

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Case NO. SC02-2403

Complainant,

(TFB File No. 2001-00, 358 (8B))

v.

PAUL FRIEDMAN,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Respondent, Paul Friedman, by and through undersigned counsel files this supplemental brief in response to the court's May 17, 2006 order directing the parties to address the suitability of the referee's recommended disciplinary measures in his August 18, 2003 Amended Report Accepting Consent Judgment. Accordingly, this brief addresses existing law, the Florida Standards for Imposing Lawyer Sanctions, and the disparate disciplinary recommendations associated with the 1996 settlement of various related cases involving three of Respondent's former partners.¹

In May 2003, Respondent agreed to the disciplinary measures that were recommended in the referee's August 18, 2003 Amended Report Accepting Consent Judgment. Due to his acceptance of the disciplinary measures, Respondent is hesitant to make alternative recommendations with regard to the suitability of the referee's recommended discipline. Respondent firmly believes in the fundamental credo lying at the base of the legal profession that a lawyer's word is his bond. Consequently, Respondent does not want to renege on his agreement with the Bar regarding the sanctions to which he has previously agreed. Respondent does not want to give the impression that he is undermining the referee's recommendations or that he feels he does not deserve punishment for his actions and is, therefore, ready and willing to abide by the

¹/ Roland Raymond St. Louis, Francisco Ramon Rodriguez and Diane Deighten Ferraro. See Supreme Court of Florida case nos.: 91,904; 91,917; SC02-1549; SC03-909; and SC04-49 (The Florida Bar file nos.: 97-31,346 (05B); 97-30,467(05B); 97-30,683(05B); 97-31,345 (05B); 2001-00,356 (8B); 2001-00,357 (8B); and 2001-00,359 (8B)).

consent decree.

STATEMENT OF THE FACTS

The Florida Bar commenced this proceeding in January 2001, and filed its complaint on November 14, 2002. Following the March 31, 2003 appointment of the referee, Respondent expeditiously entered into his Conditional Guilty Plea for Consent Judgment. There are several reasons why Respondent now, after the Court's May 17, 2006 Order compelling renewed consideration of his July 2003 consent decree and its appropriateness, feels compelled to take a stance contrary to it.

Respondent's former partner Ferraro entered into a consent decree with the Bar in December 2002. Respondent began discussing the terms of his discipline with the Bar in May 2003, reached an agreement, and was finally able to execute a consent decree in July 2003 after approval by the Florida Bar Board of Governors. In Ferraro's case, this Court promptly approved the referee's recommendation—namely, that she be publicly reprimanded. In contrast, Respondent's recommended sanction has still to be approved by the Supreme Court of Florida three years later. In Respondent's response to the Court's November 3, 2003 Order to Show Cause, he respectfully urged the Court to expeditiously adjudicate the disposition of this matter so as to avoid any prejudice to his case. Respondent stated:

...the contemplated stay could result in possible amendment of the charges against him based upon a record created in proceedings to which he is not a party (which indeed he is excluded from) or at the very least influence the

disposition of the charges against him based on whatever cross-allegations of blame surface from his former law partners. This not only would deprive Respondent of an expeditious review of the charges against him, which he has fully settled with the Florida Bar, but might also seriously prejudice the Court's review of that settlement and its disposition of those charges.

Respondent's November 28, 2003 response to Court's November 3, 2002 Order to Show Cause at p. 2. This Court declined to adjudicate this matter at that time and, as a result, Respondent's practice has suffered and the purpose behind quickly entering into a consent decree has been frustrated. Respondent desisted from litigating the merits of his case and agreed to the 90-day suspension to make peace with the Benlate clients because he was remorseful for what had occurred and wanted to accept responsibility for his conduct and bring closure to the entire matter, including the bar proceedings. Since his entering into that agreement, however, circumstances have changed.

