

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC02-2430

v.

TFB File No. 2001-00358(8B)

PAUL D. FRIEDMAN

Respondent.

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SUPPLEMENTAL ANSWER BRIEF

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## PRELIMINARY STATEMENT

The Complainant, The Florida Bar, submits this Answer Brief in compliance with the Court's order of May 17, 2006.

Complainant will be referred to as The Florida Bar, or as The Bar. Paul D. Friedman, Respondent, will be referred to as Respondent, or as Mr. Friedman throughout this brief.

References to the related case involving Roland Raymond St. Louis, Case No. SC04-49, will refer to Respondent St. Louis or Mr. St. Louis.

References to the related case involving Francisco Ramon Rodriguez, Case No. SC03-909, will refer to Respondent Rodriguez or Mr. Rodriguez.

References to the related case involving Diane Deighton Ferraro, Case No. SC02-1549, will refer to Respondent Ferraro or Ms. Ferraro.

References to the Report of Referee in this matter shall be by the symbol RR(Friedman) followed by the appropriate page number. References to the Reports of Referee in the related cases shall be by the symbol RR(St. Louis), RR(Rodriguez)<sup>1</sup> or RR(Ferraro) followed by the appropriate page number.

References to specific pleadings will be made by title.

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<sup>1</sup> The referee in Rodriguez styled his report "Order of Finding of Guilt" instead of Report of Referee.

## STATEMENT OF THE CASE

This case was submitted for the Court's consideration pursuant to the Amended Report of Referee Accepting Consent Judgment dated August 18, 2003. The referee recommended acceptance of the agreement arrived at between Respondent and The Florida Bar providing for a suspension period of 90 days, payment of restitution to clients in the amount of \$910,000.00 ( which sum had already been paid) and payment of the Bar's costs in the amount of \$7319.96 (which likewise had already been paid). On April 23, 2004 the Court entered an order staying consideration of this matter pending the dispositions of the related cases of The Florida Bar v. Rodriguez, Case No. SC03-909 and The Florida Bar v. St. Louis, Case No. SC04-49. The Court's order of May 17, 2006 directed the filing of this supplemental brief to specifically discuss the appropriateness and length of the recommended suspension (90 days); the concepts of restitution to clients and disgorgement of the fee into the Client's Security Fund pursuant to rule 3-5.1(h); the appropriateness and amount of a possible disgorgement; and the appropriateness of a public reprimand and the appropriateness of probation accompanied with *pro bono* service. A similar order was entered on the same date in the related case of The Florida Bar v. Rodriguez, Case No. SC03-909, and a similar supplemental brief is being submitted in that case.

It is important to recognize at the outset that neither this case nor the related case of The Florida Bar v. Ferraro, SC02-1549, was tried before the respective referees. The record in this case therefore consists of the pleadings and the stipulated facts set forth in the Conditional Guilty Plea for Consent Judgment executed by Mr. Friedman on July 16, 2003, submitted to the referee and referenced in the Amended Report of Referee.

## STATEMENT OF THE FACTS

This and the related St. Louis, Rodriguez and Ferraro cases arise out of the representation of twenty clients having claims against DuPont, stemming from the clients' use of the DuPont product Benlate, by the law firm then known as Friedman, Rodriguez, Ferraro and St. Louis, P. A. (hereafter FRF&S) in which all four respondents were shareholders. On August 7, 1996, during settlement negotiations with DuPont's defense counsel, Respondents St. Louis and Rodriguez agreed to execute an agreement (hereafter the "Secret Side Agreement") whereby in return for a payment of \$6,445,000.00 by DuPont to FRF&S they would refrain from further Benlate litigation against DuPont and serve as counsel and/or consultants for DuPont in future matters. The agreement was drafted by Respondent St. Louis and executed by him on behalf of the firm. All four respondents were aware of the discussion of an arrangement such as this before the fact as a result of attending firm meetings at which the topic was discussed, although Respondents Ferraro and Friedman were not actively engaged in the Benlate cases and did not learn that an agreement had been struck and the document executed by Respondent St. Louis until after the fact. All four respondents shared in the distribution of the \$6,445,000.00 fee in varying amounts, presumably in proportion to their ownership interest in the firm or their contribution to the litigation of the Benlate cases.

The case of The Florida Bar v. Ferraro, SC02-1549, was resolved through negotiations which culminated in an agreement whereby Respondent Ferraro agreed to accept a public reprimand, make restitution to the clients in the amount of \$425,000 and pay the Bar's costs in the amount of \$3169.36. Respondent Ferraro paid the agreed restitution amount and the Bar's costs prior to the submission of the consent judgment to the referee. In his Report of Referee the referee recommended acceptance of the consent judgment, and it was accepted by the Court by order entered February 20, 2003.

