IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JON DOUGLAS PARRISH,

Respondent.

_____/

Supreme Court Case
No. SC15-1988

The Florida Bar File
No. 2014-10,156 (20B)

ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

Florida Standards for Imposing Lawyer Sanctions

SYMBOLS AND REFERENCES

Jon Douglas Parrish, Respondent, will be referred to as "Respondent." The Florida Bar, Complainant, will be referred to as "The Florida Bar" or as "the Bar." The referee will be referred to as "Referee." Additionally, "Rule" or "Rules" will refer to the Rules Regulating The Bar. "Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

"RR" will refer to the Report of Referee entered on November 15, 2016, followed by the appropriate page number (e.g., RR 10). References to specific pleadings will be made by title. "TR" will refer to the transcript of the trial before the Referee, followed by the volume, the appropriate page number, and line number (e.g., TR I, P 100, L 1).

"TFB Exh." will refer to The Florida Bar's exhibits admitted during the final hearing, followed by the appropriate exhibit number (e.g., TFB Exh. 1). "R. Exh." will refer to Respondent's exhibits admitted during the final hearing, followed by the appropriate exhibit number (e.g., R. Exh. 1).

"IR" will refer to the Index of Record.

"IB" will refer to the Initial Brief dated March 21, 2017, filed by Respondent.

STATEMENT OF THE CASE AND OF THE FACTS

This proceeding relates to Respondent's representation of Ben Bergaoui and Spruce River Ventures, LLC, on various matters beginning approximately March 3, 2010. RR 3-14; TFB Exh. 1. Spruce River is a Florida limited liability company controlled by Bergaoui. RR 3; TFB Exh. 1; TR I, P 110, L 6-8, P 113, L 20-24; TR II, P 227, L 17-20.

In approximately May 2010, Bergaoui (on behalf of Spruce River) signed an agreement with Respondent (on behalf of his firm), related to the terms of the representation (the "Lamborghini Agreement"). RR 3-4; TFB Exh. 2. Under the terms of the Lamborghini Agreement, Bergaoui was to confer a security interest in a Lamborghini in favor of Respondent's firm in the amount of $30,000. RR 4; TFB Exh. 2. Bergaoui was then to market the vehicle for a period of 90 days in an effort to sell the car for a price in excess of $30,000. RR 4; TFB Exh. 2. In such event, the firm would be paid $30,000 pursuant to its security agreement, with Bergaoui to retain any proceeds above $30,000. RR 4; TFB Exh. 2.

The Lamborghini Agreement also contained an additional forced sale provision beyond the security agreement. In the event that Bergaoui did not sell the vehicle within 90 days, Bergaoui was required to deliver possession of the Lamborghini to the firm. RR 4; TFB Exh. 2. Respondent's firm would then have

the right to market and sell the vehicle. RR 4; TFB Exh. 2. If the vehicle was sold by the firm, the firm would keep all the proceeds of the sale and, in its sole discretion, either 1) credit Bergaoui's account in the amount of the sale for current and future legal fees, or 2) credit Bergaoui's account in the amount of $80,000. RR 4; TFB Exh. 2. No disclosures pursuant to Rule 4-1.8(a) were made by Respondent prior to entering into the Lamborghini Agreement. RR 4; TFB Exh. 2; TR I, P 117, L 3-10; TR II, P 300, L 21-25, P 301, L 1-21. Notwithstanding the clear written terms of the Lamborghini Agreement, the firm did not fully enforce it. RR 4; R. Exh. 7; TR I, P 172, L 8-12; TR III, P 413, L 7-25, P 414, L 1-11, P 415, L 10-22. The Referee recommended that Respondent be found guilty of violating Rule 3-4.3, Rule 4-1.5, and Rule 4-1.8(a) based on the allegations of Count I. RR 4-5, 14. Respondent has sought review of the Referee's recommendation. IB 18-24.

Respondent's legal representation included substituting in as counsel for Bergaoui and Spruce River in litigation brought by Ennex Handels GES.M.BH. RR 5; TR I, P 113, L 25, P 114, L 1-8, P 159, L 3-9; The Ennex Handels case was civil litigation arising out of a contract dispute. RR 5; TR I, P 119, L 5-20, P 120, L 11-15, P 161, L 14-24; TR II, P 227, L 10-25, P 228, L 1-12. Count II involved allegations of misconduct arising out of Respondent's handling of the Ennex

Handels case. RR 5; IR 1; TR I, P 122, L 12-21. The Referee did not recommend any findings of guilt on Count II, and Respondent did not seek review of Count II. RR 5-6, 14; TR II, P 312, L 6-25, P 313, L 1-25, P 314, L 1-25, P 315, L 1-18.

Respondent's representation also included representing Spruce River in litigation against Sandra A. Cotton, as Trustee, et al., in civil litigation in Charlotte County, Florida. RR 6-14; R. Exh. 44, 74; TR I, P 122, L 22-25, P 123, L 1-5; TR II, P 260, L 4-16. The Cotton case involved claims for specific performance and money damages arising out of a contract for the sale of real property. RR 6; R. Exh. 44, 74; TR I, P 122, L 22-25, P 123, L 1-2, P 154, L 15-24; TR II, P 260, L 4-16. The real property consisted of seven parcels owned by the various defendants, many of whom were elderly and extended family members of one another. RR 6, 7; R. Exh. 74; TR I, P 95, L 4-14, P 125, L 12-22; TR III, P 427, L 2-19, P 428, L 9-15, P 482, L 8-25. The litigation had been initiated in 2004; Respondent substituted in as counsel for Spruce River in April 2010. RR 6; TFB Exh. 14, 15; R. Exh. 44; TR I, P 153, L 24-25, P 154, L 1-4. Count III is based on Respondent's misconduct in handling the Cotton case. RR 6-14.

On April 8, 2011, one of the defendants in the Cotton case wrote to the court and advised that another of the defendants, Louise Mckamey, had passed away the previous day. RR 7; TFB Exh. 16. Copies of the letter were sent to the attorneys

of record in the Cotton case, including Respondent. RR 7; TFB Exh. 16, 41; TR III, P 429, L 4-18. No action was taken by Respondent in response to receipt of the notice. RR 7; TFB Exh. 17, 18; R. Exh. 87; TR III, P 430, L 10-25, P 432, L 3-24. On May 24, 2012, another defendant filed a motion to dismiss the pending complaint, with prejudice, pursuant to Fla. R. Civ. P. 1.260(a), based on the failure to substitute a new defendant for the deceased defendant. RR 7; TFB Exh. 17, 18; R. Exh. 44; TR 432, L 3-11. Respondent then filed a motion to substitute parties related to three defendants who had passed, including Mckamey. RR 7; R. Exh. 44; TR III, P 433, L 8-25, P 434, L 1-16. The court denied Respondent's efforts to substitute defendants as untimely. RR 7; TFB Exh. 17, 18; TR III, P 435, L 16-21. The case settled (after Spruce River obtained successor counsel to replace Respondent) prior to an appellate decision on the issue. RR 7; TFB Exh. 33; R. Exh. 44; TR III, P 437, L 4-11.