When the parties entered into that consent decree it was expected that service of the discipline would commence within a matter of a month or two, and Respondent duly prepared himself and his practice of law. Instead, this proceeding has been pending for the last three years, which has imposed a greater public embarrassment and punishment than the consented-to discipline. As a result, the purpose behind settling the disciplinary action against him—namely, to obtain finality and closure in this proceeding—has been frustrated. The absence of finality and closure now 5 2 years since the underlying wrong occurred has left Respondent with an unusually lengthy (and therefore unfair) black-cloud

hanging over his head. Had Respondent known that agreeing to a 90-day suspension would entail a three year delay, he would not have agreed to such a resolution. Since consenting to discipline, Respondent (a commercial litigator) has been compelled for over three years to avoid undertaking complex matters that could reasonably be expected to take more than a brief period of time to complete on behalf of clients. As a result of having served that three year sentence in limbo, it seems fundamentally fair to take an adverse position to the consent decree.

Additionally, such a stance is compelled by the complete absence of parity in discipline as between Respondent and his three former partners, Diane Deighten Ferraro (hereinafter **AFerraro@**), Francisco Ramon Rodriguez (hereinafter **ARodriguez@**), and Roland Raymond St. Louis (hereinafter **ASt. Louis@**). While Respondent readily acknowledges that his behavior was unacceptable, he was certainly not the most culpable of the four. Respondent should not, therefore, receive the most severe punishment. The Florida Bar agrees that Respondent is, next to Ferraro, the least involved person in the underlying matter and deserves a much lesser discipline than St. Louis and Rodriguez.

Last, consideration of guiding legal principles leads to the conclusion that the consented-to recommendation in this proceeding is unduly harsh and lacks a reasonable basis in existing law.

SUMMARY OF THE ARGUMENT

The disciplinary measures the Referee recommended for Respondent are too severe. After consideration of the numerous mitigating factors, time served while Respondent has waited for his suspension to begin, restitution paid, and the sanctions given to his former partners, the 90-day suspension is the most severe sanction this Court should consider applying; however, a public reprimand is more appropriate. Relevant case law and disciplinary standards indicate that the appropriate disciplinary measure for this Court to apply to Respondent is a public reprimand. Therefore, Respondent respectfully requests this Court disregard the Referee's recommended disciplinary measures and adopt a public reprimand, which is supported by Florida case law and Florida Standards for Imposing Discipline.

ARGUMENT

Standard of Review

This Court has stated in several cases that it does not "second-guess a referee's recommended discipline" if it is supported by existing case law and the Florida Standards for Imposing Lawyer Sanctions. Fla. Bar v. Miller, 863 So2d. 231, 235 (Fla. 2003); Fla. Bar v. Temmer, 753 So.2d 555, 558 (Fla 1999); and Fla. Bar.v. Lecznar, 690 So. 2d 1284, 1288 (Fla. 1997). Because existing law supports a more lenient sanction than that recommended by the referee, it is Respondent's position that this Court should use the referee's recommendation as a ceiling in the sanctions to be imposed in the instant case.

I. Since it is unjust for Respondent to be disciplined more severely than

his more culpable partners, a public reprimand is the appropriate sanction.

It is evident from the record that Respondent's conduct is indistinguishable at its core from that of his former partner Diane Deighten Ferraro. See and compare Ferraro and Respondent's Conditional Guilty Pleas for Consent Judgment. Both were not involved in negotiation of the settlement that included the alleged secret side agreement and did not learn of its existence until after the fact. Both made full restitution prior to the commencement of the Bar's proceedings. Both expeditiously consented to discipline by entering into a Conditional Guilty Plea for Consent Judgment, which the referees accepted and recommended.

Respondent, like Ms. Ferraro, consented to having violated Rules 4.1-7(b)(duty to avoid limitation on independent professional judgment), 4-5.1(c)(responsibility for rules violations) and 4-5.6(b)(restrictions on right to practice). The referee in the Ferraro case expressly found that she ~~A~~had absolutely nothing to do with the settlement negotiations with Dupont and did not know that her partners had done this until after they did it ... [and] had no knowledge of the secret side agreement at the time it was negotiated by her partners.@ The referee further noted that Ferraro had paid a substantial sum (\$425,000) in restitution to her former firm's clients associated with the underlying subject matter. The referee cited to existing case law and the Florida Standards for Imposing Lawyer Sanctions in support of his determination and recommendation that the appropriate

discipline be a public reprimand, which this court thereafter approved.

