence." IB 5, 7. Specifically, Respondent states the Referee erred by including and relying on Exhibits 19S, 19T, and 19U "in their entirety," rather than for the limited purposes for which they were admitted when recommending disbarment. IB 9-10. Exhibits 19S, 19T, and 19U are applications from 2006 through 2009 for errors and omissions insurance. They were admitted during the sanctions hearing. Respondent obtained errors and omissions insurance for his annuity sales practice in the amount of one million dollars based on applications wherein a negative response was indicated to the question, "Has the applicant ever had any professional license terminated or suspended?" See TFB Exhs. 19S, 19T, and 19U. These exhibits were admitted in relation to the portions of the exhibits that were testified to. TR 80; RR 2, n. 3. Respondent oversimplifies the admissibility of these exhibits by saying that "the *only* testimony elicited from Respondent on Exhibits 19S, 19T, and 19U were questions dealing with Mr. Doherty's suspension from the practice of law and that he did not prepare the applications." IB 10; TR 64-85. Testimony was also elicited from Respondent based on the historical facts that can be retrieved from the documents, such as applicable dates, name of the insurance company, the coverage period, and the amount of coverage. TR 64-85. The Referee's findings and commentary outlines the evidence from the December 8, 2010 sanctions hearing, which included

testimony and documents relating to Respondent's errors and omissions insurance coverage. RR 9-14. Outlining and detailing the historical facts in the Report of Referee was not improper.

The emphasis placed on Exhibits 19S, 19T, and 19U is made clear in the Referee's Report. RR 9-14. The Referee stated:

> Respondent testified at the December 8, 2010, sanctions hearing that he did not prepare the applications; and, while agreeing that an insurance policy was issued based upon the application, he testified that he did not know of any error and that the company had not sent it to him to ask him to sign it.
>
> I reject Respondent's testimony. I do so for several reasons. First, a detailed examination of the historical facts contained in the three documents circumstantially shows by clearing and convincing evidence that the person who originated the particularized information relative to the applicant could only have been the Respondent.
> ***
> ... it is necessary to conclude that an individual with knowledge of the particulars must have supplied the minutiae in these applications over the course of three years. The conclusion is manifest that Respondent had to have been the source of the running details of his sole practitioner's business. Respondent did not say or imply that absolutely none of the details of the information was incorrect. Nor did he assert or imply that absolutely none of the details of the information came from him.
>
> Second, Respondent sent an email dated, July 10, 2008, to his carrier's representative. The email supplemented the renewal application for coverage from 08/01/2008 to 08/01/09.... Pertinent to the current issue as to the question, whether it was

Respondent who was supplying the carrier with the details stated in the several applications, is the fact that Respondent specifically stated in the email that he had gone on-line to renew his policy. ... By going on-line, it is readily explainable that each of these applications should contain no signature of the Respondent's. ... Submission of the application does not necessarily rest on the signing of a document. ... Casting away responsibility for the contents of the application on the basis that he did not sign the document failed to give due meaning to the probative value of the misrepresentation for the purposes of these disciplinary proceedings. ... Respondent's sworn disavowals of responsibility for the three applications for professional liability coverage were, in my view, dismissive of the gravamen of the circumstances.

***

Respondent's own words then, together with the content of the applications themselves and the context of the proceedings, support a finding, which I make, that Respondent did not testify truthfully in the course of the December 8, 2010, sanctions hearing when he denied that he was the individual who three times falsely reported "No" to the questions, "Has the application ever had any professional license terminated or suspended?" Respondent has presented himself as wholly absolved of responsibility. I find that such an approach missed the mark as to the nature and substance of these proceedings. Respondent's decision to misrepresent whether there had been prior suspensions has been demonstrated, in my view, to have been willful and intentional. The fact that he made misrepresentations of a comparable character to securities-related professional organizations in the 1990s is highly probative that he did so in these three applications.

I conclude that Respondent's sworn denial severely damages his credibility. I also find that his sworn denial reflects poorly on Respondent's fitness to practice law as it displays a disregard for the judicial process, not too dissimilar to the

> disregard that I find having occurred when Respondent failed, for more than four years, to comply with the un-overturned order of disgorgement by the New Hampshire bankruptcy judge in the Ducey matter.

RR 9-14. The Referee not only made factual findings, he made significant credibility findings. RR 9-14. Such determinations should not be disturbed on appeal if there is competent substantial evidence in the record to support them. These findings are directly linked to the recommended sanction of disbarment.

The Referee had the ability to evaluate Respondent's demeanor, the consistency of his statements at the disciplinary hearing, and other evidence presented at the disciplinary hearing. The Referee found Respondent to be untruthful, that he lacked regard for the judicial process, and that he exhibited conduct reflecting poorly on his fitness to practice law. RR 5-15. Because the record reflects substantial competent evidence to support the Referee's conclusions, the Referee's recommendation should be approved.