In July 2011, an issue arose regarding the taxes against three of the seven parcels at issue in the Cotton case. RR 8-9; R. Exh. 55; TR I, P 123, L 3-22; TR II, P 260, L 17-24; TR III, P 460, L 4-18. The owners of the parcels had failed to pay the real estate taxes, and the properties were scheduled to be transferred by tax deed. RR 8-9; R. Exh. 55; TR II, P 260, L 17-24; TR III, P 349, L 23-25, P 350, L 1-22. Respondent loaned $150,000 to the owners of those three parcels (two

married couples, the Shepards and the Alstons). RR 9; TFB Exh. 19, 20, 28; TR I, P 93, L 1-17, P 104, L 18-25, P 123, L 3-25, P 124, L 1-14, P 125, L 13-25; TR II, P 302, L 1-6, P 309, L 19-25, P 310, L 1-10. The loan was evidenced by a note and mortgage encumbering the affected properties. RR 9-10; TFB Exh 19, 20; TR 1, P 93, L 1-17, P 94, L 3-5. In addition, Respondent insisted that his client, Spruce River, subordinate its interest in those parcels to the interest of Respondent's mortgage. RR 9; TFB Exh. 21; TR I, P 94, L 15-25, P 95, L 1-3, P 124, L 3-25, P 125, L 1; TR II, P 260, L 4-12, P 268, 6-14, P 303, L 19-25, P 304, L 1-12; TR III, P 463, L 15-25. All documentation for the transaction was prepared by attorney John White, who had previously consulted with Respondent regarding the tax deeds. RR 9, 10; TFB Exh. 19, 20, 21, 41; R. Exh. 55; TR I, P 92, L 7-21, P 93, L 1-17, P 94, L 3-5, 15-25, P 95, L 1-3; TR II, P 303, L 19-25, P 304, L 1-12; TR III, P 466, L 17-23, P 480, L 1-7. No written disclosure was made to Spruce River or Bergaoui of the advisability of seeking independent counsel or of whether Respondent was representing Spruce River in the transaction. RR 10, 11; TFB Exh. 19, 20, 21; TR I, P 124, L 15-25, P 125, L 1-11; TR II, P 304, L 13-25, PP 305-308, P 309, L 1-18. Respondent assigned his interest in the note, mortgage, and subordination agreement to an entity controlled by him. RR 10; TFB Exh. 19, 20, 21, 34; TR II, P 310, L 21-25, P 311, L 1-6. That entity initiated

foreclosure proceedings on the three parcels against the Shepards, the Alstons, and Spruce River. RR 10; TFB Exh. 36; TR II, P 310, L 21-25, P 311, L 1-6.

Respondent attempted to negotiate a settlement of the Cotton case. RR 12, 13; TFB Exh. 23; R. Exh. 19, 20; TR III, P 355, L 3-12, P 368, L 3-6, P 444, L 8-25, P 445, L 1-7. Although never fully executed, a potential settlement agreement was drafted, circulated, and partially executed. RR 12; TFB Exh. 23; TR I, P 132, L 19-25, P 133, L 1-3; TR II, P 271, L 21-25, P 272, L 1-8; TR III, P 357, L 6-25, P 358, L 1-22, P 362, L 4-6, P 450, L 7-14, P 451, L 7-12. The Settlement Agreement provided for the creation of a new Florida limited liability company to be owned by Respondent's firm, Bergaoui, and several of the defendants in the Cotton case. RR 12; TFB Exh. 23; TR I, P 128, L 13-25; TR III, P 349, L 6-18, P 355, L 9-22. The new entity would substitute into the litigation for its various participants and seek to obtain the entire tract for development. RR 12; TFB Exh. 23; TR III, P 444, L 8-25, PP 445-446, P 447, L 1-15. The terms of the Settlement Agreement gave Respondent co-equal decision-making responsibility with his client, gave Respondent an ownership interest in the litigation, and constituted a business transaction Respondent and his client. RR 12, 13; TFB Exh. 23; TR I, P 125, L 13-25, P 126, L 1-2, L 14-25, P 127, L 1-17; TR III, P 446, L 16-19, P 450, L 15-21. No written disclosures required by Rule 4-1.8(a) were made regarding

the Settlement Agreement. RR 13-14; TFB Exh. 23; TR III, P 480, L 8-25; P 483, L 9-15.

While the settlement agreement was being circulated, another defendant, not a proposed party to the settlement agreement, learned of the proposed settlement and about the mortgage loan between Respondent and the Shepards and Alstons. RR 11, 13; TFB Exh. 25; TR I, P 129, L 1-14; P 274, L 18-25, P 275, L 1-4. In response, Respondent sent a proposed affidavit to Bergaoui for Bergaoui to execute under oath. In the proposed affidavit, Bergaoui was to swear that Respondent had advised him of the advisability of seeking independent counsel, but that Bergaoui deemed such consultation unnecessary. RR 11, 13; TFB Exh. 24, 25; TR I, P 130, L 11-25, P 131, L 1, 12-25, P 132, L 1-10; TR III, P 453, L 16-25, P 454, L 1-25, P 455, L 1-13. Bergaoui then sought legal advice from Brad Bryant, an independent attorney. RR 13; TFB Exh. 27, 29; R. Exh. 20; TR I, P 132, L 2-18, P 188, L 20-24; TR III, P 455, L 21-25, P 456, L 1-3, L 22-25, P 457, L 1-3, P 483, L 16-24. Thereafter, Respondent's representation of Bergaoui and Spruce River ended. RR 13; TR III, P 457, L 21-25, P 458, L 1-9.

The Referee recommended that Respondent be found guilty of violating Rule 3-4.3, Rule 4-1.1, Rule 4-1.2, Rule 4-1.3, Rule 4-1.8(a), Rule 4-1.8(e), and

Rule 4-1.8(i) on Count III. RR 14, 15. Respondent has petitioned for review of those recommendations. IB 24-40.

The final hearing was conducted on October 13 and 14, 2016, in Collier County, Florida. Respondent had filed 14 motions for summary judgment, but declined to argue 10 of his motions. IR 45, 46, 47, 48, 49, 53, 54, 55, 56, 57, 58, 59, 60, 61; TR I, PP 12-58. After the presentation of the evidence, at Respondent's suggestion, the parties agreed to submit written closing arguments and proposed findings for the Referee. TR III, P 332, L 6-16; P 488, L 16-20. The Referee issued his Report on November 15, 2016, in which he made his recommendations as to guilt and recommended that Respondent be suspended from the practice of law for one year. RR 14-15, 16. Respondent timely petitioned for review of the recommended findings of guilt and the proposed sanction.

STANDARD OF REVIEW

A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. *Florida Bar v. Forrester*, 656 So. 2d 1273 (Fla. 1995), quoting *Florida Bar v. Marable*, 645 So. 2d 438 (Fla. 1994). On review, this Court neither reweighs 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.* at 42. The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the evidence in the record clearly contradicts the conclusions. *Florida Bar v. Nicnick*, 963 So. 2d 219, 222 (Fla. 2007).

A referee's recommended sanction in an attorney disciplinary proceeding is persuasive, but this Court has the ultimate responsibility to determine the appropriate sanction. *Florida Bar v. Kossow*, 912 So. 2d 544, 546 (Fla. 2005). A referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *Florida Bar v. Sweeney*, 730 So. 2d 1269 (Fla. 1998); *Florida Bar v. Lecznar*, 690 So. 2d 1284 (Fla. 1997). A referee's findings of mitigation and aggravation are presumed to be correct and are

upheld unless they are clearly erroneous or not supported by the record. *Florida Bar v. Del Pino*, 955 So. 2d 556, 560 (Fla. 2007).

SUMMARY OF ARGUMENT

The Referee's recommended findings of guilt as to Count I should be accepted by this Court. The forced sale provision of the Lamborghini Agreement was a business transaction requiring compliance with Rule 4-1.8(a), but Respondent failed to comply. The Lamborghini Agreement also provided for an improper fee because it determined attorney compensation based on improper factors. By entering into the Lamborghini Agreement, Respondent's violated the Rules. Subsequent conduct may be mitigating, but does not undo his violations.