Like Ferraro, Respondent had absolutely no role in the settlement negotiations with Dupont. Respondent also did not know that his partners had entered into the offensive agreement until after they did it. See, e.g., Amended Report of Referee, at ' II.B.m., which states:

[Respondent] had no part in the settlement negotiations with Dupont and he did not know that his partners had settled the cases and that they had entered into the secret side agreement until some time after they did it; he was not aware that a secret side agreement was being negotiated and he was not aware of it until after his partners had prepared and executed it.

.....

It is also undisputed that, well before the subject settlement had been entered into, Respondent had been informed by the two partners handling the cases and clients that (a) while it was raised at one time and rejected, they believed no practice restriction agreement would again be requested by Dupont and (b) if one were ever again raised, then all of the firm's partners would first be made aware of the same, have the opportunity to see it in writing, consider the results of legal research related to such a concept, and then discuss the same with all partners in order to determine each partner's and the firm's position on the matter. The Amended Report of Referee, at section II.B.h., states:

In connection therewith, Francisco Ramon Rodriguez assigned a senior associate the responsibility of performing legal research regarding whether Dupont's proposal was permissible. Francisco Ramon Rodriguez and Roland Raymond St. Louis, Jr., also then informed the other partners that they believed a settlement with Dupont for FRF&S= clients would be

reached without any practice restriction agreement having to be a part thereof. [Friedman's] response was that in any event the subject matter did not need to be addressed unless Dupont again raised the matter (and, if so, after the partners then had a chance to review Dupont's position in writing).

Although the referee reports in Ferraro's and Respondent's proceedings do not make any substantive distinction between the pertinent conduct of Ferraro and Respondent, they do make a few findings that demonstrate differences between Ferraro and Respondent. For example, the reports reflect that Respondent held a larger interest in the profits of their former firm. It is on that account that, after consideration of the mitigating factors, a 90-day suspension was agreed to and recommended rather than a public reprimand. Respondent has not found any basis in law for the proposition that holding a larger interest in a law firm's profits should be a determinative factor as to discipline where such interest has no bearing upon the conduct under review. Furthermore, the Bar has not shown that Respondent's larger interest in the firm's profits was a relevant factor in these proceedings. The Bar did explain to Respondent that he was charged with violating Rules 4-1.4(b), 4-1.5(a), 4-1.8(a) and 4-1.15 because he had a larger interest in the firm's profits, but it did not make any affirmative connection between Respondent's interest in the firm's profits and the conduct in question. The referee also noted as a distinguishing factor that Ferraro was a vice president of the former firm while Respondent was its secretary-treasurer.² Respondent also has not found any basis in law

^{2/} St. Louis was the other vice president of the firm, and Rodriguez was both its managing partner and

for the proposition that holding the title of secretary-treasurer as opposed to vice-president should make a difference when recommending sanctions. Yet, it is on account of the above two distinctions that, after consideration of the mitigating factors, a 90-day suspension was agreed to and recommended rather than a public reprimand. The referee gave these two factors unmerited weight since it is unsupported by law. As further reflected by said report, Respondent in 2002 paid \$910,000 to the affected clients of his former firm, thereby fully paying over the financial benefit he realized on account of the offensive agreement. Respondent's deep remorse over that which occurred, including the immediate breakup and resulting dissolution of the firm he originally founded, compelled him to settle a civil lawsuit and make restitution independent of the Bar and to consent to the instant recommended discipline.....

It is equally evident that the conduct of Respondent was less egregious and is distinguishable at its core from that of his former partners St. Louis and Rodriguez. Respondent, however, stands to receive harsher discipline than what was recommended by the referees in the St. Louis and Rodriguez contested proceedings. In contrast to those proceedings, Respondent consented and fully cooperated with The Florida Bar, unhesitatingly agreed that Dupont should have been told "No," freely and voluntarily made restitution years ago to the clients, and always expressed unqualified remorse.

president.