II. THE REFEREE'S RECOMMENDATION OF DISBARMENT IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD, AND IS CONSISTENT WITH THE APPLICABLE STANDARDS FOR IMPOSING LAWYER SANCTIONS AND THE APPLICABLE CASE LAW

Respondent has a history of deceptive conduct. In December 1997, Respondent was suspended from the New Hampshire Bar for commingling and converting funds of bankruptcy clients, and failing to comply with a court order to

disgorge funds. TFB Exh. 30 - *In re Doherty's Case*, 703 A. 2d 261 (NH 1997). The New Hampshire Supreme Court characterized Respondent's conduct as "display[ing] unyielded contempt for the judicial system as evidenced by his steadfast refusal to disgorge the fee." *Id.* at 450. Respondent also received as reciprocal discipline a two year suspension in Florida and a two year suspension in Massachusetts. After the conduct involving the Duceys, but prior to the entry of discipline, Respondent moved to Florida and began selling financial products in October 1991. TFB Exh. 30 - *In re Doherty's Case*, 703 A. 2d 261, 263 (NH 1997); FH 527-528; SH 18. Respondent was licensed as a Certified Financial Planner in 1992. TFB Exh. 30 - *In re Doherty's Case*, 703 A. 2d 261, 263 (NH 1997); FH 527-528. He had several encounters with state agencies regarding lack of disclosure of prior tax liens and prior discipline. In Florida, Respondent agreed to restrict his ability to sell financial products to life insurance and annuities only. It had been alleged that Respondent had failed to disclose his prior suspensions. FH 726; TFB Exh. 33.

Respondent applied for reinstatement in New Hampshire, which was approved effective August 30, 2000. He was also reinstatement in Florida, effective March 13, 2001. Respondent applied for reinstatement in Massachusetts; however, shortly after the Florida reinstatement, the Massachusetts Supreme Court issued a scathing opinion denying Respondent's reinstatement. TFB Exh. 33 - *In*

Re: Brian G. Doherty, No. BD-98-002 (Mass. June 11, 2001). In its Order, the Massachusetts Supreme Judicial Court stated, "**the evidence as presented at the hearing establishes a pattern of lack of candor and deceit, if not outright dishonesty**." TFB Exh. 33 - *In Re: Brian G. Doherty*, No. BD-98-002, at *4 (emphasis added). The Massachusetts Court found that Respondent made misrepresentations and omissions on required forms for licensure as a securities salesperson with the National Association of Securities Dealers, Inc. Respondent's omissions and misrepresentations pertained to whether he had been disciplined or the subject of disciplinary proceedings for any state regulatory agency. The Massachusetts Court considered evidence pertaining to Respondent's licensure as an attorney, licensure as a securities salesperson, and his licensure as a financial planner. The Massachusetts Court further found that Respondent made false statements or omissions to the Certified Financial Planners Board of Standards, Inc. in 1997. Respondent also failed to disclose to many regulatory agencies a federal tax lien. The Massachusetts Court also reviewed Respondent's testimony at his reinstatement proceedings in New Hampshire and considered some of his responses to be "**misleading and deceptive at best**." TFB Exh. 33 - *In Re: Brian G. Doherty*, No. BD-98-002, at *6 (emphasis added).

The fact that Respondent was reinstated in two jurisdictions without his deceptive conduct coming to light further underscores a pattern of deceptive

conduct. The Massachusetts Bar discovered deceptive conduct apparently unknown to the New Hampshire Bar or to The Florida Bar. The opinion by the Massachusetts Supreme Court denying reinstatement is a starting point in analyzing Respondent's fitness to practice law. When this conduct is considered together with Respondent's conduct involving Audrey B. Smith and his deceptive insurance applications in 2006 through 2009, disbarment should be the presumptive discipline.

Respondent applied to become a registered investment advisor on July 16, 2001. SH 85-93; TFB Exh. 34. This was one month after the Massachusetts opinion was issued denying reinstatement based on Respondent's failure to disclose tax liens and his prior suspensions. SH 85-93; TFB Exh. 34.

Respondent testified at the sanctions hearing to the effect that he had learned a lesson from the Massachusetts opinion denying reinstatement and became more open and forthcoming and committed to making full disclosure of prior discipline. SH 56-59. Contrary to this testimony, Respondent had obtained errors and omissions insurance for his annuity sales practice in the amount of one million dollars based on applications wherein a negative response was indicated to the question, "Has the applicant ever had any professional license terminated or suspended?" Respondent obtained three separate policies on the basis of three false applications during the years 2006 through 2009. TFB Exh. 19B, question 13; TFB

Exhs. 19S, 19T, and 19U. Respondent testified that these policies were in relation to his sales of annuity products and often are required in order to be authorized to sell certain annuities. SH 60-61; TFB Exh. 19B. Respondent notified the insurer of a potential claim involving the attempted sale of annuities to Audrey B. Smith, which is the subject of this disciplinary proceeding. TFB Exh. 19U. During the sanctions hearing, Respondent was often evasive in responding to questions about his prior misrepresentations involving failure to disclose tax liens and his prior discipline. SH 63-72.

Respondent has continued to make the same misrepresentations regarding his prior discipline, as recently as the 2008 errors and omissions applications, despite the Massachusetts opinion denying reinstatement and other state security licensure problems in Illinois and Connecticut caused by his failure to disclose prior discipline. This continued misrepresentation reveals a pattern by Respondent of attempting to conceal his prior discipline. This is consistent with the finding by the Massachusetts Court that Respondent engaged in "a pattern of lack of candor and deceit, if not outright dishonesty." TFB Exh. 33.

The Referee correctly concluded that disbarment is the appropriate sanction for Respondent's misconduct. The Referee's recommended sanction has a reasonable basis in the case law and Florida Standards for Imposing Law Sanctions. The recommended sanction of disbarment should be approved.

Applicable Standards

In recommending disbarment, the Referee relied on the applicable Standards for Imposing Lawyer Sanctions. RR 16-17. Under the totality of the facts and circumstances of Respondent's conduct, the Referee found that the "record demonstrate[s] by clear and convincing evidence that Respondent has failed to discharge his professional duties to his client, Audrey B. Smith, the public, the legal system, and the legal profession properly." The Referee made factual determinations based on his observation of Respondent throughout the proceedings. Such determinations should not be disturbed on appeal if there is competent substantial evidence in the record to support them. *Rue*, *supra* at 1082.