The Referee's recommendations of guilt as to Count III should also be accepted by this Court. His recommendations regarding lack of competence and lack of diligence for Respondent's failure to handle the death notice are well supported by competent, substantial evidence. Respondent's efforts to evade responsibility by trying to limit his responsibility to that of a supervisory attorney is contrary to the Referee's findings and the evidence.

The Referee correctly found that the mortgage loan (including subordination agreement) violated several provisions of Rule 4-1.8. The Referee's finding that the transaction constituted financial assistance to a client in violation of Rule 4-1.8(e) is supported by competent, substantial evidence and should be accepted by this Court. The fact that the money was paid to third parties instead of the client

does not undermine the Referee's finding. Careful analysis of the text and structure of Rule 4-1.8(i) demonstrates that the transaction also constitutes a proprietary interest in litigation in violation of that rule.

The Referee correctly found that Respondent did not comply with Rule 4-1.8(a) to get his client's informed written consent to the mortgage loan transaction. The Referee's finding that no independent legal advice was recommended or provided is supported by competent substantial evidence and should be upheld. Even if independent legal advice had been recommended, Respondent still fell short of compliance. Full compliance is required by Rule 4-1.8(a).

The Referee's findings of guilt as to Rule 3-4.3 are supported by competent, substantial evidence. Those findings of guilt should be accepted by this Court, in addition to the specific rule violations found under Chapter 4.

The Referee's recommended sanction of a one-year suspension is well-supported by both the Florida Standards for Imposing Lawyer Sanctions and relevant case law. Respondent's argument that an admonishment is appropriate should be rejected by this Court, just as it has previously rejected an admonishment for similar misconduct in the past. More serious discipline is appropriate for the serious misconduct at issue in this proceeding.

The fact that the Report of Referee was drafted by Bar Counsel is not a violation of Respondent's due process. Even if such a procedure were potentially problematic, Respondent waived any objection because he suggested the procedure followed by the parties.

ARGUMENT

THE REFEREE CORRECTLY FOUND THAT RESPONDENT VIOLATED RULE 4-1.8(a) AND RULE 4-1.5 BASED ON THE FORCED SALE PROVISION OF THE LAMBORGHINI AGREEMENT.

In Count I, the Referee recommended that Respondent be found guilty of violating Rule 3-4.3 (general misconduct), Rule 4-1.5 (excessive or improper fee), and Rule 4-1.8(a) (conflict of interest – business transaction with a client). RR 3-5, 14. These findings were supported by competent, substantial evidence. Accordingly, this Court should accept the Referee's findings.

Count I related to the Lamborghini Agreement, which was part of the overall fee relationship between Respondent and his client. RR 3-4; TFB Exh. 2; TR I, P 114, L 12-25, P 115, L 1-9, TR II, P 248, L 22-25; TR III, P 399, L 23-25, P 400, L 1-5, P 424, L 4-9. Specifically, the forced sale provision of the Lamborghini Agreement violated the Rules Regulating The Florida Bar. The terms of the forced sale provision are clearly set forth in the Lamborghini Agreement. If Bergaoui failed to sell the vehicle within 90 days, then the firm would have the right to market and sell the vehicle. RR 4; TFB Exh. 2. In such event, the firm would keep the proceeds of the sale and, in its sole discretion, credit Bergaoui with either the proceeds of the sale or $80,000. RR 4; TFB Exh. 2. Thus, if the firm sold the vehicle for more than $80,000, it could credit Bergaoui with only $80,000 and

retain all amounts over $80,000 as a windfall. RR 4; TFB Exh. 2. If the firm sold the vehicle for less than $80,000, it was only required to credit Bergaoui for the actual sale price. RR 4; TFB Exh. 2. Thus, the agreement was one-sided in that it created an opportunity for the firm to receive a windfall, but protected the firm against any risk. This provision is a business transaction between attorney and client because it involves the possible transfer of nonmonetary property for a specific maximum price to the firm. R. Regulating Fla. Bar 4-1.8(a), cmt. Attorneys must meet the requirements of Rule 4-1.8(a) prior to entering into such agreements with their clients. Both Respondent and Bergaoui testified that the requirements of Rule 4-1.8(a) were not met prior to entering into the Lamborghini Agreement. RR 4; TR I, P 117, L 3-10; TR II, P 300, L 21-25, P 301, L 1-21.

In his Initial Brief, Respondent claimed that Rule 4-1.8(a) did not apply to the Lamborghini Agreement because the commentary to the rule states that the rule does not apply to "ordinary fee agreements." IB 18. *Id*. But the Lamborghini Agreement was no ordinary fee agreement. RR 4-5; TFB Exh. 2. The involuntary sale provision allowed the firm to accept Bergaoui's Lamborghini in lieu of cash for legal fees. The comment on which Respondent relies also specifically notes that the requirements must be met when the lawyer accepts nonmonetary property as payment for all or part of a fee. *Id*. In this instance, under the clear language of

the Lamborghini Agreement, the firm was entitled to keep the car or sell it at any price in exchange for a fee credit no greater than $80,000. This provision is precisely the type of provision in a fee agreement which requires compliance with Rule 4-1.8(a) .

Respondent also argues that his failure to comply with Rule 4-1.8(a) is excused because he never enforced the provisions of the Lamborghini Agreement. IB 24. This argument ignores the clear language of the rule which prohibits an attorney from *entering* into an agreement covered by the rule. R. Regulating Fla. Bar 4-1.8(a). Respondent's later decision not to fully enforce the Lamborghini Agreement may be relevant as mitigation, but it does not undo Respondent's guilt.

The Referee also correctly found that the Lamborghini Agreement violated Rule 4-1.5, which prohibits improper fees. RR 14. The forced sale provision of the Lamborghini Agreement provided for an improper fee. Respondent's compensation was not related to any of the factors which are appropriate to consider in evaluating the reasonableness of an attorney's fee. Rule 4-1.5(b) sets forth the appropriate factors to consider when determining an appropriate fee, including the complexity of the matter, the time commitment required, and customary fees within a particular locality. The Lamborghini Agreement instead based compensation on ability to market an exotic sports car. First, if the client

was able to successfully market the sports car, the firm was to receive only $30,000. RR 4; TFB Exh. 2. But if the client was unable to successfully market the vehicle within 90 days, the firm was entitled to receive the entire value of the sports car. RR 4; TFB Exh. 2. Worse, if the firm was able to sell the car for more than $80,000, the firm was entitled to keep all amounts above $80,000 as a windfall. RR 4; TFB Exh. 2. Given that Respondent's own expert testified that the fair market value of the car was as high as $90,000, the Lamborghini Agreement created a reasonable expectation of a windfall for the firm. TR III, P 378, L 17-20. Because the firm would be able to achieve this extra compensation based solely on its ability to market a car, not based on legal work, the Lamborghini Agreement violated Rule 4-1.5.

Like his argument as to Rule 4-1.8(a), Respondent's argument as to Rule 4-1.5 ignores the text of the Lamborghini Agreement and focuses exclusively on Respondent's later decision not to fully enforce all of its terms. IB 20-23. However, Rule 4-1.5, like Rule 4-1.8(a), prohibits attorneys from *entering* into an agreement for an improper fee. R. Regulating Fla. Bar 4-1.5. Thus, Respondent's entering into the Lamborghini Agreement violated Rule 4-1.5; his subsequent behavior cannot undo his misconduct.

THE REFEREE'S FINDINGS OF GUILT AS TO COMPETENCE AND DILIGENCE IN COUNT III ARE SUPPORTED BY COMPETENT

SUBSTANTIAL EVIDENCE.

