

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SC Case No. SC02-2403

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

PAUL FRIEDMAN,

Respondent.

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**RESPONDENT'S SUPPLEMENTAL REPLY BRIEF**

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## **STATEMENT OF THE CASE**

The Referee accepted the agreement between Respondent and The Florida Bar (“TFB”) providing for a 90-day suspension, payment of \$910,000.00 in restitution (this sum has already been paid) and payment of \$7,319.96 in TFB costs (this sum has also been paid). This case was not tried before the referee; rather, the parties entered into a negotiated consent judgment. The record in this case, therefore, consists of the pleadings and facts stipulated to in the Conditional Guilty Plea for Consent Judgment submitted to the referee and referenced in the Amended Report of the Referee. On April 23, 2004, this 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.

## **STATEMENT OF THE FACTS**

TFB filed its complaint against Respondent on November 14, 2002. On March 31, 2003 a referee was appointed and Respondent expeditiously entered into his Conditional Guilty Plea for Consent Judgment. In June 2003, Respondent reached an agreement with TFB. On or about July 16, 2003 TFB Board of Governors met, agreed to, signed, and filed said consent decree. On November 3, 2003, the Court issued an Order to Show Cause as to why the instant matter should not be stayed pending the disposition of two related cases as well as two unrelated

cases. 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. See Response to Order to Show Cause, Nov. 3, 2003. On April 23, 2004, the Court entered an order staying consideration of this matter pending the outcome 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. As a result, Respondent's purpose for quickly entering into a consent decree has been frustrated. At the time this matter is heard, this proceeding will have been pending for more than 3 ½ years, consequently imposing a greater public embarrassment and punishment than the consented-to discipline.

### **SUMMARY OF THE ARGUMENT**

While a 90-day suspension is the most severe sanction this Court should consider applying, a public reprimand is more appropriate. Respondent Friedman's conduct was more akin to Respondent Ferraro's conduct than that of Respondents Rodriguez and St. Louis. Respondent Friedman's sanction should be proportionate to his involvement in the underlying matter and should take into consideration the burden that the unnecessary delay has caused him personally and professionally.

## ARGUMENT

- II. Respondent's discipline should be proportionate to his degree of culpability and, therefore, a 90-day suspension should be the maximum sanction imposed.

As previously stated in Respondent's Initial Supplemental Brief, Respondent's conduct is indistinguishable at its core from that of his former partner Diane Deighton Ferraro ("Ferraro"). See and compare Ferraro and Respondent's Conditional Guilty Pleas for Consent Judgment. Neither Ferraro nor Respondent were involved in negotiation of the settlement that included the engagement/retainer agreement, nor did they know of its existence until after the fact:

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.

See Amended Report of the Referee Accepting Consent Judgment at ¶ II.B.m.

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. Based on the concept of proportionality as expressed in TFB's Supplemental Answer Brief, Respondent should receive a public reprimand given Respondent's role in

the underlying Benlate cases and the similarity of his conduct to that of Ferraro.<sup>1</sup> TFB in its supplemental brief has conceded that if the Referee's recommendations on Rodriguez and/or St. Louis are affirmed, Respondent deserves discipline that is less than whatever is imposed on Rodriguez and/or St. Louis.

II. The unreasonable delay of this matter has caused Respondent substantial prejudice, thereby warranting a reduction of his sanction.

Respondent's Initial Supplemental Brief discussed the 5 ½ years that have elapsed since TFB commenced its grievance proceedings in January 2001 and the 3 ½ years that have elapsed since the complaint was filed against Respondent on November 14, 2002. See Respondent's Initial Supplemental Br. at 2-5. Although TFB addressed the other points which Respondent raised in his brief, it did not discuss the prejudice that resulted from the unreasonable delay in this disciplinary proceeding. Standard 9.32(i) of the Florida Lawyer Sanction Standards refers to mitigation based on "unreasonable delay in disciplinary proceeding[s] provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay." Respondent's situation in the instant case meets the requirements in 9.32(i).

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<sup>1</sup> Ferraro's consent judgment, which was approved by the Court, provided for a public reprimand, restitution to the clients in the amount of \$425,000 and payment of the Bar's costs in the amount of \$3,169.36. *See The Florida Bar v. Diane Deighton Ferraro*, Report of Referee Accepting Consent Judgment at p.8.