In making his findings, the Referee applied the Standards, and lists the following in his Final Report of Referee:

> **4.3 Failure to Avoid Conflicts of Interest.** The Referee did not indicate a particular subsection of this standard. Instead, the Referee indicated that "Respondent has failed to avoid a conflict of interests [sic]" and refereed to his findings in his Preliminary Report of Referee relative to Rules 4-1.7 and 4-1.8.
>
> **6.1 False Statements, Fraud, and Misrepresentation.** The Referee specifically noted 6.11, where disbarment is appropriate when a lawyer has the intent to deceive the court and knowingly makes a false statement.
>
> **7.0 Violations of Other Duties Owed as a Professional.** The Referee specifically noted 7.1, where disbarment is appropriate when a lawyer intentionally engaged in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for himself, and causes potentially serious injury to the public or the legal system.

RR 16.

The Referee also made findings as to aggravating and mitigating factors. The Referee found four aggravating factors. First, the Referee found that Respondent had prior disciplinary offenses. RR 16; Standard 9.22(a). Second, the Referee found that Respondent acted with a selfish motive. RR 16; Standard 9.22(b). Third, the Referee found that Respondent refused to acknowledge the wrongful nature of his conduct. RR 16; Standard 9.22(g). The Referee specifically stated that, "Respondent's sworn sanctions-hearing disavowal of the representations to professional liability carriers severely undermines his other sanctions-hearing testimony wherein he asserted that he has acknowledged, and learned from, the wrongful nature of his past conduct." RR 16. Last, the Referee found that Respondent had substantial experience in the practice of law having been admitted in two jurisdictions since 1978 and in Florida since 1987. RR 31; Standard 9.22(i).

The Referee found no mitigating factors, but made specific comments as to the inapplicability of two mitigating factors - 9.32(d) and 9.32(e). The Referee found that any assertion with respect to Respondent making a "timely and good faith effort to rectify the consequences of misconduct to be severely undercut." RR 17; Standard 9.32(d). He also found "that any assertion from Respondent that there has been a cooperative attitude in these proceedings to be severely

weakened." RR 17; Standard 9.32(e). The record evidence supports the Referee's findings that these mitigating factors either did not apply or were severely undercut or weakened. Respondent testified that he had acknowledged, and learned from, the wrongful nature of his past conduct. SH 56-59. After the prior discipline, however, Respondent falsely completed three separate applications for errors and omissions coverage by answering "no" to the question of whether he ever had any profession license terminated or suspended. SH 63-72; TFB Exhs. 19S, 19T, and 19U; RR 13. His testimony during the sanctions hearing about these applications was willful and intentional, and showed a lack of appreciation for the severity of his conduct and the proceedings. RR 13. The record evidence demonstrates that Respondent has a history of making comparable misrepresentations. Respondent was not forthright with securities-related professional organizations when he failed to disclose tax liens and judgments on his Uniform Application for Securities Industry Registration (Form U-4), and failed to disclose that he was the subject of a then-pending complaint before the New Hampshire Supreme Court. RR 8; TFB Exh. 33; TFB Exh. 29.

Respondent argues that Standards 9.32(d) and 9.32(e) should be applicable. For Standard 9.32(d), Respondent points to affidavits submitted from clients since Mrs. Smith attesting to the changes in his office policies. IB 19-20. Respondent alleges that his subsequent efforts to comply with Rule 4-1.8, by sending letters to

recent annuity clients suggesting that they may seek independent counsel, is sufficient to meet this mitigating factor. These letters to recent annuity clients did not necessarily disclose the material risks related to the transaction and may still not be in compliance with the Rules. For example, there was no mention of the possibility of surrender charges for early withdrawal. Compliance with the Rules of conduct is expected of every member of The Florida Bar. Compliance with the Rules should not be considered a bonus to mitigate misconduct. Additionally, Respondent fails to indicate that he was sued by Mrs. Smith's daughter, Debra Quinn. After acrimonious litigation, Respondent reached a settlement with Mrs. Smith's family agreeing to no longer be the Personal Representative of Mrs. Smith's estate. SH 139-140.

For Standard 9.32(e), Respondent argues that he was cooperative in the disciplinary proceedings. This Court explained in *Fla. Bar v. Herman*, 8 So. 3d 1100 (Fla. 2009), that "the mitigating factor of cooperation in the Bar discipline process contemplates something above and beyond the normal cooperation expected of every member of the Bar." *Id.* at 1107. Respondent must show "facts to demonstrate exceptional disclosure or cooperation" on his part. *Id.* at 1106. Respondent has not provided evidence of anything more than expected normal cooperation. The facts admitted by Respondent could have easily been established by the Bar with or without his cooperation, namely that he failed to obtain the

written disclosures required under the Rules.