In Count III, the Referee recommended that Respondent be found guilty of violating Rule 4-1.1 (failure to provide competent representation) and Rule 4-1.3 (lack of diligence) based on his failure to respond to a suggestion of death in the Cotton case. RR 7-8, 15. Respondent challenges these findings. IB 24-29. As discussed in greater detail below, however, the Referee's findings are supported by competent, substantial evidence and Respondent's arguments are based on a misstatement of the Referee's findings.

The Referee's findings of fact are well supported by the evidence. The suggestion of death which was filed with the court was admitted into evidence at the final hearing. RR 7; TFB Exh. 16. The notice shows on its face that Respondent was provided a copy contemporaneously, and Respondent acknowledged that his firm received the notice. RR 7; TFB Exh. 16, 41; TR III, P 429, L 4-18. Respondent testified, and the court docket confirmed, that Respondent took no action in response to the notice for over a year. RR 7; TFB Exh. 17, 18; R. Exh. 44, 87; TR III, P 430, L 10-12, P 432, L 3-24. When Respondent finally took action, the court denied the effort as untimely. RR 7; TFB Exh. 17, 18; TR III, P 432, L 3-24, P 433, L 8-23, P 435, L 16-21. The court filings and Respondent's own testimony confirm that substitution of defendants (of

whom there were several and who were elderly) was an important strategic priority to prevent dismissal of the action. RR 7-8; R. Exh. 44, 74; TR III, P 436, L 2-19. All of this evidence provided ample support for the Referee's findings that Respondent's conduct in response to the notice was neither competent nor diligent.

In order for this Court to reject the Referee's recommendation, Respondent must show that the findings are not supported by competent substantial evidence; providing an alternate explanation of the evidence is not sufficient. *Nicnick*, 963 So. 2d at 222. Given the evidence supporting the Referee's finding, Respondent cannot possibly succeed in such an effort. Instead, Respondent makes his argument based on a mischaracterization of the Referee's findings and analysis of an entirely different rule.

Respondent's argument against the Referee's finding is based on his analysis of Rule 4-5.1, which relates to the responsibilities of supervisory attorneys. IB 25-29. The Bar did not allege that Respondent violated Rule 4-5.1. IR 1. The Referee did not find that Respondent violated Rule 4-5.1. RR 14-15. Nevertheless, Respondent claims that the Referee's findings were "premised on a theory of liability as a supervising attorney." IB 27. Thus, Respondent misstated the Referee's findings, then based his argument on that misstatement.

The Referee rejected Respondent's argument that he was only a supervisory attorney, and the Referee's conclusion had substantial evidentiary support. RR 8; TFB Exh. 1, 41; TR III, P 397, L 4-11. Specifically, Bergaoui testified that he considered Respondent to be his attorney. RR 8; TR I, P 112, L 16-25, P 113, L 1-25, P 114, L 1-11. In addition, Respondent, in his first engagement letter with Bergaoui and Spruce River, stated, "I will be the attorney primarily responsible for your legal work although other firm personnel may assist me from time to time as deemed appropriate." RR 8; TFB Exh. 1. This Court has long held that the test for creation of an attorney-client relationship is the subjective belief of the client, provided that the client's belief is reasonable. *Florida Bar v. Beach*, 675 So. 2d 106, 109 (Fla. 1996), adopting *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992). Under the *Beach* standard, the Referee had ample evidence to find Respondent to be Bergaoui's attorney, not a mere supervisor. Thus, this Court should accept the Referee's recommended findings that Respondent was the attorney primarily responsible for the representation and that he failed to act competently or diligently in connection with the death notice.

THE REFEREE CORRECTLY FOUND THAT THE MORTGAGE CONSTITUTED A PROPRIETARY INTEREST IN VIOLATION OF RULE 4-1.8(i)

Respondent challenged the Referee's recommendation of guilt as to Rule 4-1.8(i), based on the mortgage loan Respondent made to the defendants in the Cotton case. RR 8-12, 15; IB 29-31. Specifically, Respondent claims that his mortgage did not constitute a "proprietary interest" for the purpose of that rule. IB 29. The facts are not disputed. Respondent lent money to the defendants in his client's lawsuit, which loan was evidenced and secured by a note and mortgage encumbering three of the seven parcels of real property at issue in the Cotton case. RR 9-10; TFB Exh. 19, 20, 28; TR I, P 93, L 1-17, P 104, L 18-25, P 123, L 18-25, P 124, L 1-14, P 125, L 13-25; TR II, P 302, L 1-12.

Respondent bases his legal argument on unrelated case law. For example, Respondent cites *Evins v. Gainesville National Bank*, 80 Fla. 659 (Fla. 1920), which involved an effort to enforce a judgment against a mortgage deed, taking the borrower's property to satisfy the debt of the mortgage holder. Respondent also relies on *Seminole County v. M.G. Investments of Orlando, Inc.*, 714 So. 2d 1066 (Fla. 5th DCA 1998), which involves a determination of which party receives attorney fees in a condemnation proceeding. Neither case relates to attorney discipline. Neither case provides persuasive guidance for this Court in analyzing Rule 4-1.8(i).

The most persuasive authority for the meaning of Rule 4-1.8(i) is the rule itself. The text and structure of the rule make clear that a mortgage interest is prohibited. After prohibiting attorneys from obtaining a proprietary interest in a cause of action or the subject matter of litigation, the rule creates exceptions. One exception is that an attorney is permitted to "acquire a lien granted by law to secure the lawyer's fee or expenses." R. Regulating Fla. Bar 4-1.8(i)(1). If Respondent's interpretation were correct, that all lien/security interests are permitted by the rule, there would be no need to include a specific exception for liens to secure attorney fees and expenses. Respondent's interpretation would render the entire sub-provision meaningless and superfluous. Rules are not to be interpreted in a manner that renders entire sub-provisions meaningless. Although Respondent does address the text of the rule in his argument, he only analyzed subsection (a), not subsection (i), which is the relevant subsection. Thus, Respondent's arguments related to Rule 4-1.8(i) should be rejected, and the Referee's recommendation accepted by this Court.

THE REFEREE CORRECTLY FOUND THAT RESPONDENT'S LOAN TO CERTAIN DEFENDANTS CONSTITUTED FINANCIAL ASSISTANCE TO HIS CLIENT IN VIOLATION OF RULE 4-1.8(e)

The Referee found that Respondent's mortgage loan to certain defendants in the Cotton case constituted financial assistance to his client. RR 12, 15. This

finding is supported by Respondent's own testimony that he made the loan, in part, for the benefit of his client. RR 9; TR II, P 309, L 19-25, P 310, L 1-20; TR III, P 460, L 4-18. Because of this competent, substantial evidence, the Referee's recommendation should be accepted by this Court.

Respondent does not appear to challenge the factual findings of the Referee. Instead, Respondent's argument appears to be based solely on the fact that the funds which Respondent expended were given to the defendants directly, rather than to his client. IB 31-32. However, this Court has previously held that Rule 4-1.8(e) could be violated even if the financial assistance was not paid directly to the client. *Florida Bar v. Patrick*, 67 So. 3d 1009 (Fla. 2011). In *Patrick*, the attorney paid appellate attorney's fees on his client's behalf; no money was paid from the attorney to the client. Nevertheless, this Court found a violation of Rule 4-1.8(e).

