IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC05-1225

v. TFB File No. 2002-00195(2A)

JOHN JOSEPH KORESKO, V,

Respondent.
_____/

AMENDED INITIAL BRIEF

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PRELIMINARY STATEMENT

The Complainant, The Florida Bar, is seeking review of a Report of Referee recommending that Respondent be found not guilty of any misconduct and that neither party should recover its costs.

Complainant will be referred to as The Florida Bar, or as The Bar. John Joseph Koresko, V, Respondent, will be referred to as Respondent, or as Mr. Koresko throughout this brief.

References to the Report of Referee shall be by the symbol "RR" followed by the appropriate page number. (e.g., RR, 12).

References to specific pleadings will be made by title. References to the transcript of the final hearing are by symbol "TR", followed by the volume, followed by the appropriate page number. (e.g., TR III, 289).

References to Bar exhibits shall be by the symbol "TFB Ex" followed by the appropriate exhibit number (e.g., TFB Ex 10).

STATEMENT OF THE FACTS

This case arises out of the Bar complaint of James Edward Magee, a former client of the Respondent. In November 1988 Respondent, a member of The Florida Bar as well as the Pennsylvania Bar, drafted wills for Mr. Magee and his wife, Marilyn L. Magee, now deceased, while they were then residents of the Commonwealth of Pennsylvania. The wills provided that Respondent would serve as Executor (under Pennsylvania probate law) of the estates of both (TFB Ex 1)[1]. In or around June 1996 Respondent prepared a sophisticated retirement plan for Marilyn L. Magee, one feature of which enabled the Magees to purchase a condominium in Key West, Florida, and to move there, where Mrs. Magee passed away on June 5, 1999, while domiciled in Florida.

At the time of her retirement in 1996 Marilyn L. Magee was employed by Westinghouse and had accumulated $163,592.59 of taxable contributions in the Westinghouse Retirement Services Savings Plan. Mr. and Mrs. Magee wanted to utilize those funds to close on the purchase of the Key West condo, but recognizing that if she withdrew all of the funds in the same tax year she would be placed in a higher tax bracket, Respondent devised a multiple step "roll-over" plan that involved the following activities and Koresko-related entities:

1 All Bar exhibits referenced were admitted in evidence without objection (TR I 29).

A. The creation of a corporation, known as the Magee Corporation (TFB Ex 4), ostensibly to be the employer of Marilyn Magee.

B. The creation of the Magee Corporation Retirement Plan and Trust, the sole purpose of which was to provide a receptacle for the roll-over of the Westinghouse Savings Plan funds in order to avoid the tax consequences that would have resulted had the funds been withdrawn instead of rolled over. (TFB Ex 5).

C. By resolution adopted contemporaneously, Magee Corporation's directors (Mr. and Mrs. Magee) appointed Penn-Mont Benefit Services, Inc. as the contractor for the administration of the Plan (TFB Ex 6). Respondent and his brother-business associate, Lawrence Koresko (a non-lawyer), are the only shareholders of Penn-Mont (TR II 164-165), and Respondent is general counsel for Penn-Mont (TR II 164).

D. The creation of a partnership known as First Business Credit Company II (FBCCII), consisting of a partnership between a Delaware corporation known as First Business Credit Company, Inc. (FBCC), the stock of which is wholly owned by Respondent's brother-business associate, Lawrence Koresko, and a corporation known as Kor-Noon, Inc., ownership of which resides in Respondent (TFB Ex 8, TR II 158-159, 165-166). Respondent is the legal

counsel of FBCCII. (TR II 166-167).

E. By resolution, the Magee Corporation's directors (the Magees), authorized Respondent to purchase investment certificates in FBCCII in an amount not less than $142,500. The resolution further provided that the Magees resigned as Trustees of the Plan and Respondent was appointed as sole successor trustee (TFB Ex 9).