For Standard 9.32 (e), Respondent further states "that any violations were unintentional." IB 20. He also stated in his Initial Brief, and throughout the proceedings, that he "did not intend to violate" the Rules and that he was unaware of the written disclosure requirements of Rule 4-1.8(a). Ignorance of the Rules is no defense to the charged conduct. Rule 3-4.1 provides that, "Every member of The Florida Bar ... is charged with notice and to know ... the standards of ethical and profession conduct prescribed by this court." R. Regulating Fla. Bar 3-4.1. Respondent's assertion of negligence due to a lack of knowledge of the Rules is not well-founded. Respondent did not need to know, as he asserts, his actions specifically violated a Rule Regulating The Florida Bar. Although the rules are silent as to the requisite level of intent needed to violate the specific rules for which Respondent has been found guilty, instructive language can be found in *Fla. Bar v. Smith*, 866 So. 2d 41, 46 (Fla. 2004). In *Smith*, the Court recognized that the determinative factor is "whether the attorney deliberately or knowingly engaged in the activity in question." The "I did not know it was wrong" defense has clearly been rejected by this Court. As noted in the recent opinion *Fla. Bar v. Adorno*, 2011 WL1496478 (Fla. 2011) (not final until time for rehearing expires), this Court stated:

> Adorno argues that he did not intend to engage in misconduct because he … did not know he was violating any disciplinary

> rules by his misconduct and, thus, he should not be subject to a disciplinary sanction. As we have discussed, members of The Florida Bar are responsible for knowing the Rules Regulating the Florida Bar. See, R. Regulating Fla. Bar 3-4.1(every member of The Florida Bar is charged with notice and held to know the standards of ethical and professional conduct prescribed by the Court); see also *Fla. Bar v. Dubow*, 636 So. 2d 1287, 1288 (Fla. 1994) (recognizing that it is well established that ignorance of the law, especially by lawyers in disciplinary proceedings, is no excuse).

Id. at 15. In *Adorno*, the Court went on to state:

> This same standard holds true in case law, which recognizes that a violation of Rule 4-8.4(c) requires intent. It is well established that 'in order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing.' *Fla. Bar v. Fredericks*, 731 So. 2d 1249, 1252 (Fla. 1999) (stating that the motive behind the respondent's action was not the determinative factor; rather, the issue was whether the respondent deliberately or knowingly engaged in the activity in question).

Id. at 15. In this case, the record clearly establishes that Respondent knowingly engaged in the activity in question. Respondent was well aware of the delicate nature of his conduct in changing or attempting to change the estate plan and investments of Audrey B. Smith. Respondent was concerned that litigation might result. FH 746-748. Yet he failed to obtain the necessary written consent and disclosures. Respondent knew of existing conflicts. He knew he had an outstanding chargeback issue with Conseco and had to pay down the debt he owed

within a specified time or be subject to interest and payment due in full. TFB Exh. 45; FH 717-725; Answer ¶ 90-91; TFB Exh. 41-redacted; TFB Exh. 45. Respondent knew he did not disclose this debt and chargeback issue to Mrs. Smith. FH 717-718; Answer ¶ 90-91. Given Respondent's contract arrangement with Conseco, Respondent knew that if a policy was issued with a provision for chargebacks and the terminally ill Mrs. Smith died prematurely under the terms of the policy, that he would have to repay the commission. Respondent was in a similar situation to repay chargebacks to Conseco and sought to avoid those consequences by canceling the Conseco applications and reapplying for Washington National annuities within days before Mrs. Smith died. Respondent's actions satisfy the element of intent because his actions were deliberate and knowing. Thus, the Referee appropriate applied the Standards to Respondent's misconduct that involve knowing misconduct, Standards 4.32 and 7.1.

Respondent argues other that other mitigating factors should be applicable – remorse and remoteness of prior offenses – but fails to point to any record evidence to support his assertion. Record evidence exists supporting the inapplicability of each of these factors. The absence of the required written disclosures contributed to the filing of a caveat by Mrs. Smith's daughter, Debra Quinn Spencer, and led to divisive litigation. It also created a bitter family situation. FH 136-146. Louise Moore Moskowitz, Mrs. Smith's other daughter,

testified that the situation had a "dreadful impact" on the entire family. FH 148. After acrimonious litigation, Respondent reached a settlement with Mrs. Smith's family agreeing to no longer be the Personal Representative of Mrs. Smith's estate. SH 139-140. Additionally, the arrogant and callous treatment of Deborah Quinn Spencer by Respondent after the death of Audrey B. Smith reveals a lack of effort to rectify the consequences of his violation of the Rules. SH 135-139. Further, case law supports the inapplicability of remorse as a mitigating factor. In order for remorse to apply, Respondent must do more than admit that he made a mistake. *Fla. Bar v. Nunes*, 734 So. 2d 393, 397 (Fla. 1999). Respondent states that he testified "openly and truthfully" in the proceedings and admitted he was remorseful. IB 24. Respondent fails to point to any evidence in the record to support his claim. Additionally, Respondent has long-engaged in a pattern of deceptive conduct that belies heartfelt remorse.

Respondent argues that because there was no actual harm to Mrs. Smith the recommendation for disbarment is unjustified. IB 9. Respondent fails to acknowledge that if he had complied with the Rules, the perception of unfair dealing would have been diminished. The failure to follow the Rules and obtain adequate disclosure led to bitter litigation challenging Respondent's appointment as personal representative. Respondent ignores that the bitter litigation regarding the caveat was encouraged by his failure to obtain informed consent. SH 140-145.

Additionally, Respondent fails to acknowledge that the Standards for Imposing Lawyer Sanctions apply to actual or *potential* harm. In this case, Mrs. Smith could have been harmed by Respondent's conduct had she lived and had the annuity applications been processed. Additionally, Respondent had unfettered authority to churn the sale of annuities through the Real Estate Trust. Respondent proposed trading the Grade A annuities (NACOLAH) in exchange for annuities from a company (Conseco/ Washington National) that had recently emerged from bankruptcy and had a history of financial instability. TFB Exh. 44 at 7; TFB Exh. 44A; TFB Exh. 44B; FH 248-249, 262-265, 317. The Rules Regulating The Florida Bar are geared to protect the public; actual harm, although present in this case, is not a requirement for this protection to be invoked.