Respondent also argues that he should not be found guilty of violating Rule 4-1.8(e) because his mortgage loan was not the type of transaction which the rule was intended to prevent. IB 32-33. This argument is not legally valid to overcome the clear language of the rule, but is also not factually supported. Respondent claims that the mortgage loan did not encourage more litigation. IB 33. Respondent's argument is directly contrary to his own testimony at the final hearing. Respondent testified that, had he not made the mortgage loan, the parcels

subject to the tax deeds would have been lost and the litigation would have effectively been over. TR II, P 310, L 11-20; TR III, P 460, L 4-18. Indeed, his own testimony and the court's handling of the issues related to the death notice demonstrate that the loss of any parcel would potentially have terminated the litigation. Thus, the loan directly extended litigation that would otherwise have ended.

The other danger which the rule seeks to prohibit is having the attorney acquire too great of a personal interest in the litigation. This danger was also present with Respondent's mortgage loan, as subsequent events demonstrated. First, Respondent testified that his second motivation for making the loan was to protect his fee (which had been converted to a contingency fee at this point). RR 9; TFB Exh. 3; TR I, P 119, L 1-4; TR II, P 310, L 11-20; TR III, P 416, L 21-25, P 417, L 1-9. If the parcels were conveyed to a third party and the litigation ended, Respondent would have collected no fee. Second, Respondent was attempting to negotiate a settlement which would have involved his own firm becoming a part owner of a new entity to develop the real property. RR 12; TFB Exh. 23; TR I, P 128, L 13-25; TR III, P 349, L 6-18, P 355, L 9-22. Respondent's own mortgage loan to the defendants had to be addressed as part of any settlement. Thus, by entering into the mortgage loan, Respondent further entwined himself in

the litigation. By further inserting himself, Respondent complicated the issues between the actual parties..

Respondent's argument about the mortgage loan not creating the dangers the rule seeks to prevent is not legally valid to overcome the clear language of the rule. Even if it were legally sufficient, Respondent's argument is contrary to the evidence presented at the final hearing. Respondent's mortgage loan constituted financial assistance to his client in violation of Rule 4-1.8(e). Accordingly, this Court should accept the Referee's recommendation of guilt on Rule 4-1.8(e). RR 12, 15.

THE REFEREE'S FINDING THAT JOHN WHITE WAS NOT INDEPENDENT COUNSEL IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE

At the final hearing, Respondent argued that he partially complied with Rule 4-1.8(a) regarding the subordination agreement because Bergaoui met with John White prior to executing the agreement. RR 10; TR II, P 304, L 13-25, PP 305-308, P 309, L 1-18; TR III, P 464, L 16-25, P 465, L 1-2. The Referee rejected Respondent's argument and found that John White was not independent counsel. RR 10. The Referee's finding is supported by competent, substantial evidence and should be affirmed.

In order to overturn the Referee's finding, Respondent must do more than show that an alternate interpretation of the evidence was possible, but must instead show that the Referee's finding lacks evidentiary support. *Nicnick*, 963 So. 2d at 222. Respondent cannot do so based on the record and did not even attempt to do so. The Referee's finding was supported by testimony from both Respondent and White that Respondent separately consulted with White regarding the tax deed situation. RR 9-11; R. Exh. 55; TR I, P 92, L 7-21; TR III, P 480, L 1-7. Respondent and White both testified that White prepared the note and mortgage documents between Respondent and the defendant borrowers, at Respondent's request, in addition to the subordination agreement. RR 9-10; TFB Exh. 19, 20, 21; TR I, P 93, L 1-25, P 94, L 1-25, P 95, L 1-3; TR II, P 303, L 19-25, P 304, L 1-12; TR III, P 466, L 17-23. White testified that he received all of his instructions regarding preparation of the documents from Respondent. RR 10; TR I, P 93, L 1-17, P 94, L 3-5, 15-25, P 95, L 1-3, P 96, L 1-14. Respondent testified that he selected White and required Bergaoui to see White. RR 9, 10; TR III, P 464, L 16-25, P 465, L 1-11. Bergaoui testified that he did not consider White to be representing him or Spruce River. RR 11; TR I, P 125, L 9-11, P 126, L 3-10. Also, White testified that he had little information about the underlying litigation

even to be able to advise Bergaoui about the Subordination Agreement. RR 10-11; TR I, P 95, L 4-25, P 96, L 1-25.

Furthermore, the evidence demonstrated that, at the time of the events in question, Respondent did not consider White to have been independent counsel for Bergaoui. Only later did Respondent change his story when Bergaoui refused to sign a false affidavit. RR 11, 13; TFB Exh. 24, 30, 42; TR I, P 130, L 11-25, P 131, L 1, 12-25, P 132, L 1-10; TR III, P 453, L 16-25, P 454, L 1-25, P 455, L 1-13. After the loan transaction and all documents (including the subordination agreement) were signed, a non-borrowing defendant learned of the transaction and sought to disqualify Respondent from representing Bergaoui in the case. RR 13; TFB Exh. 25; TR I, P 129, L 1-14; TR II, P 274, L 18-25, P 275, L 1-4. In response, Respondent sent a proposed affidavit for execution by Bergaoui in which Bergaoui was to state, under oath, that he had been advised of his right to seek independent counsel, but had declined to seek such independent counsel. RR 11, 13; TFB Exh. 24, 25; TR I, P 130, L 11-25, P 131, L 1, 12-25, P 132, L 1-10; TR III, P 453, L 16-25, P 454, L 1-25, P 455, L 1-13. Only when Bergaoui refused to sign the draft affidavit did Respondent begin claiming that White had been independent counsel. RR 11; TFB Exh. 24, 28, 30, 42. Clearly, the version of events set forth in the draft affidavit would have been within the personal

knowledge of Respondent. That version of events was inconsistent with Respondent's later testimony that White was independent. Both versions cannot be true; either Respondent sought to have his client sign a false affidavit, or Respondent's testimony at the final hearing was false, or both. Understandably, the Referee specifically found Respondent's testimony (and White's supporting testimony) not credible regarding White's independence. RR 11.

In order for this Court to reject the Referee's finding of fact, Respondent must demonstrate more than just some conflicting evidence; Respondent must show that the Referee's conclusion is not supported by competent, substantial evidence. Respondent does not even attempt to do so and obviously cannot do so, given the overwhelming evidence in support of the Referee's finding.

THE REFEREE CORRECTLY REJECTED RESPONDENT'S ARGUMENT THAT PARTIAL COMPLIANCE WITH RULE 4-1.8(a) IS SUFFICIENT

Even if the Referee had found John White to have provided independent counsel to Bergaoui, Respondent still violated Rule 4-1.8(a) with regard to the Subordination Agreement because he failed to fulfill all of the other requirements of the rule.

The first requirement of the rule is that the transaction be fair and reasonable to the client and fully disclosed in writing. Although the Subordination Agreement

was written, its terms were not fair or reasonable to Bergaoui. R. Regulating Fla. Bar 4-1.8(a)(1). The real property encumbered by Respondent's mortgage constituted the majority of the total parcel at issue in the Cotton case. RR 9; TFB Exh. 20, 21; TR III, P 350, L 9-15, P 366, L 10-15, P 449, L 4-13, P 482, L 8-25, P 483, L 1-8. Earlier in the litigation, Bergaoui had been required to pay a cash bond of $2,000,000 in order to preserve his notice of lis pendens. TFB Exh. 11, 12; TR I, P 135, L 7-20; TR III, P 419, L 16-18, P 425, L 21-23, P 426, L 20-21. The promissory note from the borrowing defendants was due in full after 6 months. TFB Exh. 19, 20. According to the testimony of their son/nephew, these defendants were struggling to have enough money to eat; they had no better likelihood of paying $150,000 to Respondent in January 2013 than they had of paying the tax collector in July 2012. RR 9; TR III, P 350, L 23-25, P 351, L 1-6, P 366, L 19-25, P 367, L 1-7. Therefore, the transaction gave Respondent, for a mere $150,000, a superior lien interest in property worth millions and an almost certain right to foreclose the borrower defendants and his own client within 6 months. Such predatory opportunism was not fair or reasonable to Respondent's client

Another requirement of Rule 4-1.8(a) is that the client give informed consent, in writing, to the terms of the agreement, including the lawyer's role in the

transaction and whether the lawyer was representing the client in the transaction. R. Regulating Fla. Bar 4-1.8(a)(3). Although the terms of the transaction were in writing, no disclosure was made of (nor consent given to) Respondent's role in the transaction, including whether he was representing Spruce River in the transaction. RR 11; TR I, P 124, L 15-25, P 125, L 1-11; TR II, P 304, L 13-25, PP 305-308, P 309, L 1-18. Accordingly, this requirement was also not met.