F. Respondent then capitalized FBCCII by the sale of said Investment Certificate in the amount of $142,500.00 to the Magee Corporation Retirement Trust (TFB Ex 10), which funds were then used by FBCCII to provide the purchase money for the Key West condo. FBCCII took back a mortgage from the Magees on August 28, 1996 in the amount of $142,500.00 (TFB Ex 11), and a note in corresponding amount, providing for monthly payments of principle and interest in the amount of $1236.65 (TFB Ex 12). In fact, no such payments were ever contemplated or made, and FBCCII never provided the Magees with a monthly payment coupon book or monthly billings for the mortgage payments. (TR II 167-168).

Following the death of his wife James Magee contacted Respondent in the year 2000 to obtain payoff information relative to the mortgage on the Key West condo held by FBCCII. Having received no reply, Mr. Magee retained counsel in Key West who

also attempted to obtain said information, without success. Mr. Magee then filed his complaint with The Florida Bar on August 23, 2001 (TFB Ex 19). On February 12, 2003 James E. Magee was issued Letters of Administration as Personal Representative of the Estate of Marilyn L. Magee by the 16th Judicial Circuit Court for Monroe County, Florida (TFB Ex 13).

On February 28, 2003 Mr. Magee wrote to Respondent, informing him that by resolution of the Board of Directors of Magee Corporation adopted on February 27, 2003 Respondent had been terminated and removed as Trustee of the Magee Corporation Retirement Plan, and demanding that the corporate records be forwarded to Susan M. Cardenas, his Key West lawyer (TFB Ex 14). On March 5, 2003 Mr. Magee wrote to Respondent demanding, among other things, that Respondent remit to the Estate of Marilyn Magee the sum of $163,592.59, cancel and release the mortgage held by FBCCII on the Key West condo and indemnify Mr. Magee, the Estate of Marilyn Magee, Magee Corporation and/or the Magee Corporation Retirement Plan for taxes, interest, penalties, accounting or legal fees incurred as a result of the plan devised by Respondent (TFB Ex 15).

On March 11, 2003, despite having notice that probate proceedings had been opened in Monroe County, Florida, Respondent wrote to the Registrar of Wills of Montgomery County, Pennsylvania and represented in said letter that at the time of

Marilyn Magee's death, even though she admittedly was domiciled in Key West, Monroe County, Florida, she owned stock certificates in Magee Corporation, a Delaware Corporation, which were located in Pennsylvania, and therefore it was appropriate to open probate proceedings in the Orphan's Court of the Court of Common Pleas for Montgomery County, Pennsylvania. Respondent further swore in a Petition for Probate and Grant of Letters that Marilyn Magee owned personal property in the amount of $165,000 located in Montgomery County, Pennsylvania, at the time of her death (TFB Ex 17). On a date in the early months of 2003, but prior to April 30, 2003, Respondent filled out the original stock certificates of Magee Corporation in the names of James Magee (certificate No. 1) and Marilyn Magee (certificate No. 2) and backdated the certificates to reflect that they were issued on September 15, 1996, (TFB Ex 18, TR II 168-171).

On March 7, 2003, Sean P. Flynn, a Pennsylvania attorney and colleague of Respondent (TR IV 442), acting on behalf of FBCCII, a partnership comprised of legal entities owned or under the dominion and control of Respondent, wrote a "NOTICE OF DEFAULT" letter to Mr. Magee (TFB Ex 16), advising Mr. Magee that he was in default on the mortgage in the amount of $317,556.40, including principle, accrued interest, late charges and attorney's fees. On March 24, 2003 Respondent's colleague, Sean P. Flynn, filed a Complaint in the Court of Common Pleas of Montgomery County, Pennsylvania

on behalf of FBCCII against the Estate of Marilyn L. Magee and the Magee Corporation Retirement Plan and Trust, through Respondent as Executor of the Estate and Trustee of the Plan, asserting a foreclosure upon the Key West condo (TFB Ex 35). Respondent, in his representative capacities, filed an acceptance of service of said pleading on the same day it was filed, March 24, 2003, then on March 27, 2003 filed an appearance together with an Answer on behalf of both defendants in which he admitted all allegations of the Complaint, including the allegation of reasonable attorney's fees in the amount of $40,799.53, and raised no affirmative defenses (TFB Ex 35).