After observing that the underlying issue(s) were deemed a matter of first impression in Florida, that clients had not suffered a loss on account of their conduct and had instead benefitted, and that the purposes of the disciplinary rules would not be served by a more severe discipline, the referees in the Rodriguez and St. Louis proceedings determined that: (a) as to Rodriguez, a four year probation accompanied by 1,000 hours of pro bono work spread over those four years and a public reprimand was deemed suitable and appropriate, and (b) as to St. Louis, a 60-day suspension followed by a three year probationary period accompanied by 100 hours of pro bono work, completion of 5 ethics hours of study and forfeiture of \$2,227,663.00 was deemed suitable and appropriate. In the present case, the disparity in the recommended discipline is unreasonable given Respondent's minor role. Respondent freely and voluntarily sought to make restitution, did in fact pay restitution, fully and voluntarily cooperated with the Bar throughout his proceeding and those that followed, exhibited great remorse, and consented to discipline.

II. Based on existing case law, public reprimand is the appropriate disciplinary measure to be taken against Respondent.

It appears, just as the referee in the Ferraro case concluded in his report (see pgs 7-8 thereof) and just as this court found and concluded in the Ferraro case by approving that report, that Standard for Imposing Lawyer Sanctions 7.3 most closely fits the facts of this case. Standard for Imposing Lawyer Sanctions 7.3 indicates that a A[p]ublic

reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.@ A public reprimand is justified in this case, and supported by existing case law, because Respondent had no knowledge of the secret side agreement at the time it was negotiated by his partners. See, Florida Bar v. Kramer, 593 So.2d 1040 (Fla. 1992) and Florida Bar v. Hollander, 607 So.2d 412 (Fla. 1992); see also Fla. Bar v. Ferraro, SC02-1549 (Feb. 20, 2003).

In The Florida Bar v. Mandelkorn, 874 So.2d 1193 (Table)(2004), this Court approved a referee's recommendation for public reprimand as the suitable sanction for a lawyer that agreed to a practice restriction in connection with settlement of a lawsuit. The underlying facts of the case are set forth in Adams v. Bellsouth Commc=ns, No. 96-2473-CIV, 2001 WL 34032759, at *1 (S.D. Fla. 2001). In Adams, the Plaintiffs= attorney proposed Athat in exchange for a settlement, his firm would agree not to represent any current or former employee of BellSouth against the company for a period of one year.=@ Id. A defense attorney then made settlement contingent on such an agreement. Id. The defendant's attorneys further insisted that Plaintiffs=counsel be compensated with funds Ataken directly out of the \$1.5 million global= settlement ...@ Id. It was concluded that the lawyers involved in the settlement violated five Florida Bar Rules. Id. at *2. The Plaintiffs= lawyer entered into a conditional guilty plea and consent judgment

recommending a public reprimand, which this Court approved. See, Mandelkorn, 874 So.2d 1193 (Table)(2004). The referee's recommended sanction in the instant case is, therefore, too severe considering Mandelkorn, particularly because the Respondent's conduct did not result in any financial loss to the firm's clients.

In Kramer, the respondent obtained a quit claim deed from a client with limited reading ability who thought he was getting a mortgage, rather than giving a deed. The respondent was held to have violated Rule 4-1.7(b)(a lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client, a third person, or by the lawyer's own interest), Rule 4-1.7(c) (when representing multiple clients in a single transaction, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved), and Rule 4-1.8(a)(a lawyer shall not enter a business transaction with a client or knowingly acquire an ownership, possessory, security, or pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses). Although the referee recommended a private reprimand and the payment of costs as discipline, this court determined that a public reprimand was appropriate.

Hollander involved an attorney's violation of Rule 4-1.5(A)(a lawyer shall not enter into an agreement for, charge, or collect a clearly excessive fee), Rule 4-8.4(a) (a lawyer

shall not violate the Rules of Professional Conduct), and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). It is apparent that intentional misconduct was involved, as were three aggravating factors: (1) past disciplinary record for violating Rule Regulating The Florida Bar 4-1.5(A) (a lawyer shall not enter into an agreement for, charge, or collect a clearly excessive fee); (2) selfish or dishonest motive; and (3) vulnerability of victims. This court upheld the referee's recommendation of a public reprimand and 6 months probation. In contrast to the respondent in Hollander, no aggravating factors are present in this proceeding and the consented-to violations by Respondent do not include conduct involving dishonesty, fraud, deceit or misrepresentation.