Respondent acknowledges that he did not meet the requirements of Rule 4-1.8(a), but claims that his failure to comply should be excused. Respondent cites *Florida Bar v. Nesmith*, 642 So. 2d 1357 (Fla. 1994), for the proposition that an express writing is not required by Rule 4-1.8(a) if the purpose of the rule is otherwise met. IB 33-34. This argument is neither factually nor legally valid.

First, the Referee made no finding that Respondent the purposes of the rule were otherwise met. In fact, the evidence does not support the conclusion that the requirements of the rule were otherwise met. As discussed above, the terms of the transaction were not fair or reasonable to the client. Furthermore, there is no evidence to conclude that Respondent's role in the transaction and whether he was representing Bergaoui in the transaction were in any way communicated to Bergaoui or approved by him after proper disclosure. RR 11; TR I, P 124, L 15-25, P 125, L 1-11; TR II, P 304, L 13-25, PP 305-308, P 309, L 1-18.

But even if Respondent's argument had factual support, Respondent's reliance on *Nesmith* is misplaced. *Nesmith* has been superseded by subsequent authority. First, in 2006, twelve years after *Nesmith*, this Court amended Rule 4-1.8(a). *In re Amendments to the Rules Regulating The Florida Bar*, 933 So. 2d 417, 440-44 (Fla. 2006). With the amended rule, this Court increased the written disclosures required by the rule, requiring that the advice to seek independent counsel be in writing and adding the requirement for written disclosure of the lawyer's role in the transaction, including whether the lawyer was representing the client in the transaction. *Id.* at 440-41. Even the Comment changed, emphasizing the importance of the written disclosure of whether the lawyer is representing the client in the transaction. *Id.* at 442. This new requirement, which Respondent does not even suggest was met in any way, did not even exist at the time of *Nesmith*. Respondent thus is attempting to rely on *Nesmith* to waive compliance with a requirement that did not even exist at the time *Nesmith* was decided. Respondent's reliance on *Nesmith* is misplaced.

Furthermore, after the amendment of the rule, this Court decided *Florida Bar v. Ticktin*, 14 So. 3d 928 (Fla. 2009). In *Ticktin*, the attorney represented a client who was sued by the Securities and Exchange Commission. When the CEO learned of his own impending indictment, he tricked the attorney into agreeing to

succeed him as CEO. *Id*. at 932. The CEO even put out a press release explaining the terms of the succession. *Id*. Thus, *Ticktin* presented a clear example of a sophisticated client (running a company in a position to be sued by the SEC), who was not being victimized (he tricked the attorney), and who understood the terms of the transaction (he issued a press release explaining the transaction). This Court, however, did not excuse the attorney's noncompliance and found him guilty of violating Rule 4-1.8(a). The Court specifically noted that the writing (press release) did not include all the required disclosures. *Id*. at 936. While this Court may have tolerated mere substantial compliance with Rule 4-1.8(a) in *Nesmith*, this Court has made clear, with its strengthening of the rule and with its opinion in *Ticktin*, that full compliance is required.

The Referee's finding of guilt as to Rule 4-1.8(a) should be upheld.

THE REFEREE CORRECTLY FOUND THAT RESPONDENT'S SETTLEMENT EFFORTS VIOLATED RULE 4-1.2, RULE 4-1.8(a), AND RULE 4-1.8(i)

The Referee found that Respondent violated Rule 4-1.2, Rule 4-1.8(a) and Rule 4-1.8(i) in his handling of a partially-executed settlement agreement in the Cotton case. RR 14, 15; TFB Exh. 23. Although Respondent challenges these recommended findings, they are supported by competent, substantial evidence and

are legally sound. Accordingly, these recommended findings should be accepted by this Court.

Rule 4-1.2 requires attorneys to abide by clients' decisions regarding the objectives of representation. The partially-executed settlement agreement created a new limited liability company in which Respondent's firm would hold a 27.5% membership interest, the same ownership interest to be held by his client, Spruce River. RR 12; TFB Exh. 23; TR III, P 355, L 3-22, P 444, L 8-25, PP 445-446, P 447, L 1-15. The new entity was to take control of five of the seven parcels at issue in the Cotton case. TFB Exh. 23; TR III, P 349, L 6-22. Furthermore, Respondent was to be one of the four managers of the new entity. RR 12, 13; TFB Exh. 23; TR I, P 128, L 13-25, P 129, L 2-4; TR III, P 355, L 9-22. Thus, under the terms of the partially-executed settlement agreement, Respondent would have ceased to be an attorney accepting direction from his client, as required by Rule 4-1.2, but would become a co-equal partner of his client in a new entity and have equal power to direct the litigation, in violation of that rule. RR 13; TR I, P 128, L 13-25.

The proposed settlement agreement also violated Rule 4-1.8(a) because it created a business transaction between Respondent and his client, without any of the written disclosures and informed consent required by that rule. RR 13-14; TFB

Exh. 23; TR III, P 480, L 8-25; P 483, L 9-15. Long before the settlement agreement was circulated for execution, Respondent was conducting himself (and perceived by the other settlement parties) as his client's partner in the transaction. RR 13; TR III, P 355, L 9-22, P 368, L 3-16.

Respondent testified that he intended to meet the requirements of Rule 4-1.8(a) if the settlement agreement had ever been finalized. RR 14; TR III, P 451, L 17-25, P 452, L 1-5. The Referee correctly found this testimony not to be credible. RR 14. First, in order to be meaningful, independent legal advice would need to have been provided earlier in the settlement process – before Respondent and Bergaoui were "partners," before Spruce River had subordinated its rights to Respondent, and without an impending deadline created by Respondent's short-term balloon note to the Shepards and the Alstons. Once an agreement was fully negotiated to settle a multi-million dollar lawsuit and Respondent is holding the overwhelming leverage of a right to foreclose most of the real property at issue, any independent legal advice would be too severely constrained to be meaningful. The time for independent legal advice was before Respondent had maneuvered his own client into such a constrained position.

Second, after one of the defendants sought to disqualify Respondent from the representation after the mortgage loan, Bergaoui did seek independent legal

advice from Brad Bryant regarding his situation, including the proposed settlement. RR 13; TFB Exh. 27, 29; R. Exh. 20; TR I, P 132, L 2-18, P 188, L 20-24; TR III, P 455, L 21-25, P 456, L 1-3, L 22-25, P 457, L 1-3, P 483, L 16-24. Brad Bryant (unlike John White) was genuinely independent; he was not hand-picked by Respondent and he did not receive his instructions from Respondent. In response, Respondent made numerous accusations against Bryant based on nothing but conjecture and accused Bryant of tortuously interfering with Respondent's contract with Bergaoui. TFB Exh. 30; TR III, P 456, L 4-21. In February 2013, Respondent even threatened to use the leverage of his improperly-obtained mortgage to coerce a resolution on his own preferred terms. TFB Exh. 31. Respondent's conduct provides competent, substantial evidence to support the Referee's conclusions of guilt as to Rule 4-1.8(a).