STATEMENT OF THE CASE

The Florida Bar filed its formal complaint in this cause on July 13, 2005. At the time of filing the pleadings from the litigation that Respondent had initiated in the Court of Common Pleas of Montgomery County, Pennsylvania on March 23, 2003 (hereafter referred to as "the Pennsylvania foreclosure action") were unavailable to Bar Counsel, but the Complaint contained the following allegation as paragraph 15:

> On March 7, 2003 a Pennsylvania attorney, acting on behalf of FBCCII, a partnership comprised of legal entities owned or under the dominion and control of Respondent, wrote a "NOTICE OF DEFAULT" letter to Mr. Magee, a copy of which is attached hereto as Exhibit P, advising Mr. Magee that he was in default on the mortgage in the amount of $317,556.40, including principle, accrued interest, late charges and attorney's fees. Said demand letter represented an implicit threat by Respondent's corporate interests to sue himself in his representative capacity as Executor of the ancillary estate of Marilyn Magee for failure to make payments under the mortgage note when FBCCII knew that neither it or the Magees intended that any such payments would be made pursuant to the tax evasion scheme orchestrated by Respondent, in violation of R. Regulating Fla. Bar 4-3.1(Meritorious Claims). Further, in permitting or facilitating said threatened action, Respondent misrepresented the nature of the off-setting notes and payment obligations under the mortgage note, in violation of R. Regulating Fla. Bar 4-8.4(c)(Conduct Involving Fraud, Deceit or Misrepresentation) as well as having violated R. Regulating Fla. Bar 4-1.7 (Representing Adverse Interests), 4-1.9 (Conflict of Interest, Former Client), 4-1.13 (Organization as Client) and 4-2.2 (Intermediary). (Complaint, ¶15, page 8).

On July 26, 2005 Bar Counsel served Interrogatories upon Respondent's counsel, including the following :

> 16. Please state whether you, either personally or in any representative capacity, have been named as a Party in any litigation brought by or against

> the Magee Corporation, the Plan, the Estate of Marilyn Magee or FBCCII, and if your answer is in the affirmative, list and identify all such litigations, including the parties thereto, the identity of counsel for each party, the jurisdiction where such litigation was brought and the case number, nature and present status of any such litigation.

Although the answers to said interrogatories were due on or about August 25, 2005, Respondent delayed serving same until September 19, 2005[2], at which time Respondent provided sufficient information that Bar counsel eventually could obtain copies of the pleadings that were introduced in evidence at trial (Bar Ex 35). Trial was held on November 21 and 22, 2005.

In his Report of Referee the Referee found that the allegation that the Magees' wills were not properly executed was not proven by clear and convincing evidence (RR8), that the allegations that the multiple step "roll-over" tax plan was not proven by clear and convincing evidence to have been a sham or tax evasion scheme (RR9) and that the Bar's formal complaint failed to plead sufficient allegations upon which a finding of misconduct could be based regarding Respondent's involvement in the Pennsylvania foreclosure action (RR11). Accordingly, the Referee recommended that Respondent be found not guilty (RR12) and that neither Party should recover costs (RR12). The Florida Bar only seeks review of that portion of the Report of Referee pertaining to the Pennsylvania foreclosure action and the denial of costs.

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2 The Answers to interrogatories were made a part of the record by the filing of same

with the Referee during trial on November 21, 2005 (TR I 28).

SUMMARY OF ARGUMENT

The Referee's conclusion that he could not consider the allegations of misconduct arising out of Respondent's clearly demonstrated conflicts of interest pertaining to his involvement in the Pennsylvania foreclosure action, where Respondent had been placed on notice of the nature of the misconduct charged by the pleadings, even though said foreclosure action had not been specifically identified in the pleadings, is contrary to this Court's holdings in previous Bar discipline cases.

