

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO.: SC02-2563

v.

TFB NO.: 2000-11,312(12A)

DARYL JAMES BROWN,

Respondent.

RESPONDENT'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

Resp. Exh.	=	Respondent's Exhibit from final hearing.
TFB Exh.	=	The Florida Bar's Exhibit from final hearing.
RR.	=	Report of Referee.
T.	=	Transcript of Final Hearing before Referee on September 9-11, 2003.

STATEMENT OF THE CASE AND FACTS

Respondent was at all relevant times, a shareholder in the law firm Brown, Clark, Christopher and DeMay, P.A. (“Brown, Clark”). (RR. 2). Respondent was also the president and along with his wife, owned Hillview Development Corporation (“Hillview”), which was developing a duplex project in Vail, Colorado. (RR. 2). Hillview contracted with Viele Construction Company (“Viele”) to construct the duplex. (RR. 3). Hillview and Viele subsequently sued each other in Colorado. (RR. 3). Respondent obtained a mechanic’s lien transfer bond from Pioneer Insurance Company (“Pioneer”) in order to sell the duplex while disputing Viele’s lien and asserting its claims against Viele. After settlement, Viele filed a grievance against Respondent. (T. 127).

The grievance committee found no probable cause supporting Viele’s allegations. (T. 127). Instead, it found probable cause based on Respondent’s granting a junior security interest in Hillview’s assets to Brown, Clark to secure its legal fees even though Respondent believed that Hillview’s assets were adequate to cover his obligations under the mechanic’s lien transfer bond and the security agreement. (Complaint, p. 12, RR. 11-12).

A. Hillview and Viele Dispute

Brown, Clark initially prepared the construction contract between Hillview

and Viele in early 1995. (T. 354-55). A dispute arose between Hillview and Viele concerning significant construction delays by Viele and Viele's failure to pay the subcontractors and suppliers. Viele filed a \$279,000 Statement of Lien. (T. 358). Thereafter, Hillview issued direct payments to the subcontractors and suppliers of Viele but Viele refused to reduce the lien by the amount of Hillview's payments. As such, the Statement of Lien was grossly excessive. (T. 358). Although Respondent, on behalf of Hillview, provided documentation of direct payments demonstrating that Viele was entitled to, at most, \$140,000 to \$150,000, Viele refused to eliminate or reduce the lien. (T. 361, 538-39; Resp. Exh. 10). On the other hand, Hillview believed it had suffered damages between \$300,000 and \$400,000 due to an eight-month delay, breach of contract, civil theft and other claims. (T. 360-61).

1. Mechanic's Lien Transfer Bond

Hillview sought to obtain a mechanic's lien transfer bond to clear title to the duplex, allowing the sale of the duplex without forfeiting the right to dispute the underlying construction issues with Viele. (T. 40, 515-16). Since Respondent wished to receive interest on Hillview's funds during the pendency of the litigation, Respondent opted not to deposit the funds directly with the clerk of court. (T. 519). Respondent wanted the flexibility to issue a secondary pledge to a lender if

Hillview had an opportunity to pursue other development deals. (T. 390, 531). Respondent investigated obtaining a mechanic's lien transfer bond, which Colorado statutes required to be one and a half times the Statement of Lien. (T. 519; TFB Exh. 14). Accordingly, Respondent contacted the Denver office of Pioneer to inquire into obtaining this type of bond. (T. 107, 515).

After a preliminary call to determine whether Pioneer handled mechanic's lien transfer bonds and the amount of the bond premium, Respondent again telephoned Pioneer and spoke to Mr. Robert Warburton, who was the president of Pioneer. (T. 26, 516-17). Respondent and Mr. Warburton's telephone call lasted approximately five minutes and was the only discussion between the parties. (T. 49, 54, 518). Shortly after their telephone call, on March 6, 1997, Respondent wrote a letter "introducing" the transaction and indicating his intention to purchase a \$420,000 certificate of deposit at the First Bank of Vail which in turn would obligate itself to Pioneer as "full cash collateral" for the issuance of the bond. (TFB Exh. 1). Respondent wrote that "any procedure ultimately agreed upon" would have to be approved by the purchaser's attorney. (TFB Exh. 1). Respondent intended First Bank of Vail to act as an intermediary rather than Pioneer having immediate access to the certificate of deposit. (T. 51, 519).