In *The Florida Bar v. Kaufman*, 347 So.2d 430, 432 (Fla. 1977), the Court reduced respondent's recommended disciplinary sanction because three years elapsed between the time the charges were filed and the time the matter was argued before the Court. The Court reduced respondent's disciplinary sanction reasoning that during the three years, respondent had time to think about his conduct and had experienced both personal and professional detriment. *Id.* Similarly to the *Kaufman* respondent, Respondent in the instant case has been significantly prejudiced, both professionally and personally, by the time that has elapsed.

In *The Florida Bar v. Marcus*, 616 So.2d 975, 977 (Fla. 1993) (quoting *Florida Standards for Imposing Lawyer Sanctions* § 9.32(d), (i), (j) (Fla. Bar Bd. Governors 1992)), the Court discussed the following factors that may be considered in mitigation: timely good faith effort to make restitution; unreasonable delay in disciplinary proceeding; and interim rehabilitation. The Court reasoned that because TFB filed the original charges against respondent almost five years earlier, respondent had time to evaluate and rehabilitate his own conduct, and had experienced both professional and personal detriment. *Id.* In the instant case, Respondent entered into the consent decree expecting that service of his 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 3 ½ years, which has imposed a greater public embarrassment

and punishment than the consented-to discipline. As a result, the purpose behind resolving the disciplinary action against him - to obtain finality and closure in this proceeding - has been frustrated. The absence of finality and closure 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 3 ½ 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. Based on the reasoning in *Marcus* that suffering personally and professionally, making restitution, and rehabilitating deserves a mitigation of discipline under 9.32(i), this Court should reduce Respondent's disciplinary sanction accordingly.

*The Florida Bar v. Guard*, 453 So.2d 392 (Fla. 1984), is analogous to Respondent's situation. In *Guard*, the referee recommended a one-year suspension and payment, within six months, of all fees and costs advanced to him for his representation in the underlying matter. His suspension was reduced to thirty days, however, based on the referee's excessive delay. *Id.* at 394. Respondent immediately made restitution to his clients and paid TFB costs. Therefore, based on the reasoning of the aforementioned cases and Standard 9.32 (i), this Court

should reduce Respondent's disciplinary sanction given that Respondent's discipline has been delayed through no fault of Respondent.

III. The distinguishing factors between Respondent and Ferraro cited by The Florida Bar do not merit Respondent's receiving harsher discipline than that imposed on Ferraro.

Respondent disagrees with TFB that his conduct was more egregious than Ferraro's and, therefore, deserving of a 90-day suspension rather than a public reprimand. TFB contends:

The distinguishing factors 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 "holdback" 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.

See TFB's Supplemental Answer Br. at 12. The distinctions alleged above are not supported in the record. The conduct related to the distinguishing factors was equally as attributable to Ferraro as it is to Respondent. The Rules Regulating TFB do not provide disciplinary sanctions for creating trust accounts, nor does the record in the instant case reflect that Respondent agreed in his consent judgment to having violated any such rule. Finally, despite Respondent's title as "Secretary Treasurer," there is no record evidencing that Respondent's role in directing the deposit of funds into the trust account was more substantial than Ferraro's role. Consequently, the factors TFB relies upon to distinguish Respondent from Ferraro

thereby justifying discipline in the form of a 90-day suspension rather than a public reprimand, are unsubstantiated.

- a. Respondent was not the only one with power to create trust accounts where all four partners had the authority to sign contracts to create trust accounts for the firm.

There is nothing in the record regarding which member of the firm “created” or “actively participated” in creating the subject trust account. Despite the record’s silence, TFB distinguished Respondent’s conduct from Ferraro’s reasoning, “...as Secretary Treasurer of the firm, [Respondent] actively participated in the creation of the interest-bearing account ....” TFB Supplemental Answer Br. at 12. This statement, unsupported by the record, implies that Respondent participated in creating the trust account, while other members of the firm, like Ferraro, did not. There is no record evidence that Respondent’s involvement in the creation of such account was any different than Ferraro’s.

- b. Respondent is not more responsible for directing the deposit of funds into the trust account than Ferraro.

The account in question was created prior to finalizing the settlement between Respondent’s former partners and Dupont.<sup>2</sup> The settlement agreement and engagement/retainer agreement provide for Dupont’s wire transfer of the two

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<sup>2</sup> Whether or not Respondent’s signature was used to create the account is irrelevant given that accounts were always opened using at least two partners’ signatures, obtained randomly.

sums of monies into the subject trust account within two days.<sup>3</sup> It is undisputed that Respondent did not have a role in negotiating the settlement with Dupont; Respondent did not craft, author or have a say in the creation of the subject settlement and engagement/retainer agreements. The record supports the contention that Respondent could not have caused the inclusion of a provision in the settlement agreement requiring Dupont to deposit funds in the subject trust account. Therefore, Respondent respectfully requests this Court not assume that he was more involved in directing Dupont to deposit its funds into the trust account merely because he bore the title of Secretary Treasurer.