Even taking into account the additional (as compared to Ferraro) rules violations to which Respondent consented, it appears the recommended discipline is harsh and more severe than provided for in existing law. For example, Florida Bar v. Davis, 577 So.2d 1314 (Fla. 1991) involved trust account violations readily distinguishable from and more flagrant than one instance of commingling.³ In contrast to Respondent, Davis did not place funds in trust that were required to be deposited in trust, did not keep accounting records, funds were missing, and he did not make restitution. In Respondent's case, there

^{3/} Additionally, in Respondent's case, the commingling was unintentional, as it was his belief those funds did not at that time belong to his firm but were instead subject to being returned to Dupont; moreover, once the settlement was entered into, the firm's interest in the commingled funds was removed from the trust account and placed in the firm's operating account.

is no dispute that absolutely all funds were accounted for, good and sufficient accounting records were maintained and restitution was made. Although Davis' conduct was more egregious than Respondent's conduct, Davis' discipline was the same as that recommended for Respondent's 90-day suspension. Respondent's recommended sanction is, therefore, too harsh as compared with Davis and should be reduced to a public reprimand.

In a case involving fraudulent attorney conduct, a 90-day suspension for violations of Rule 4-8.4(c)(dishonesty, fraud, deceit or misrepresentation), Rule 4-4.1(a)(knowingly making a false statement of material fact), Rule 4-8.4(b)(criminal act) and Rule 4-8.4(d)(conduct prejudicial to administration of justice) was deemed suitable and appropriate. Florida Bar v. Varner, 780 So. 2d 1 (Fla. 2001). In Varner, the following mitigating factors were deemed applicable: good faith effort at restitution and at correcting the consequences of his misconduct, good character and reputation, and remorse. In contrast, Respondent here went one step further - he voluntarily made restitution years ago, and of a considerable sum. In further contrast to Respondent, the conduct in Varner involved an attempt to deceive. Respondent never engaged in deceitful conduct. See also, Florida Bar v. Brown, 790 So. 2d 1081 (Fla. 2001)(90 day suspension for assisting client in conduct that Brown should have known was criminal or fraudulent, violating Rule 4-1.2(d); engaging in fraudulent, dishonest conduct, violating

Rule 4-8.4(c); and knowingly assisting or inducing another to violate the Rules of Professional Conduct, a violation of 4-8.4(a)). Additionally, Florida Bar v. Stein, 916 So.2d 774 (Fla. 2005), supports a conclusion that a 90-day suspension is the harshest disciplinary measure that could be taken in this case. In Stein, respondent was adjudicated guilty of violating eight Rules, which, as in the instant case, all stemmed from the same transaction. Id. at 775. After considering the mitigating factors, respondent's age and when respondent was admitted to the bar, the referee recommended a 90-day suspension as the appropriate disciplinary measure. Id. at 777. Respondent's case also contains mitigating factors, some of which are the same as those in Stein: absence of prior disciplinary record, non-cumulative misconduct, expressions of remorse, and previously having had good character and reputation. Based on the Court's reasoning in Stein, the Court should consider the mitigating factors when determining the appropriate disciplinary measure to apply in Friedman's situation and a 90-day suspension is the most severe action that should be taken in this instance.

Consequently, it appears a 90-day suspension in Respondent's case is an outer limit when considered alongside the foregoing precedents. Such a conclusion is equally supported by the Florida Standards for Imposing Lawyer Sanctions (hereinafter Standard). Although Respondent's conduct falls squarely within the ambit of Standard 7.3, other possible Standards applicable to the facts of this case provide for more lenient