As discussed in the Statement of the Case herein, this case resulted in a negotiated consent judgment in which Respondent Friedman agreed to accept a suspension of 90 days, pay restitution to the firm's clients in the amount of \$910,000.00 and pay the Bar's costs in the amount of \$7162.36. The restitution and costs were paid prior to submission of the consent judgment to the Court, but the suspension has not been served as a result of the Court's stay order entered on April 23, 2004.

The case of The Florida Bar v. Rodriguez, SC03-909, was tried and resulted in a Report of Referee (styled Order of Finding Guilt) recommending that Respondent Rodriguez receive a public reprimand, serve four years of probation, provide 1000 hours of *pro bono* service and pay the Bar's costs in the amount of \$45,258.88. The Rodriguez case is presently pending before the Court on the Respondent's Petition for Review and the Bar's Cross Petition for Review.

The case of The Florida Bar v. St. Louis, SC04-49, was also tried and resulted in a Report of Referee recommending that Respondent St. Louis receive a 60 day suspension, serve 3 years of probation with *pro bono* service in the amount of 100 hours per year, disgorge the sum of \$2,277,663.00 of the prohibited fee into the Client Security Fund over a ten year payment plan and pay the Bar's costs in the amount of \$72,218.37. It also is pending before the Court on the Bar's Petition for Review and Respondent's Cross Petition.

## SUMMARY OF ARGUMENT

A suspension for a period of ninety days is appropriate in this case, when viewed in the light of the proportionality of the misconduct and varying degree of egregiousness thereof of the four respondents involved in these related cases. Respondent Friedman's conduct was more egregious than that of Respondent Ferraro, but less than that of Respondents Rodriguez or St. Louis.

Respondent Friedman (as did Respondent Ferraro) has already voluntarily paid restitution in an amount proportionate to his share of the prohibited fee involved, and therefore further payment to the Client Security Fund is inappropriate, although it is appropriate in the related Rodriguez and St. Louis cases where no disgorgement of the prohibited fee has occurred. This is discussed in greater depth in the supplemental brief being submitted in the Rodriguez case.

The Bar did not seek a probation provision in this, or any of the other cases, in the belief that the misconduct involved arose out of a singular set of circumstances not likely to be repeated by this respondent and that probation, therefore, would not serve a remedial purpose in this case.

## ARGUMENT

### ISSUE I

WHERE A LAWYER KNOWINGLY ACQUIESCES IN A PROHIBITED FEE ARRANGEMENT AND FAILS TO TAKE TIMELY CORRECTIVE MEASURES TO DISGORGE THE FEE AND INFORM HIS CLIENTS, PARTICIPATES IN THE COMMINGLING OF THE FUNDS DERIVED THEREBY IN THE TRUST ACCOUNT AND ACCEPTS A PROPORTIONATE SHARE OF THE PROHIBITED FEE, A NINETY DAY SUSPENSION IS AN APPROPRIATE SANCTION.

The Florida Bar urges the Court to apply a concept of proportionality when considering the degree of sanction to be applied to this respondent, in comparison with that which is appropriate to the respondents in the related cases involving Ms. Ferraro, Mr. Rodriguez and Mr. St. Louis, and suggests that the degree of culpability of each should be measured and that measurement should be the determinant of the appropriate sanction.

This writer is unable to find a specific pronouncement by the Court that it accepts the concept of proportionality, but in the case of The Florida Bar v. Tauler, 775 So. 2d 944 (Fla. 2000) it appears that the Court has accepted the concept. The majority in Tauler compared the misconduct of Tauler (misappropriation of trust account funds), with the level of egregiousness found to have existed in the cases of The Florida Bar v. Travis, 756 So. 32d 689 (Fla. 2000) and The Florida Bar v. Korones, 752 So. 2d 586

(Fla. 2000), and after considering the mitigating factors present in Tauler, and the lack thereof in Travis and Korones, stated “While we do not countenance Tauler's actions, *proportionality* requires that Tauler be held less culpable...” (Id at p. 949)(Emphasis added). One such factor taken into consideration was the protracted time period over which Travis (two years) and Korones (three years) misappropriated funds, compared with the relatively brief period involved in Tauler (five months). The Court also appears to recognize and adopt the Tauler referee’s finding of “...*diminished culpability* due to the circumstances surrounding Tauler’s misconduct.” (Id at p. 947)(Emphasis added).