In his Initial Brief, Respondent argues that the mitigating factor of imposition of other penalties and sanctions under Standard 9.32(k) should apply and was not addressed by the Referee. IB 22-23. To support his argument, Respondent attaches Appendix C to his Initial Brief, which is a March 25, 2011 letter from the Certified Financial Planner Board of Standards, Inc. This argument and Appendix C is improper and should not be considered. The Final Report of Referee is dated December 20, 2010. The Referee did not have this evidence before him and the record evidence is devoid of any argument by Respondent that Standard 9.32(k) should apply. Respondent notes in his Brief that "the letter

appearing as Appendix C was issued after the proceedings below were concluded." IB 22. Respondent now attempts to put before this Court evidence that was not presented to or considered by the Referee, which is wholly inappropriate.

Applicable Case Law

The recommended sanction is also consistent with applicable case law. Although the Referee did not specify any particular decisional law of this Court in making his recommendation, he affirmatively stated that his recommendation was made "after considering all the evidence, arguments of counsel, and relevant legal authorities." RR 5. The Florida Bar and Respondent submitted memoranda to the Referee regarding appropriate discipline and sanctions, and included decisional case law of this Court. The relevant case law supports disbarment as the appropriate sanction for Respondent's misconduct. Respondent has demonstrated that he is unworthy of practicing law and should be disbarred. Disbarment is necessary to protect the public from Respondent's incompetent and unethical representation. *Fla. Bar v. Korones*, 752 So.2d 586 (Fla. 2000).

The Referee considered uncharged conduct, including the false statements in the errors and omissions policies in determining Respondent's fitness to practice law. In *Fla. Bar v. Vaughn*, the Court stated that "evidence of unethical conduct 'not squarely within the scope of the Bar's accusations' can be considered due to its relevancy 'to the question of the respondent's fitness to practice law and thus

relevant to the discipline to be imposed.'" 608 So. 2d 18, 21 (Fla. 1992) (citing to *Fla. Bar v. Stillman*, 401 So. 2d 1306, 1307 (Fla. 1981)).

A violation of the conflict of interest rules alone frequently results in a rehabilitative suspension. However, in recent years, the Court "has moved towards stronger sanctions for attorney misconduct." *Fla. Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2003). Due to the extremely serious nature of Respondent's misconduct, his prior discipline, and several aggravating factors, the Referee recommended that Respondent be disbarred. RR 5. This sanction is supported by the Rules, case law and extensive aggravating factors. The Referee found that Respondent has demonstrated he failed to avoid conflict of interests and failed obtain the required written disclosures necessary to represent a client when a conflict of interest exists. PRR 7, 14, 22.

The Court has disbarred attorneys with conduct similar to Respondent's. In *Fla. Bar v. Simonds*, 376 So. 2d 853 (Fla. 1979), Simonds petitioned for leave to resign in lieu of discipline stemming from six pending disciplinary cases. In two of the cases, Simonds entered into business transactions "with clients without properly advising them of their differing interests, their legal rights and of the almost strict fiduciary standard imposed upon attorneys who enter into such business transactions with their clients which has long been the rule in Florida." *Id.* at 854. Simonds obtained $20,000.00 unsecured investment loans each from

two of his clients, but "failed to advise either that he was the substantial owner of the business" in which they loaned investment money. *Id.* at 853. Simonds also lost personal funds in this transaction. Simonds' resignation has the same effect as disbarment. "Disbarment includes disbarment by consent, resignation in lieu of disbarment, and reciprocal disbarment." Fla. Stds. Imposing Law. Sancs. 2.2 cmt (2000).

Respondent's conduct is similar to that of Simonds in that Respondent failed to advise Mrs. Smith of his interests, which differed from hers. Additionally, Respondent did not lose any personal funds. In fact, Respondent stood to gain personal funds through commissions on the three annuity applications, and on future annuities purchased from the proceeds of sale of Mrs. Smith house pursuant to the terms of the Real Estate Trust. Respondent stood to gain a reduction of his debt to Conseco and a deferment of the due date. Respondent's conduct was deliberate, manipulative, and restrictive.

Respondent urges that an admonishment or a public reprimand is the appropriate discipline. Respondent cites two cases to support his assertion that public reprimand is the appropriate discipline. These cases are distinguishable. In *Fla. Bar v. Kramer*, 593 So. 2d 1040 (Fla. 1992), this Court imposed a public reprimand for violating Rules 4-1.7(b) and (c), and 4-1.8(a). Kramer loaned a client $2,500.00 in order for the client to pay off some fees associated with

property in Kentucky. *Id.* In exchange for the funds, Kramer has his client execute a deed instead of providing a mortgage and note. *Id.* The client, who had limited reading ability, thought he was getting a mortgage. *Id.* Kramer did not explain the terms of the transaction to his client and failed to disclose the true nature of the transaction. *Id.* The Referee recommended that Kramer receive a private reprimand (admonishment), but the court disagreed. *Id.* The Court noted that an admonishment "is only appropriate in cases where this Court finds an attorney's misconduct to be 'minor.'" *Id.* at 1041 (referring to Rule 3-5.1(b)). This Court stated:

> Business dealings between lawyers and clients are fraught with conflict-of-interest problems, as this case clearly illustrates. Human nature makes such conflicts virtually inevitable notwithstanding a lawyer's good intentions. When a lawyer deals with a client in a business transaction, the lawyer must be scrupulous in disclosing the exact nature of the transaction and in obtaining the client's consent in writing. **Failure to comply with these safeguards normally warrants a greater punishment than a reprimand**.