discipline than that recommended by the referee. For example, a violation of Rule 4-1.15 appears to be subject to Standard 4.14 (Admonishment is appropriate when a lawyer is negligent in dealing with client property that causes little or no actual or potential injury to a client or where there is a technical violation of trust account rules or where there is an unintentional mishandling of client property). The Referee's Amended Report at II.B.x., recites that on behalf of the former firm, Respondent placed monies received from Dupont in the same trust account at Northern Trust Bank, thereby commingling his former firm's funds with client funds. There can be no dispute that Respondent explained to the Bar that on the day all the Dupont monies had been wire transferred to the firm, they were wired into the firm's one trust account at Northern Trust Bank - and that at that time no single client had as yet agreed to a settlement of its case/claims and consequently the firm considered all said monies Dupont's (as same were delivered subject to the understanding that if certain clients in particular did not first agree to settle, then all funds had to be returned) and not the firm's or the clients'. Not a single penny was unaccounted for or missing. Once the firm's clients settled with Dupont, the portion of said trust funds deemed fees to the firm were transferred to the firm's operating account. Consequently, pursuant to Standard 4.14, admonishment is the appropriate discipline. If however (prior to settlement of a given client's case) those monies can justly be said to have then been client property, then Standard 4.13 indicates that public

reprimand is appropriate.

Florida Bar v. Armas, 518 So.2d 919 (Fla. 1988) supports public reprimand as the appropriate disciplinary measure when a lawyer fails to comply with rules and regulations on trust fund accounting and record keeping. In Armas, the Referee determined that client funds were not used for unauthorized purposes and consequently, recommended that respondent receive a public reprimand and be placed on probation for two years. Id. at 920. Based on the similarities between the present case and Armas, Respondent should be publicly reprimanded for his non-compliance with the trust fund accounting rules and regulations; his ability to account for all Dupont's funds should be strongly considered when choosing the appropriate disciplinary measure.

A violation of Rule 4-1.4(b)(duty to explain matters to client) appears to be subject to Standard 7.0. The Amended Report of the Referee reflects that Respondent did not inform the clients of the secret side agreement nor explain its contents to them. In point of fact, nor did Ferraro. As is apparent, Respondent did not provide legal services to these clients of the firm, rather these were St. Louis=clients and their cases/claims were exclusively supervised and handled by St. Louis and Rodriguez. Consistent with the established record reflected in the reports of the referees in the St. Louis and Rodriguez proceedings, it is also apparent no injury to a client occurred. Moreover, there is certainly no showing that Respondent intended that a client of the firm, the public or the legal

system be injured in any way. Thus, it appears Standards 7.3 or 7.4 pertain to Respondent - negligent conduct that either did (7.3) or did not (7.4) cause injury to a client, the public or the legal system. The discipline associated with 7.3 is public reprimand, and the discipline associated with 7.4 is admonishment.

Next, a violation of Rule 4-1.8(a)(acquiring interest adverse to client) appears to be subject to Standard 4.14. In this regard, the referees report reflects that Respondent assisted his partners (Ferraro, Rodriguez and St. Louis) in preparing settlement closing statements that included a provision setting forth that the firm would keep the interest earned on the client's funds while being held in the firm's trust account, and that such turned out to not be in the best interest of the clients. As reflected by those closing statements, the matter of interest earned was disclosed in writing to those clients - an act quite distinct from intention to do harm to a client - as it was then everyone's belief that Dupont's funds would be held in trust for but a few days. (As it were, a binding settlement as to Dupont did not occur for several weeks thereafter; as a condition precedent to there being any settlement with anyone, Dupont required there be a settlement with two clients in particular, and one of those two did not choose to expeditiously settle his claim.) For his part, Respondent considered the interest earned during that period before a required settling party settled to be Dupont's precisely because no binding settlement with any client of the firm existed until such time as that required

party settled. In all events, a violation of Rule 4-1.8(a) appears to be subject to Standard 4.14, which states: "Admonishment is appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client or where there is a technical violation of trust account rules or where there is an unintentional mishandling of client property." If, however, Standard 4.13 applies, public reprimand is appropriate.

To the extent any of the foregoing rules violations can be deemed a violation of other duties owed as a professional (see Standard 7.0), then it appears Standards 7.3 or 7.4 pertain to Respondent, as the conduct can not fairly be said to have been anything more than negligent. Standard 7.3 makes clear that the appropriate discipline is public reprimand, and Standard 7.4 makes clear that the appropriate discipline associated is admonishment.