- c. Respondent viewed the Dupont retainer as Dupont's money and was, therefore, reluctant to deposit the funds in the firm's operating account.

Respondent accepts responsibility for not insisting that the retainer/engagement portion of the funds be removed from the subject trust account as soon as he became aware that Dupont's wired funds had been deposited in the same trust account. But, as noted in Respondent's initial brief, he believed the portion representative of Dupont's intended retainer payment was, like the intended client settlement funds, Dupont's money until the underlying settlement agreement became binding upon the former firm's clients. See Hr'g Tr. 78: 14-

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<sup>3</sup> The engagement/retainer agreement is dated August 7, 1996, and it states that E.I. du Pont de Nemours and Company must pay the agreed fee of \$6,445,000 in advance not later than August 9, 1996. See Amended Report of the Referee Accepting Consent Judgment at p. 6.

79: 23, July 25, 2002. Since the purported commingled funds were, per the agreements, subject to return to Dupont in the event the intended settlements did not come to fruition, Respondent viewed those funds as Dupont's property. See Hr'g Tr. 103-04, 121-23, July 25, 2002. Respondent, therefore, believed it was inappropriate for the firm to deposit the retainer amount in its operating account.

Once the client settlements became binding, the retainer and client settlement funds were disbursed respectively to the firm's operating account and to the clients, or into segregated trust sub-accounts maintained for the benefit of each client. See Hr'g Tr. 78: 14-79: 23, 121-123, July 25, 2002. TFB's Supplemental Answer Brief does not dispute Respondent's contention that the purported commingling was unintentional. The record of this proceeding indicates that the purported commingling resulted from direct payment of both sets of funds into the one account, pursuant to the terms of the August 8, 1996 settlement agreement and retainer/engagement agreement, neither of which were drafted by Respondent.

In *The Florida Bar v. Barcus*, 697 So.2d 71, 72-75 (Fla. 1997), the Court determined that despite having violated five Rules Regulating TFB, respondent's actions warranted public reprimand rather than suspension. The Court reasoned that because respondent had not knowingly failed to perform services, intentionally caused injury, or purposefully neglected a client's case, respondent's acts did not merit suspension. *Id.* at 75. Instead, the Court determined that respondent was

guilty of “ineptly handl[ing] a difficult situation.” *Id.* Similarly to the respondent in *Barcus*, Respondent in the instant case did not fail to perform services or intentionally neglect his clients. Respondent only handled a complicated situation inappropriately. Consequently, like the Court in *Barcus*, this Court should determine that Respondent’s isolated conduct does not merit a 90-day suspension.

- d. Respondent should receive a public reprimand because none of the former firm’s clients were harmed by the purported commingling of funds.

No one was harmed by the purported commingling of funds. Respondent consistently maintained accurate records of the trust account, which allowed for all of Dupont’s money to be accounted for and disbursed as required. The accuracy with which the trust account records were kept reveals the lack of maliciousness behind this unintentional endeavor. According to Standard 4.14, admonishment is an appropriate disciplinary sanction when a lawyer is negligent in dealing with client property, there is an unintentional mishandling of client property and there is little or no injury caused to the client. See Lawyer Sanction Standards 4.14. Standard 4.13 states that public reprimand is the appropriate sanction when a lawyer is negligent in dealing with client property, causing injury or potential injury to a client. See Lawyer Sanction Standards 4.13. Consistent with Standard 4.13 or 4.14, an admonishment or public reprimand is the appropriate discipline for

this purported “distinguishing” conduct since the unintentional mishandling of client property injured no one.

Conclusion

In determining Respondent’s appropriate sanction, Respondent respectfully requests this Court consider the following: the concept of proportionality, the time that has elapsed, and the unsubstantiated nature of the factors TFB cited when distinguishing between Respondent and Ferraro. Respondent urges this Court to consider the appropriateness of a public reprimand rather than a 90-day suspension.

Dated: June \_\_\_\_\_, 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 E-mail and U.S. Mail on June 23, 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.

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Robert C. Josefsberg