Likewise, in a group of Bar discipline cases, only one of which resulted in a published opinion, the Court has accepted proportioned disciplines according to the degree of culpability. The Florida Bar v. Cueto, 834 So. 2d 152 (Fla. 2002) is but one of several discipline matters arising out of a kick-back scheme between Miami-Dade County adjustors and personal injury attorneys. While Cueto was disbarred, others who participated to varying lesser degrees received varying lessened sanctions. This Court approved consent judgments of 18 month suspensions in five cases<sup>2</sup>, a two year

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<sup>2</sup> Cabello, SC01-604; Tacher, SC01-592; Gonzalez, SC01-1200; Izquierdo SC00-242; and Klemick SC00-2214.

suspension in one<sup>3</sup>, three year suspensions in two cases<sup>4</sup> and disciplinary resignations in two more<sup>5</sup>.

At least one other jurisdiction, Mississippi, appears to be comfortable with the concept of proportionality the Bar is urging. In The Mississippi Bar v. Walls, 797 So. 2d 217 (Miss. 2001), despite the fact that the respondent had been suspended for one year by the United States Court of Appeals for the Fifth Circuit, the Mississippi court imposed only a public reprimand, commenting that

This Court applies a *proportionality* requirement to Bar discipline cases. (Citation omitted). Suspensions from the practice of law have been reserved for instances where some form of dishonesty has significantly harmed the client, or constituted a fraud on a court, or both. (Id at p. 221)(Emphasis added).

The Board of Governors of The Florida Bar appears to have accepted proportionality in Bar discipline cases as evidenced by the Florida Standards for Imposing Lawyer Sanctions adopted by the Board. One need look no farther than any of the sub-parts of section C of the Standards to recognize that the recommended level of sanction becomes increasingly severe as the degree of culpability of the respondent increases. For example, Fla. Stds. Imposing Law. Sancs. 4.4, suggests that admonishment is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a

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<sup>3</sup> Appel, SC00-2516.

<sup>4</sup> Joseph Rodriguez, SC01-605 and Vazquez, SC00-1899 & SC01-462.

<sup>5</sup> Batista, SC00-1660 and Fernandez, SC00-289.

client, and causes little or no actual or potential injury to a client (Id at 4.44), whereas suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client (Id at 4.42(a)) and disbarment is appropriate when a lawyer abandons the practice and causes serious or potentially serious injury to a client (Id at 4.41(a)). Referees customarily rely upon these standards in recommending discipline, as does the Court.

Likewise, both referees and the Court rely upon the application of the mitigating and aggravating factors set forth in Section C of the standards in determining whether a recommended sanction should be enhanced or lessened, according to the proportionality of those factors applicable in each circumstance, thus tacitly accepting the applicability of proportionality in determining sanctions.

In comparing the varying degrees of culpability of this Respondent vis-à-vis that of Ms. Ferraro, it is apparent that, while neither of them knew that the secret side agreement had been executed at the time of execution, both learned shortly thereafter of that fact and neither took any measures to inform the clients or repudiate the agreement. Both participated in the distribution of the prohibited fee, although Ms. Ferraro's share was less than the others. The distinguishing factor between Ms. Ferraro and Mr. Friedman, is the fact that Mr. Friedman, as Secretary Treasurer of the firm, actively participated in the creation of the interest-bearing account for the "hold-back" funds for the benefit of the

firm and at the expense of the clients, and the commingling of funds in the trust account. Thus, while Ms. Ferraro has already received only a public reprimand, Mr. Friedman's sanction should be that of a suspension.

Mr. Friedman's complicity in the firm's misconduct was less than that of either Mr. Rodriguez or Mr. St. Louis, both of whom were the principal actors in the Benlate litigation as well as in the negotiations of the terms of the secret side agreement with DuPont. Accordingly, while having entered into a consent judgment for a 90 day suspension with Mr. Friedman, the Bar has sought a suspension of two years and disgorgement of the prohibited fee in the case of Mr. Rodriguez, and disbarment and disgorgement of the prohibited fee in the case of Mr. St. Louis, based on the concept of proportionality, their culpability having been respectively more egregious than that of either Ms Ferraro or Mr. Friedman. As noted, the Bar seeks a two year suspension for Mr. Rodriguez.

Mr. Rodriguez was the most experienced trial lawyer in the firm and was expected to be lead trial counsel, if needed. He was initially contacted by the DuPont defense attorneys about an agreement for a limitation of practice regarding future Benlate cases, and was actively involved in negotiating the terms of the secret side agreement. (RR Rodriguez p.6). Despite initial reluctance to enter into the agreement with DuPont (RR Rodriguez pp.12, 13), Mr. Rodriguez eventually acceded to doing so.

Mr. St. Louis was responsible for having brought the Benlate clients into the firm (RR St. Louis p.11), was actively engaged in the settlement discussions (RR St. Louis p.14-18) as well as the secret side agreement negotiations (RR St. Louis p.19-20), drafted the final version of the agreement and, following settlement agreement, personally traveled throughout the state to meet with the various Benlate clients and sell them on the terms of the settlement, providing each with redacted documents so that they would not learn the provisions of their settling companion clients (RR St. Louis p.23-24). The St. Louis referee further found that he had made two misrepresentations to Bar counsel concerning the agreement (RR St. Louis p. 29), and lied to Judge Wilson when he professed to having disclosed the secret side agreement to The Florida Bar in an earlier proceeding (RR St. Louis p.35-36). The Bar feels that this most egregious conduct on the part of Mr. St. Louis justifies disbarment.