A violation of Rule 4-1.5(a)(prohibited fee) appears to be subject to Standard 4.6, or possibly 5.0. The Amended Report of the Referee at 'II.B.v., reflects that FRF&S= receipt followed by acceptance of Dupont's wire transfer of \$6,445,000 was a practice restriction violation and therefore a prohibited fee. It is apparent from the combined record of these related disciplinary proceedings, that in 1996, when the conduct under focus occurred, there was an absence of jurisprudence related to this circumstance. In all events, it is evident from the record that, like Ferraro, Respondent was not involved in

negotiating the settlement that included the offensive agreement and did not learn of its existence until after the fact. Thus, it appears Standards 4.63 or 4.64, or Standard 5.14 could pertain to Respondent. All of these Standards provide a sanction of either admonishment or public reprimand.

III. Respondent's payment of \$910,000 in restitution to former clients through civil case should be considered as a substantial mitigating factor when deciding appropriate disciplinary measure.

Rule 3-5.1(h)(Forfeiture of Fees) provides that an order of this Court adjudicating a respondent guilty of entering into, charging or collecting a prohibited fee may order the respondent to forfeit the fee or any part thereof. It is apparent that the purpose of this part of the Rule is to prevent an errant lawyer from financially benefitting. Respondent voluntarily disgorged himself of the prohibited fees by making restitution to the clients of his former firm. Respondent, almost 4 years ago, voluntarily returned the prohibited fee to his former firm's clients - a voluntary act of restitution and disgorgement. Respondent has obviously backed up the sincerity of his position/remorse with his pocketbook. Moreover, no claim with respect to this matter has been made to the Client's Security Fund and the Fund has not been called upon to pay any monies to anyone in connection with this matter. Inasmuch as Respondent voluntarily paid restitution, he should be

considered to have fully complied with the purpose and spirit of Rule 3-5.1(h).⁴

The Rule further addresses excessive fees, which may be ordered returned to the client, and a fee otherwise prohibited by the Rules Regulating The Florida Bar which may be ordered forfeited to The Florida Bar Client Security Fund and disbursed in accordance with its rules and regulations. Neither of these types of fees are present in Respondent's case, hence this provision of Rule 3-5.1(h) should not be considered applicable to Respondent.

Conclusion

The purpose of attorney discipline is to be fair to society, to be fair to the attorney, and to serve as a deterrent to other attorneys. Florida Bar v. Wasserman, 654 So.2d 905, 907 (Fla. 1995). Fairness to society entails protecting the public from unethical conduct, while simultaneously ensuring that a qualified lawyer not be taken away from the public because of undue harshness in imposing a penalty. Stein, 916 So.2d at 777. Based on the case law and facts presented in this brief, any disciplinary measure more severe than the referee's current recommendation for a 90-day suspension would constitute an unduly harsh penalty and deny the public a qualified lawyer.

The referee's recommendation in the instant case is also too severe in light of the

^{4/} It should also be noted that those same clients subsequently recovered additional monies from Dupont on account of the claims related to this very matter which they so pursued.

sentences recommended for both Rodriguez and St. Louis. As indicated in existing case law, Respondent should receive the same disciplinary measure as Ferraro, rather than be disciplined more severely than St. Louis or Rodriguez. Consequently, Respondent requests this Court find that disciplining him in the same manner as Ferraro, through the use of public reprimand, is the most appropriate disciplinary measure the Court can apply.

When determining which disciplinary measure to take against Respondent, it is crucial to consider the presence of numerous mitigating factors. Such mitigating factors include: (1) voluntarily stepped forward in cooperating with The Florida Bar; (2) continuously, and through to this day, exhibited unqualified remorse; (3) voluntarily/timely and in good faith made restitution to each client of the former firm; (4) unhesitatingly assisted The Florida Bar in its further proceedings involving his former partners including testifying at their trials; (5) fully and freely made disclosure to The Florida Bar; (6) has been substantially adversely impacted for a period of three years by the unusual and extreme delay associated with this disciplinary proceeding, a delay to which he did not contribute; and (7) lack of pre-existing disciplinary record. Respondent, therefore, respectfully requests that the Court reduce the severity of the referees' recommended disciplinary action from a 90-day suspension to a public reprimand.

Dated: June 2, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail on May 31, 2006, to Donald Spangler, Bar Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300.

Robert C. Josefsberg

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

Robert C. Josefsberg