Id. at 1041 (emphasis added). Deference was given to the Referee's evaluation of the underlying facts. No mitigating or aggravating factors are noted in *Kramer*. Also, there is no determination as to whether Kramer had any prior discipline. Respondent's conduct herein was not "minor" as he suggests. In this case, the Referee concluded that Respondent's conduct to warranted disbarment. Respondent has prior discipline involving dishonest conduct. The Referee found

several aggravating factors and no mitigating factors. Thus, unlike *Kramer*, disbarment is the appropriate sanction for Respondent's misconduct.

Respondent incorrectly cites to *Fla. Bar v. Black*, 602 So. 2d 1298 (Fla. 1992), as a case wherein a public reprimand was imposed. IB 29. In *Black*, the Court **did not impose a public reprimand** as represented by Respondent in his Initial Brief. IB 29. The court imposed a 60-day suspension. Black borrowed funds from a client, left the client unsecured in the transaction, promised to pay an illegal usurious rate of interest, and failed to advise the client to seek independent legal advice. He ultimately repaid the client, who suffered no loss. Black was found guilty of violating Rules 3-4.3, 4-1.7(b), 4-1.8(a), and 4-8.4(d). Aggravating factors included: selfish motive, vulnerable client, and substantial experience in practice of law. Mitigating factors included: no prior disciplinary record, timely good faith effort to make restitution or rectify consequences of misconduct, remorseful, cooperative in disciplinary proceedings, and no intent to deprive client of property or deceive client. The referee recommended a 91-day suspension. The Court imposed a 60-day suspension in light of the extensive mitigation. Although Black took advantage of his client and clear violations of the Rules existed, the Court imposed a suspension of 60 days instead of 91 days because "the extensive mitigation as found by the referee militates against a severe punishment." *Id.* at 1299. Unlike Black, Respondent has prior discipline and no mitigating factors

were found. Further, Respondent's conduct was far more egregious than that of Black. He took advantage of a terminally ill client, ingratiated himself into her financial affairs, and sought to benefit even after her death. Neither suspension, like that imposed in *Black*, nor a public reprimand is appropriate for Respondent's conduct. Respondent should be disbarred.

Contrary to Respondent's assertion, his conduct deserves a harsher penalty than those imposed in the cases cited in his Initial Brief. Respondent argues that the substance of the Complaint involved conduct where he was not acting in an attorney capacity. IB 38. Respondent further characterizes his conduct as helping Mrs. Smith accomplish her financial and estate planning goals. FH 610-624. It is The Florida Bar's position that the conduct of Respondent selling annuities to his client was, at a minimum, directly related to the practice of law and subject to the Rules Regulating The Florida Bar.

The Florida Bar submits, as well-established by case law, that "conduct while not acting as an attorney can subject one to disciplinary proceedings." *Fla. Bar v. Della-Donna*, 583 So. 2d 307, 310 (Fla. 1989). As this Court stated in *Della-Donna*, "even in personal transactions and when not acting as an attorney, attorneys must 'avoid tarnishing the professional image or damaging the public.'" *Id.* (citing to *Fla. Bar v. Hooper*, 507 So. 2d 1078 (Fla. 1987)). Further, professional ethics is not a coat that can be "checked at the door" regardless of the

role or function an attorney is performing. *Della-Donna*, *supra* at 310. Respondent ignores the principal set forth by this Court nearly 40 years ago, that "an attorney is an attorney is an attorney." *Fla. Bar v. Bennett*, 276 So. 2d 481, 481 (Fla. 1973).

Respondent performed all services for Mrs. Smith under the umbrella of being an attorney. Extra trust was given to him because of his professional designation as an attorney. Respondent testified that Mrs. Smith trusted him, that she saw no need to seek other counsel, and that advising her to consult independent counsel "would have been a futile effort." FH 661-662, 672-673. As the Referee concluded,

> ... compliance with the rules of discipline that address the making of disclosures and obtaining written client-consents is not a matter of following a client's wishes. Such compliance must, under all circumstances, comport with a lawyer's obligations under the rules, regardless of a client's desires or directions. A client could never overcome an attorney's obligations under the rules.

PRR 14.

Even now, Respondent refuses to acknowledge that he has engaged in unethical conduct and refuses to acknowledge the severity of his misconduct. Respondent attempted to sell annuities to his terminally ill client, knowing that she had a very short life expectancy. Respondent failed to disclose to Ms. Smith the essential terms of the transaction, including his financial interest in obtaining a

commission from the sale. Respondent's conduct falls within the parameters of Rule 4-1.8(a), which prohibits an attorney from engaging in a business transaction with a client unless the transaction is fair and reasonable to the client, the required written disclosures are made, and informed consent is obtained.

III. REFEREE PROPERLY FOUND THAT RESPONDENT ENGAGED IN A BUSINESS TRANSACTION WITHIN THE MEANING OF RULE 4-1.8

Respondent argues that the Referee erred in finding that he engaged in a business transaction in violation of Rule 4-1.8. The arguments made by Respondent in his Initial Brief are the same that were made by Respondent in his Motion to Dismiss, during the final hearing, and in his Written Closing Argument. These arguments were properly rejected by the Referee. Respondent claims that he did not violate Rule 4-1.8 and should be found not guilty. Respondent bases his argument on the Bar not meeting a threshold requirement under Rule 4-1.8 that he "engaged in a business transactions" with Mrs. Smith. His argument turns on his belief "that the sale of any annuity is not the type of transaction between [a] lawyer and client [that] the Rule contemplates and seeks to regulate." IB 38. Respondent continues to argue "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 clients, as opposed to an isolated transaction which is subject to regulation and control by other regulatory authorities." IB 38.