This Court's Bar disciplinary case law and the Florida Standards for Imposing Lawyer Sanctions support a disciplinary suspension of at least 91 days for the misconduct alleged, and the Court should impose an appropriate discipline upon the Respondent for said misconduct and should award the Bar's costs incurred.

ARGUMENT

ISSUE I

WHERE THE RESPONDENT IS FULLY AWARE OF THE FACTS GIVING RISE TO ALLEGATIONS OF MISCONDUCT AND IS PLACED ON NOTICE BY THE PLEADINGS OF THE GENERAL NATURE OF THE MISCONDUCT ALLEGED, DID THE REFEREE ERR IN FINDING THAT NO SANCTION COULD BE IMPOSED BECAUSE THE MISCONDUCT HAD NOT BEEN PLEAD WITH SPECIFICITY AND EXACTITUDE?

The Referee concluded, as a matter of law, that he could not make a recommendation of guilt based upon Respondent's conduct involved in the Pennsylvania foreclosure action because said action was not specifically plead in the Complaint, even though the Complaint makes specific reference to the threat of filing such an action, the pleadings from which, at the time the Complaint was drafted and filed, were unknown to Bar Counsel but well known to Respondent. The standard of review for a question of law is *de novo*. Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000); D'Angelo v. Fitzmaurice, 863 So. 2d 311 (Fla. 2003).

The record establishes that the foreclosing entity, First Business Credit Company II (FBCCII) was Respondent's creation, and was comprised of a partnership of two corporations, one of which was wholly owned by Respondent, known as Kor-Noon Corporation, and the other wholly owned by Respondent's brother-business associate,

Lawrence Koresko, known as First Business Credit Company, Inc. The partnership was created by Respondent for the sole and specific purpose of providing an investment vehicle for Marilyn L. Magee's retirement funds which had been rolled over into the Magee Corporation Retirement Plan and Trust ("the Plan") at Respondent's behest. FBCCII's only reason for existing was to serve as a conduit of those funds from the Plan to the sellers of the Key West condo, in return for which FBCCII issued an instrument Respondent characterized as an Investment Certificate to the Plan and took back a mortgage and note from Mr. and Mrs. Magee. It was this mortgage and note that were utilized as the basis for the Pennsylvania foreclosure action. Respondent's pervasive presence is detected in virtually every phase of the roll-over plan he created, from his role as Trustee of the Plan, to his company known as Penn-Mont Benefit Services, Inc. as Administrator of the Plan, to his interest in the FBCCII partnership through Kor-Noon Corporation. The plaintiff in the Pennsylvania foreclosure action, FBCCII, is none other than that partnership in which Respondent enjoyed an ownership position. Thus it cannot be denied that he was possessed of superior knowledge of his involvement and precipitating role in the Pennsylvania foreclosure action.

The Complaint filed to initiate this disciplinary proceeding alleged that Respondent's partnership, FBCCII, had employed Pennsylvania counsel to draft a "Notice of Default" dated March 7, 2003 (Bar Ex 16) demanding that Mr. Magee cure

the alleged default within thirty days or litigation would follow. Unbeknownst to either Mr. Magee[3] or Bar Counsel, Respondent's partnership did not even wait the thirty days before filing the foreclosure complaint in Pennsylvania on March 24, 2003 (TFB Ex 35), a scant 17 days after the "Notice of Default" letter was mailed to Mr. Magee in Key West.