The Referee also correctly found that the partially-executed settlement agreement violated Rule 4-1.8(i). The settlement agreement created a new entity which was to assume ownership of some of the parcels of the real property and to substitute into the litigation regarding the remaining parcels. RR 12; TFB Exh. 23; TR III, P 444, L 8-25, PP 445-446, P 447, L 1-15. This new entity was to be partially owned by Respondent's firm, giving Respondent a proprietary interest in

the litigation. RR 12; TFB Exh. 23; TR I, P 125, L 13-25, P 126, L 1-2, L 14-25, P 127, L 1-17; TR III, P 446, L 16-19 , P 450, L 15-21.

Although the settlement agreement was never fully executed, the failure of the settlement was due to the actions of others, not any action by Respondent. RR 13; TR II, P 271, L 21-25, P 272, L 1-8; TR III, P 359, L 6-25, P 360, L 1-6, P 361, L 2-14, P 362, L 4-25, PP 363-364, P 365, L 1-14, P 367, L 8-25, P 368, L 1-6, P 451, L 7-12. When counsel for some non-participating defendants learned of the proposal, a motion was filed seeking to disqualify Respondent. RR 13; TFB Exh. 25; TR I, P 129, L 2-14; TR III, P 453, L 12-25. In response, Respondent prepared an affidavit for Bergaoui to sign, in which Bergaoui would have falsely claimed to have been informed of the advisability of seeking independent counsel for the subordination agreement but declining such independent counsel. RR 13; TFB Exh. 24; TR I, P 129, L 15-21, P 130, L 13-25, P 131, L 1, 12-25, P 132, L 1; TR III, P 453, L 12-25, P 454, L 1-15, P 455, L 7-13. Even Respondent now acknowledges this version of events to be false. Then, Bergaoui sought genuinely independent counsel. RR 13; TR I, P 132, L 2-18, P 188, L 20-24; TR III, P 455, L 21-25, P 456, L 1-3, L 22-25, P 457, L 1-3. Once Bergaoui was given independent advice, the deal collapsed. RR 13; TFB Exh. 23; TR I, P 132, L 15-25, P 133, L 1-3. Given that the failure to conclude the settlement was due to the actions of

others, despite Respondent's efforts, his misconduct should not be excused simply because Respondent's plan was thwarted.

THE REFEREE CORRECTLY FOUND VIOLATIONS OF RULE 3-4.3

The Referee found Respondent guilty of violating Rule 3-4.3, in addition to other, more specific rules, in each of Count I and Count III. RR 14, 15. Respondent objects to these findings of guilt. IB 23-24, 38-39

Rule 3-4.3 allows for discipline for wrongdoing that might not otherwise be specifically identified in Chapter 4. This Court has applied Rule 3-4.3 to a variety of situations, both as the sole basis for discipline and in conjunction with other rule violations. See, e.g., *Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010); *Florida Bar v. Rotstein*, 835 So. 2d 241 (Fla. 2002).

The inclusion of Rule 3-4.3 is particularly relevant to this proceeding because Respondent has attempted to avoid discipline for his misconduct by advancing certain technical arguments. For example, Respondent attempts to avoid responsibility for violating Rule 4-1.8(e) because the money was paid to a third party instead of the client. IB 32-33. Respondent also attempts to evade responsibility for violating Rule 4-1.8(i) because he acquired a mortgage instead of a deed. IB 31. As explained above, Respondent's technical arguments should be rejected, but the conduct in question violates Rule 3-4.3 regardless of whether

other rules violations are found. The primary purpose of the attorney discipline system is to protect the public. This Court has not and need not permit attorneys to circumvent the restrictions imposed by the Rules Regulating The Florida Bar through clever technicalities.

THE REFEREE'S RECOMMENDED SANCTION OF A ONE-YEAR SUSPENSION IS SUPPORTED BY APPLICABLE AUTHORITY

Respondent also challenges the Referee's recommended sanction of a one-year suspension. RR 16; IB 40-55. This Court has ultimate responsibility for imposing the appropriate sanction, but will generally not disturb a recommended sanction if it is supported by applicable authority. In this instance, the Referee's recommendation of a one-year suspension is supported by applicable authority and should be accepted by this Court.

The Florida Standards for Imposing Lawyer Sanctions support the one-year suspension which the Referee has recommended. RR 15. The most serious aspect of Respondent's misconduct was his multiple and substantial conflicts of interest. The most serious conflict of interest related to his entering into the loan transaction and subordination agreement with his client. This transaction violated three separate subsections of Rule 4-1.8. In addition to the mortgage and subordination agreements, Respondent's Lamborghini Agreement and proposed settlement agreement also constituted conflicts of interest.

Standard 4.31(a) provides:

> Disbarment is appropriate when a lawyer, without the informed consent of the client(s), engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client.

Standard 4.32 provides:

> Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to the client.

Clearly, Respondent knew of the conflicts of interest. In fact, with the Subordination Agreement, Respondent insisted on the conflict of interest, placing his interest ahead of his client's. RR 9; TFB Exh. 21; TR I, P 94, L 15-25, P 95, L 1-3, P 124, L 3-25, P 125, L 1; TR II, P 303, L 19-25, P 304, L 1-12; TR III, P 463, L 15-25. The transaction created serious injury and/or potential injury to the client, as evidenced by Respondent's foreclosure action against his own (now-former) client asserting the superior interest he acquired through the conflict of interest. RR 10; TFB Exh. 36. Because the mortgage transaction arose out of a tangential aspect of the representation, however, the Bar contends that a lengthy suspension under Standard 4.32 is the appropriate application of the Standards. RR 15.

Respondent argues that Standard 4.34 is appropriate because he was merely negligent in identifying the conflict of interest. IB 43-44. Respondent's position is without merit. As Respondent, White, and Bergaoui testified, Respondent required

the Subordination Agreement as a condition of making the mortgage loan transaction. RR 9; TFB Exh. 21; TR I, P 94, L 18-25, P 95, L 1-3, P 124, L 3-25, P 125, L 1; TR III, P 463, L 9-25. Far from being unaware of the conflict, Respondent created it.

Consideration of applicable standards for the other violations suggest that those violations, alone, would require less of a sanction. On their own, Respondent's lack of diligence (Standard 4.43), lack of competence (Standard 4.53), and excessive fee (Standard 7.0) would each likely result in a public reprimand under the applicable Standards. Combined, they create significant aggravating factors for multiple offenses (Standard 9.22(d)) and a pattern of misconduct (Standard 9.22(c)) supporting the Referee's recommended sanction of a one-year suspension. RR 15.

In addition to multiple offenses and pattern of misconduct, the Referee found several other aggravating factors present. Standard 9.22(b) was found because Respondent repeatedly acted for his own benefit rather than the benefit of the client. RR 16. The Lamborghini deal provided the possibility of an extra windfall for Respondent if the car sold at or near market value. RR 4; TFB Exh. 2; TR III, P 406, L 12-24, P 407, L 11-22, P 408, L 4-17. Respondent testified that the loan transaction was made both in order to benefit his client and to protect

Respondent's interest in his contingency fee. RR 9; TFB Exh. 3; TR I, P 119, L 1-4; TR II, P 309, L 19-25, P 310, L 1-20; TR III, P 414, L 12-19; P 416, L 21-24, P 460, L 4-18. Respondent's conduct in connection with the Settlement Agreement also appears to have been calculated to protect his contingency fee and/or to profit by inserting himself in his client's transaction. RR 9; TFB Exh. 3; TR I, P 119, L 1-4; TR II, P 309, L 19-25, P 310, L 1-2, P 352, L 1-10. Only Respondent's lack of diligence and competence in connection with the death notice does not appear to have been motivated by greed.