Respondent interprets Rule 4-1.8 to require an attorney to be "in business" with a client in order for the disclosure requirements under subparts (a)(1), (a)(2), and (a)(3) to apply. Respondent also mixes into his argument his assertion that he did not violate Rule 4-1.8 because he did not acquire an adverse interest, which Respondent claims is also a threshold requirement for there to be a violation of the Rule. Specifically, Respondent states "a portion of the statutes requires the acquisition by the lawyer of an interest *adverse* to the client." IB 35. Contrary to Respondent's assertion, acquiring a pecuniary interest adverse to a client is not a threshold requirement necessary to trigger the applicability of the Rules.

Rule 4-1.8(a) reads in the alternative: "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...." R. Regulating Fla. Bar 4-1.8(a) (emphasis added). Respondent misconstrues the terms of the Rule and argues as if the "**or**" in Rule 4-1.8 had been replaced by "**and**." To impose upon the clearly stated terms of the Rule a requirement that the Rule only applies if a lawyer is "in business with a client and acquires an adverse interest" is at odds with the plain language and simple terms of the Rule. Respondent spends a large portion of his Initial Brief addressing the adverse interest prong of the rule, which is irrelevant to the issues on appeal. Respondent mistakenly argues that a violation of the rule requires a violation of business transaction clause and the adverse

interest clause. The Rule may be violated by the business transaction clause alone. It is not necessary for this Court to find a violation of the adverse interest clause of Rule 4-1.8 to uphold the Referee's finding that Respondent violated Rule 4-1.8 by engaging in a business transaction with a client. Although, the Bar alleged that Respondent violated both prongs of this Rule, the Referee only found Respondent guilty of the first prong of the Rule – entering into a business transaction with a client. PRR 14. The Bar is not challenging the Referee's finding of no adverse interest and makes no further comments about this prong of the Rule in this Answer Brief.

The Referee properly found that Respondent entered into a business transaction with Mrs. Smith. The Commentary to Rule 4-1.8 provides guidance concerning the applicability of the Rule:

> A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client. The requirements of subdivision (a) must be met even when the transaction is not closely related to the subject matter of the representation. **The rule applies to lawyers engaged in the sale of goods or services related to the practice of law.**

R. Regulating Fla. Bar 4-1.8 cmt (emphasis added). Respondent cites to a report published by the ABA as support for his argument that the sale of annuities by a lawyer to a client is not a business transaction subject to Rule 4-1.8(a). See *Lawyers Doing Business With Their Clients: Identifying and Avoiding Legal and*

Ethical Dangers, American Bar Association (2001). Contrary to Respondent's assertion, the Report supports a conclusion that by selling annuities to Ms. Smith, Respondent provided a law-related service subject to the Rules. Respondent's sale of annuities to Ms. Smith meets most if not all of the indicia listed in the Report and cited by Respondent in his Initial Brief. IB 37. In addition, the Report cites specific examples of analogous "law-related services," including providing title insurance, **financial planning**, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, etc. ABA Report, at p. 61 (emphasis added). Respondent conducted financial planning services, estate planning services, and legal services to Mrs. Smith through his company, Doherty Professional Association. The Referee found "that the selling of annuities by an agent/attorney could become *ipso jure* functionally related to the practice of law." PRR 13. The roles of Respondent as attorney, Certified Financial Planner, and annuity salesman were inextricably intertwined. The Referee found "that the multiple roles simultaneously assumed and executed by Respondent to be interweaving and interlocking" and that these roles were "restrictive and manipulatable." PRR 21.

The commission that Respondent would have received is clearly indicative of a business transaction. Respondent would have received a commission if the transaction had been completed. He would also have been able to obtain additional

commissions by acting as the trustee and insurance agent to purchase the fixed annuities as required by the Real Estate Trust. Insurance salesmen, such as Respondent, are in the business of making commission. Annuities may only be sold through a licensed agent under Florida law. To characterize the selling of annuities or attempted sale of annuities as not being a business transaction defies common sense and the terms of the Rule.

Respondent points to a number of cases where an attorney was found to have engaged in a business transaction with a client. IB 39-42. His argument seems to assert that conduct described in these cases is the only way that Rule 4-1.8 could be applied. The Referee appropriately rejected this argument by stating "just because an authority declared x to be a proper application of law, [does not mean] that the authority intended necessarily to declare that x is the only application of that law." PRR 13 (emphasis added). The Referee found Respondent's interpretation "that the selling of annuities by an insurance agent, who happened to be an attorney as well," is not functionally related to the practice of law to be "unnecessarily limited." PRR 13.

Respondent's assertion that the proposed sale of annuities is unrelated to the practice of law and therefore not regulated conduct is contradicted by his testimony to the effect that the proposed transactions were intended to further the estate planning goals of Audrey Smith. FH 523-524, 547-561, 584. The fixed annuities

that Respondent was required to purchase pursuant to the terms the Real Estate Trust were explicitly made part of the estate planning documents he drafted as the lawyer for Audrey Smith. The estate planning provided by Respondent as the lawyer were part and parcel of the proposed annuity purchases promoted by Respondent as the annuity salesman. The duplicity of the argument asserted by Respondent is underscored by his simultaneous assertion that the proposed transactions were an essential part of the estate planning legal services he provided to Audrey Smith and the contradictory assertion that the proposed transactions were unrelated to the practice of law. FH 523-524, 547-561, 584.