This court has addressed concerns of "uncharged conduct" in a number of cases. In The Florida Bar v. Solomon, 711 So. 2d 1141 (Fla. 1998), the Court stated

> Solomon contends that the referee violated his due process rights by recommending that he be found guilty of specific instances of misconduct that were not charged in the Bar's complaint. We disagree. This Court has repeatedly recognized that the referee's report may include evidence of unethical conduct "not squarely within the scope of the Bar's accusations" when "it is relevant to the question of the respondent's fitness to practice law and thus relevant to the discipline to be imposed." The Florida Bar v. Stillman, 401 So. 2d 1306 (Fla. 1981); The Florida Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997) (referee's recommendation as to guilt is valid despite Bar complaint not specifically charging respondent with underlying instances of misconduct). The referee's report issued in this case references conduct that was clearly within the scope of the Bar's accusations. We find that Solomon was properly and adequately notified of the nature and extent of the charges against him. (Id. at 1145).

The case of The Florida Bar v. Stillman, 401 So. 2d 1306 (Fla. 1981) is informative. At trial the Referee accepted evidence that went beyond the allegations of the Bar's complaint, establishing that the respondent had earlier been convicted of forgery

[3] The pleadings did not name James Edward Magee as a defendant and consequently he was never served with the pleadings and learned of the existence of the Pennsylvania foreclosure action only during the trial of this matter (TR I 70-71).

and grand larceny. On review, this Court stated

> It was proper for the referee, in making his report, to include information not charged in The Florida Bar's complaint. Evidence of unethical conduct, not squarely within the scope of the Bar's accusations, is admissible, and such unethical conduct, if established by clear and convincing evidence, should be reported because it is relevant to the question of the respondent's fitness to practice law and thus relevant to the discipline to be imposed. (Id. at 1307)

Stillman was cited with approval in the case of The Florida Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997) where the respondent sought review of the referee's consideration of uncharged conduct consisting of her having failed to pursue a settlement agreement or provide the client with a copy of his file. Citing Stillman, the Court added

> We find that the conduct referenced by the referee in his report in this case, though not specifically pled in the Bar's complaint, was clearly within the scope of the Bar's accusations and respondent was clearly notified of the nature and extent of the charges pending against her. (Id. at 832)

Particularly appropriate to the case at bar is the holding in The Florida Bar v. Vaughn, 608 So. 2d 18 (Fla. 1992) where, as here, the referee found the respondent not guilty of the misconduct charged, but nonetheless recommended disciplinary sanctions based upon the respondent's failure to cooperate with the Bar's investigation and disciplinary process even though the complaint did not charge respondent with violation of R. Regulating Fla. Bar 4-8.1(b). The Court found that

> Although the bar's complaint did not specifically charge Vaughn with a violation of rule 4-8.1(b), paragraph 6 of the complaint certainly put Vaughn on notice that his lack of cooperation was at issue. (Id. at 20)

Additionally, in The Florida Bar v. Fredericks, 731 So. 2d 1249, 1253 (Fla. 1999) the Court followed the Referee's recommendations of guilt pertaining to uncharged rule violations, holding that an attorney could be found guilty of violating a rule not specifically charged in the complaint where the complaint alleged the actual conduct which formed the basis of the violation and, therefore, put the attorney on notice, and that specific findings of uncharged conduct and violations of rules not charged in the complaint are permitted where the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint.

Certainly the allegations of this Complaint placed Respondent on notice that his conduct regarding a threatened foreclosure action against his own client brought the actual foreclosure suit within the scope of notice, particularly in light of his knowledge of and personal involvement in the then pending foreclosure action.

In fact, by pleading conflict of interest rule violations consisting of R. Regulating Fla. Bar 4-1.7 and 4-1.9 (Complaint, page 9, ¶15), Respondent was placed on notice of the rule violations inherent in the foreclosure action since, in reality, the foreclosure action is no more than the fruition of the incipient conflicts of interest created by Respondent when he used the Koresko corporations Kor-Noon, Inc. and FBCC to give life to the partnership FBCCII, of which he was legal counsel, assumed the role of sole Trustee of

Magee Corporation Trust and Retirement Plan, retained possession of the corporate minutes, resolutions, stock certificates, the Plan checkbook, and assumed the responsibility for the annual filings of corporate reports and fees.