## ISSUE II

WHERE THE RESPONDENT HAS VOLUNTARILY MADE RESTITUTION OF A PROHIBITED FEE TO HIS CLIENTS AS A PROVISION OF A CONSENT JUDGMENT, FORFEITURE OF ADDITIONAL FUNDS INTO THE CLIENT'S SECURITY FUND IS INAPPROPRIATE.

The issue of disgorgement of the prohibited fee realized by Respondent's law firm has been discussed and briefed in both the Rodriguez case and the St. Louis case. The Bar's position has consistently remained that none of the four related respondents should be permitted to retain the fruits of their unethical conduct. The St. Louis referee recognized the propriety of the Bar's recommendation in that respect, and has recommended forfeiture of the prohibited fee, reduced by 40% to an after-tax amount and spread over a ten year payment plan, with the Bar's agreement. The Rodriguez referee, however, recommends against forfeiture, thus tentatively allowing Mr. Rodriguez to retain his share of the prohibited fee. This issue will be discussed in greater depth in the supplemental brief ordered to be filed in Rodriguez.

Notwithstanding the unsettled state of disgorgement in the Rodriguez and St. Louis cases, however, it would be manifestly unfair to require Mr. Friedman to make either additional restitution or forfeiture to the Client Security Fund, since he has already made restitution of the amount he realized (as did Ms. Ferraro) to the firm's Benlate clients.

### ISSUE III

WHERE RESPONDENT'S MISCONDUCT AROSE OUT OF A SINGULAR SET OF CIRCUMSTANCES NOT LIKELY TO ARISE AGAIN AND BE REPEATED BY THIS RESPONDENT, PROBATION DOES NOT SERVE AN APPROPRIATE REMEDIAL PURPOSE.

A reading of R. Regulating Fla. Bar 3-5.1(c) demonstrates that the purpose of probation can be remedial or supervisory in nature

**(c) Probation.** The respondent may be placed on probation for a stated period of time of not less than 6 months nor more than 3 years or for an indefinite period determined by conditions stated in the order. The judgment shall state the conditions of the probation, which may include but are not limited to the following:

- (1) completion of a practice and professionalism enhancement program as provided elsewhere in these rules;
- (2) supervision of all or part of the respondent's work by a member of The Florida Bar;
- (3) the making of reports to a designated agency;
- (4) the satisfactory completion of a course of study or a paper on legal ethics approved by the Supreme Court of Florida;
- (5) such supervision over fees and trust accounts as the court may direct; or
- (6) restrictions on the ability to advertise legal services, either in type of advertisement or a general prohibition for a stated period of time, in cases in which rules regulating advertising have been violated or the legal representation in which the misconduct occurred was obtained by advertising.

The Florida Bar did not seek probation in any of these four related cases. There has never been a suggestion that any of the four respondents suffered from any sort of substance abuse problem that required remedial attention, labored under any ignorance of the law or legal procedures that would suggest their work be monitored by more competent lawyers, lacked an understanding of accounting requirements that would be remedied by instruction and monitoring, etc. The circumstances of the misconduct involved were singular and unique in nature, are not likely to be repeated by Mr. Friedman in the future, and therefore there does not appear to be any ongoing need that should be addressed by a probationary program. The acquiescence in the secret side agreement is far too egregious to consider a lenient sanction such as probation.

## CONCLUSION

The Court should accept the Referee's recommendation of a 90 day suspension in this case, assuming the Court agrees that the recommended sanctions in the related cases of The Florida Bar v. Rodriguez and The Florida Bar v. St. Louis are proportionately adjusted upward from the recommendations of their respective referees, according to the degree of culpability of those respondents vis-à-vis that of Respondent Friedman. Should the Court decide otherwise concerning Rodriguez and St. Louis, the sanction to be applied to Respondent Friedman should be proportionally lessened.

Respectfully submitted

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Donald M. Spangler  
and  
James A. G. Davey, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Answer Brief regarding Supreme Court Case No. SC02-2430, TFB File No. 2001-00358(8B) has been mailed by first class mail to Robert C. Josefsberg, Respondent's Counsel, at Podhurst and Orseck, P. A., 25 W Flagler St., Miami, FL 33130-1712 on this \_\_\_\_\_ day of June, 2005.

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

Undersigned counsel does hereby certify that the 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.

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Donald M. Spangler, Bar Counsel