The Referee also found Standard 9.22(g) an applicable aggravating factor for failure to recognize the wrongful nature of the conduct. RR 16. At no time did Respondent express any remorse or reconsideration of his conduct. On the contrary, much of Respondent's evidence at the final hearing was focused on attacking his former client on irrelevant issues, as if an attorney's ethical obligations are contingent on the client's conduct. TR I, PP 136-153; TR II, PP 218-228; R. Exh. 10, 11, 12, 16.

The fifth aggravating factor found by the Referee was Standard 9.22(i), substantial experience in the practice of law. Respondent was admitted to The Florida Bar on October 1, 1993. RR 16. To offset these five aggravating factors,

the Referee did find one mitigating factor, Standard 9.32(a), because Respondent has not been previously disciplined. RR 16.

In addition to the Florida Standards for Imposing Lawyer Sanctions, applicable case law supports the Referee's recommended sanction of a one-year suspension. RR 16. For example, *Florida Bar v. Herman*, 8 So. 3d 1100 (Fla. 2009), involved a violation of Rule 4-1.8(a). In that case, the attorney represented a company involved in the sale and repair of aircraft parts. While representing that client, the attorney became an investor, and eventually the sole investor, in an aircraft leasing company. The second company eventually changed its business to selling and leasing aircraft parts, placing it in competition with the attorney's original client. As with Respondent, no disclosures were made and no written waivers were obtained. This Court rejected the referee's recommendation of a 90-day suspension and imposed an 18-month suspension.

Florida Bar v. Patrick, 67 So. 3d 1009 (Fla. 2011), provides support for the Referee's recommended sanction based on the financial assistance provided by Respondent. *Patrick* involved an attorney who agreed to pay his client's appellate attorney fees in an effort to induce the client to avoid settling the case. *Id*. at 1012. That attorney received a one-year suspension, just as the Referee has recommended for Respondent. In each case, the attorney made expenditures to

third parties for the benefit of the client, which prolonged litigation. Further, in each case, the attorney was motivated, in part, by attempting to protect his fee. Although Respondent denies that his interest conflicted with his client's interest, this conclusion is unsupported. Respondent's litigation against his (now-former) client demonstrates the falsity of Respondent's assertion. RR 10; TFB Exh. 36.

Other cases involving violations of Rule 4-1.8(a) also support a serious sanction. *Florida Bar v. Doherty*, 94 So. 3d 443 (Fla. 2012), involved an estate planning attorney who attempted to sell annuities to an elderly client. The attorney failed to make the required written disclosures and to obtain written consent to the business transaction. *Id*. at 445. This Court upheld the referee's recommendation of disbarment, notwithstanding the fact that the client died prior to any transaction actually taking place. *Id*. at 451.

Finally, *Ticktin* also involved a violation of Rule 4-1.8(a) which resulted in a rehabilitative suspension. As discussed above, *Ticktin* involved a client who was highly sophisticated and manipulated the attorney into engaging in the transaction. Nevertheless, this Court rejected the referee's recommendation of a mere admonishment and even the Bar's recommendation of a 60-day suspension and imposed a 91-day suspension.

Although Respondent objects to the imposition of a one-year suspension and argues against the authority cited by the Bar and relied on by the Referee, Respondent has offered almost no authority supporting his suggestion that an admonishment would be appropriate. The one exception is Standard 4.34, which, as noted above, is not applicable to Respondent's misconduct. Standard 4.34 is based on negligently allowing a conflict of interest to arise. Respondent's conduct was intentional. To take only the most obvious example, Respondent insisted that Spruce River subordinate its interest to his mortgage in the Cotton case. That interest is now being foreclosed against Spruce River. Respondent's willful conduct is inconsistent with his current claim that the conflict was merely negligent. Just as this Court rejected the referee's recommendation of an admonishment in *Ticktin*, this Court should reject Respondent's argument for an admonishment in this proceeding. Respondent's misconduct was serious and requires a serious sanction.

PREPARATION OF DRAFT REPORT OF REFEREE BY THE BAR NOT A PROBLEM

Respondent argues that he was denied due process because the Report of Referee was drafted by Bar Counsel. IB 16-18. Respondent has cited no authority prohibiting bar counsel from drafting reports of referee and the practice is not

uncommon. Undersigned Bar Counsel is unaware of any authority which prohibits or even discourages the practice of having reports of referee drafted by counsel.

More importantly, if Respondent deemed the preparation of proposed findings objectionable, he should have raised an objection at the final hearing. Respondent failed to do so, thereby waiving any objection. In fact, if Respondent had objected to having proposed findings submitted by the parties, he ought not to have suggested it.

At the beginning of the second day of the final hearing, Respondent's counsel requested that the parties not give oral closings at the conclusion of the hearing, but instead submit written closings with proposed findings for the Referee. He stated, "[O]ur recommendation is that you let us file what would be a relatively short written closing with attached proposed findings of fact and conclusions of law in lieu of a closing[.]" TR III, P 332, L 6-16. At the end of the final hearing, the Referee again gave the opportunity for oral closings, but Respondent's counsel reiterated Respondent's preference to proceed with written closings and proposed findings. TR III, P 488, L 16-20.

Respondent not only failed to object, not only suggested the practice, but actually reiterated his preference for written closings and proposed findings. Like the Bar, Respondent submitted his own proposed Report of Referee for

consideration. Now, however, Respondent claims he was denied due process by the very procedures he suggested and followed. Submission of written closings and proposed Reports of Referee did not violate due process. Respondent should not now be allowed to seek relief from his own suggestion.

CONCLUSION

This Court should adopt the Referee's findings of fact and recommended rule violations. The Court should also accept the Referee's recommended sanction of a one-year suspension.

Troy Matthew Lovell, Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer Brief has been electronically filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal; and that true and correct copies have been furnished via certified U.S. mail, return receipt no. 7016 0750 0000 5416 4879, to Jon Douglas Parrish, Respondent, c/o Donald G. Peterson and Jonathan M. Weirich, Counsel for Respondent, to their record Bar address of Parrish, White & Yarnell, P.A., 3431 Pine Ridge Road, Suite 101, Naples, Florida 34109, and via electronic mail to their designated email addresses of donpeterson@napleslaw.us, jonathanweirich@napleslaw.us, ply@napleslaw.us, karlaschooley@napleslaw.us, angelakuenzle@napleslaw.us; via certified U.S. mail, return receipt no. 7016 0750 0000 5416 4886, to J. Christopher Lombardo, Lenore Brakefield, and Joseph M. Coleman, Counsel for Respondent, to their record Bar address of Woodward, Pires & Lombardo, P.A., 3200 Tamiami Trail North, Suite 200, Naples, Florida 34103, and via electronic mail to their designated email addresses of clombardo@wpl-legal.com, lbrakefield@wpl-legal.com, jcoleman@wpl-legal.com and service@wpl-legal.com; and via electronic mail to Adria E. Quintela, Staff Counsel, The Florida Bar, to her designated email address of aquintel@floridabar.org, on this 17th day of April, 2017.

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

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

Troy Matthew Lovell, Bar Counsel