ISSUE II

WHERE THE RECORD PROVIDES CLEAR AND CONVINCING EVIDENCE OF MISCONDUCT INVOLVING CONFLICTS OF INTEREST, THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUPPORT A DISCIPLINARY SUSPENSION OF 91 DAYS OR MORE.

In his Report of Referee the Referee suggested that The Florida Bar "had devoted very little focus or time on this [foreclosure] lawsuit in this hearing." (RR11), then went on to add that "[the Bar] has not sufficiently plead or raised the filing of the [foreclosure] lawsuit or its handling" (RR11). He did, however, add that his "declination to rule is procedural and not substantive." (RR12). It is thus apparent that the Referee had before him sufficient evidence to be "concerned" (RR10, TR IV 455) by Respondent's conduct in connection with the foreclosure[4], and implied that the Pennsylvania Bar should review said conduct (RR12).

The Referee specifically found that the Bar did not prove those allegations by a preponderance or clear and convincing standard (RR11), but the record demonstrates otherwise. The standard of review for a question of fact is whether or not the Referee's

[4] "[T]he filing of that lawsuit, having it served upon yourself and then admitting the allegations in it, that, [counsel], gives me some issues." (TR IV, 455). "And the thing that I'm really focused on, again, is this lawsuit up in Pennsylvania and this admitting all the allegations, that doesn't look real - - that doesn't have the appearance of propriety to me . . ." (TR IV 465).

findings are supported by competent substantial evidence in the record. The Florida Bar In Re Inglis, 471 So. 2d 38 (Fla. 1983), The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997).

An examination of the record here reflects that the Pennsylvania foreclosure pleadings were placed in evidence by the Bar (TFB Ex 35) without objection (TR I 29), that the complaining witness, Mr. Magee, was examined by Bar counsel about those proceedings and acknowledged that, despite the fact that the foreclosure action placed his home in jeopardy, he had never been made a party to the proceeding or served with pleadings or otherwise been given notice, apart from the "Notice of Default" letter he received from Respondent's colleague, Sean P. Flynn. (TR I 70-71). The Referee questioned the Bar's tax expert witness, Ms. France, regarding the implications of the foreclosure action (TR III 260), as did Bar Counsel (TR III 263-264). Respondent testified that Mr. Magee's letter of March 5, 2003 demanding that Respondent remit the sum of $163,529.59 and cancel and release the mortgage (TFB Ex 15) was the precipitating factor that resulted in the filing of the Pennsylvania foreclosure action (TR IV 423) on March 24, 2003 (TFB Ex 35). The Referee recognized the retaliatory nature of Respondent's actions (TR IV 455, 457). Bar Counsel questioned Respondent about his role in the foreclosure suit during cross-examination (TR IV 441-443) and even the Respondent recognized a potential conflict of interest in his role in the foreclosure suit

(TR IV 441) when he directed his brother to employ other counsel to pursue the suit. The Referee's "devoted very little focus or time" comment (RR11) thus appears to address the quantitative measure of the evidence, rather than the qualitative value of same. Every witness who testified, however (with the exception of Respondent's CPA tax expert witness), was examined to some extent pertaining to this issue.

The record is completely devoid of any evidence refuting, or even disputing, the foregoing evidence of misconduct on the part of Respondent pertaining to this issue. The pertinent Pennsylvania pleadings (TFB Ex 35) clearly and convincingly speak for themselves and, when examined in the light of Respondent's undisputed roles in the business entities involved, demonstrate without question that there was a conflict of interest that the Referee mistakenly declined to recognize out of his concern regarding the state of the Bar's allegations as plead. The quality of the Bar's evidence on this issue is not a matter of weighing and assessing the credibility of witnesses, the facts are undisputed.