The Referee properly found that Respondent entered into a business transaction with Mrs. Smith under Rule 4-1.8(a). PRR 14. Respondent argues that the Referee made a blanket finding of a Rule 4-1.8(a) violation and did not make specific findings as to the exemption and disclosure provisions contained in the subparts of Rule 4-1.8(a). IB 34. Respondent further argues that he did not violate Rule 4-1.8(a)(1) and (a)(3). Respondent is incorrect. Not only did the Referee make specific findings of fact in the Preliminary Report of Referee, Respondent also made admissions in relation to subparagraphs (a)(1) and (a)(3). In his findings of fact, the Referee found that "no written documentation of any sort, containing attributes of any type, in the nature of those prescribed by Rule 4-1.8(a) was obtained by Respondent from Mrs. Smith." PRR 7. In finding that Respondent

violated Rule 4-1.8(a), the Referee further found that Mrs. Smith's desire to solely work with Respondent in managing her affairs was immaterial. PRR 14. Specifically, the Referee stated

> ... compliance with the rules of discipline that address the making of disclosures and obtaining written client-consents is not a matter of following a client's wishes. Such compliance must, under all circumstances, comport with a lawyer's obligations under the rules, regardless of a client's desires or directions. A client could never overcome an attorney's obligations under the rules.

PRR 14. Additional record evidence establishes that Respondent did not comply with the written disclosures outlined by the Rule in subparts (a)(1), (a)(2), and (a)(3). Respondent made several admissions and gave testimony pertinent to this topic. Respondent did not advise Mrs. Smith, in writing, to seek independent legal counsel. IB 34; Answer ¶ 21, 119, 120; FH 661-662, 672-673. At the final hearing, Respondent stated that it "would have been a futile effort" to advise Mrs. Smith, in writing, to seeking independent legal counsel. FH 661. Respondent did not make written disclosures to his terminally ill client about his financial interest, the commission rate and the chargeback agreement he had with Conseco,in the proposed transactions; and he asserted he was not required to make such disclosure. Answer ¶ 90, 91; FH 717-718.

As shown by the record evidence, pursuant to Rule 4-1.8(a) (3), Respondent was required to disclose the following information in writing to Audrey B. Smith,

and to obtain her signature on the disclosure, the following information:

1. The fact that Respondent would receive a commission from the sale of the Conseco/Washington National annuities and the amount of the commission. If the exact amount of commission was unknown, then the approximate range of the anticipated commission rate. FH 717-718; Answer ¶ 90, 91.

2. The fact that there was no limitation on Respondent's ability to sell annuities and receive a commission from the sale of the Real Estate Trust annuities and the general range of applicable commission rates for the sale of annuities. TFB Exh. 5. Respondent admitted there was no such disclosure. FH 740-741.

3. That Respondent had entered into a settlement agreement, dated March 2006, agreeing to pay Conseco the amount of $86,370.54, and that the amount owed would be reduced by fifty percent of commission earned by Respondent on any Conseco product sold. TFB Exh. 41-redacted; TFB Exh. 45; FH 717-725.

4. In the event that Respondent did not sell Conseco products for a six month period, that the entire amount of money owed would become due and payable. In that Respondent did not sell other Conseco products subsequent to the March 2006 agreement, the entire amount of $86,370.54 would have become due and payable to Conseco in September 2006. TFB Exh. 41-redacted; TFB Exh. 45; FH 717-725.

5. The fact that Respondent recommended withdrawing the Conseco annuity application, in part, because he would receive no commission in the event Audrey B. Smith died within one year of the issuance of the applied for annuities. FH 690-694, 717-725.

6. The material risks involved in the transaction including:

a. The annuities being exchanged were A+ rated and the replacement Conseco/ Washington National annuities were less than investment grade and rated from B++. FH 248-249, 262-265; TFB Exhs. 44A, 44B.

b. Conseco/ Washington National had recently emerged from bankruptcy and had a history of insolvency. TFB Exh. 44 at p. 7.

c. The potential impact of renewed financial instability of Conseco/ Washington National upon annuity holders. TFB Exh. 44A; FH 317.

7. The available alternatives to the proposed transactions including:

a. not exchanging annuities;

b. authorizing financial products other than annuities for the real estate trust investment;

c. including language in the real estate trust to prohibit Respondent from profiting from the purchase of annuities and to prohibit churning of annuities.

The terms of the Rules are duplicative and these same disclosures are also required

to be confirmed in writing pursuant to Rule 4-1.7 and the rest of Rule 4-1.8.

The Referee's findings are supported by competent substantial evidence in the record. Respondent ignores this evidence and points to other evidence in the record which he claims supports his contention that he did not engage in a business transaction with Mrs. Smith and did not violate Rule 4-1.8(a). Pointing out conflicting evidence, however, is not enough. The party challenging the referee's findings of fact must demonstrate that the Referee's findings were not supported by substantial competent evidence. Respondent did not and could not meet that burden.

The Referee had the ability to evaluate Respondent's demeanor, the consistency of his statements at the disciplinary hearing, and other evidence presented at the disciplinary hearing. The Referee was also able to consider the evidence Respondent now argues was not properly considered. After considering all of these factors, the Referee concluded that Respondent engaged in a business transaction in violation of the "business transaction clause of Rule 4-1.8(a)." PRR 14. Therefore, because the record reflects that substantial competent evidence supports the Referee's conclusions, this Court should approve the Referee's findings of fact.

CONCLUSION

The Florida Bar respectfully requests that this Court approve the Referee's findings of fact and recommendation that Respondent be disbarred from the practice of law, and assess the costs of these proceedings against the Respondent.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by UPS Next Day Air #1Z E32 77W 22 1000 2179 to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to **Brian Gerard Doherty, Respondent,** 161 Fox Den Circle, Naples, Florida 31404; and a copy by regular U. S. mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-2300, all this ____ day of _____, 2011.

_____

Henry Lee Paul
Bar Counsel

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

_____

Henry Lee Paul
Bar Counsel