The Bar's pleadings placed Respondent on notice that it intended to seek sanctions for violations of, *inter alia*, R. Regulating Fla. Bar 4-1.7 (Representing Adverse Interests) and R. Regulating Fla. Bar 4-1.9 (Conflict of Interest, Former Client). (Complaint, ¶15, page 8). It is obvious from the facts of this case that the interests of FBCCII are adverse to those of James Edward Magee, that Mr. Koresko should have recognized the inherent

nature of the conflict of interest at the time he created FBCCII and that his continued failure to withdraw after the conflict grew to fruition, despite his belated acknowledged recognition of the conflict, constitutes a violation of those rules.

Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. Fla. Stds. Imposing Law. Sancs. 4.32.

The case of The Florida Bar v. Sofo, 673 So. 2d 1 (Fla. 1996) involved an attorney with dual representation of two corporations, in which he owned stock, with adverse interests in the same matter, and who used information obtained in the representation of one corporation without its consent, warranting a suspension of ninety-one day days. The Court stated

> However, we conclude that a ninety-one day suspension, with reinstatement conditioned upon Sofo taking and passing the Multistate Professional Responsibility Examination, is the proper sanction in this case considering respondent's lack of prior disciplinary record as well as other disciplinary cases involving similar misconduct. For example, this Court approved a ninety-day suspension in The Florida Bar; In re Pahules, 334 So. 2d 23 (Fla. 1976), where an attorney who formed and owned stock in two corporations undertook representation of both in spite of their conflicting interests.

In The Florida Bar v. Joy, 679 So. 2d 1165 (Fla. 1996) the respondent was suspended for 91 days where he undertook the representation of a corporation and its

minority shareholder with adverse interests, favoring one of the two by improperly disbursing trust account funds to it to the disadvantage of the other.

Where an attorney represented both husband and wife in previous matters, then undertook the representation of the wife in divorce proceedings, was found to have had a conflict of interest and ordered to withdraw by the trial court, but filed a motion to recuse the trial judge instead of withdrawing, this Court found a one year suspension to be appropriate. The Florida Bar v. Wilson, 714 So. 2d 381 (Fla. 1998).

The respondent in The Florida Bar v. Vining, 721 So. 2d 1164 (Fla. 1998) was suspended for a period of six months based on a conflict of interest where, despite having been discharged and his P. A. sued by a client, he nevertheless continued to represent that client in other pending litigation.

The Florida Bar is suggesting that a 91 day suspension is appropriate discipline for this Respondent based upon the cited rule violations.

ISSUE III

WHERE THE FLORIDA BAR HAS PREVAILED IN A BAR DISCIPLINARY ACTION IT IS ENTITLED TO RECOVER ITS TAXABLE COSTS.

No dispositional hearing was held in this matter due to the Referee's having recommended that Respondent be found not guilty, and consequently no evidence of costs incurred by The Florida Bar has been made a part of this record. If the Court determines that discipline is appropriate in this matter, Bar Counsel is prepared, however, to submit a cost affidavit at the direction of the Court, in the amount of $16,325.68, or to proceed to hearing before the Referee on this issue should the Court remand the case for that purpose.

CONCLUSION

The Court should find that the Respondent has violated R. Regulating Fla. Bar 4-1.7 (Representing Adverse Interests) and R. Regulating Fla. Bar 4-1.9 (Conflict of Interest, Former Client), should enter its order suspending Respondent from the practice of law in the State of Florida for at least 91 days and should enter a judgment for costs in favor of The Florida Bar in the amount of $16,325.68, or alternatively, should remand the case to the Referee for a determination of allowable costs.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Initial Brief regarding Supreme Court Case No. SC05-1225, TFB File No. 2002-00195(2A) has been mailed by certified mail #7005 1160 0003 8805 2013, return receipt requested, to John A. Weiss, Counsel for Respondent at 2937 Kerry Forest Parkway, Suite B2, Tallahassee, Florida 32309-6825 on this _____ day of June, 2006.

_____

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Copy provided to:
John Anthony Boggs, Staff Counsel

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

Undersigned counsel does hereby certify that the Amended Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the 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.

_____

Donald M. Spangler, Bar Counsel