Following Respondent's March 6, 1997 letter, Mr. Lowdermilk, a Pioneer

representative, contacted Respondent and over three to four telephone calls, they discussed various scenarios to accomplish the transaction. (T. 523). During these conversations, Pioneer never told Respondent that Hillview was prohibited from pledging the certificate of deposit to anyone else and never asked Hillview to tell Pioneer if it pledged the certificate of deposit to other creditors. (T. 43-44, 100).

First Bank of Vail discussed the bond conditions with Pioneer and drafted a letter reflecting the ultimate agreement. (T. 56). First Bank faxed a draft of the letter to Pioneer for suggested revisions. (T. 56, 71, 93). The letter was never sent to Respondent for review or revisions. (T. 528). Once the letter was in final form, it was provided to Respondent at the March 28, 1997 closing on the property. (T. 527). The March 28, 1997 Agreement did not reference the March 6, 1997 letter, did not prohibit Hillview from pledging an interest in the certificate of deposit to another entity and did not require Hillview to notify Pioneer if it made such a pledge. (TFB Exh. 7).

Although Respondent had not previously reviewed the March 28, 1997 Agreement, he agreed to the terms and signed on behalf of Hillview and Mr. Lowdermilk signed on behalf of Pioneer. (T. 78, 528). Pioneer issued the bond on March 28, 1997. (TFB Exh. 3). Pioneer did not file a UCC-1 financing statement pertaining to Pioneer's claimed interest in the \$420,000 certificate of

deposit until approximately two years later. (TFB Exh. 24, p. 2).

Expert testimony in the area of surety practices was offered by Complainant and Respondent. (T. 189-262; 425-451). Both experts agreed that if Pioneer intended to secure “full cash collateral,” it would have been more prudent for Pioneer to follow the standard industry practice of obtaining an irrevocable letter of credit from the bank in conjunction with a UCC-1 financing statement filing. (T. 244-46, 441, 444). Moreover, Respondent’s expert, Mr. Joseph Madagan, testified that the March 28, 1997 Agreement permitted the certificate of deposit funds to be used in any number of circumstances. (T. 440).

2. Brown, Clark Security Agreement

Following the closing, Respondent and his Colorado attorney met with Mr. Viele and his attorney, Mr. Robert Meer, in Colorado to discuss settlement. (T. 532-33). Respondent became convinced that Hillview’s and Viele’s views of the issues were so divergent they would not be able to resolve the matter without litigation. (T. 533). While Hillview had hired local Colorado counsel to represent Hillview’s interests, Respondent’s law firm had extensive experience litigating similar construction law issues and Respondent had told his partners about Hillview’s problems. (T. 396-98, 533-35). Accordingly, after returning to Florida several days later, Respondent discussed the firm’s possible representation of

Hillview with Donald Clark, one of Brown, Clark's shareholders. (T. 397, 535). Mr. Clark agreed that Brown, Clark's representation of Hillview was logical but requested a security interest to ensure that the legal fees would be paid if something happened to Respondent. (T. 398). Respondent agreed to sign the security agreement. (T. 540).

Respondent informed Mr. Clark of the mechanic's lien transfer bond issued by Pioneer and provided him with all the paperwork pertaining to Hillview's agreement with Pioneer. (T. 365, 399, 402-03, 538). Mr. Clark and Respondent believed that there would be adequate equity in the certificate of deposit to secure Hillview's legal fees even after any adverse judgment was satisfied. (T. 403-05, 408, 535-37, 542; RR. 11-12, 18). Neither Mr. Clark nor Respondent believed that the security agreement would in any way jeopardize Pioneer's interest in the certificate of deposit. (T. 405, 541).

Mr. Clark added a description of the collateral and the party names to a boilerplate security agreement given to him by a law clerk and provided it to Respondent to sign. (T. 401-02). Respondent testified that he trusted Mr. Clark implicitly. (T. 541). Respondent did not review the security agreement, but merely flipped to the last page and signed on behalf of Hillview. (T. 541). Brown, Clark did not file a UCC-1 financing statement for more than two years after Respondent

executed the security agreement and only after Viele claimed an interest in the certificate of deposit. (T. 365, 370).

Mr. Glen Krahenbuhl, Hillview's Colorado appellate counsel, testified that there was no common law duty in Colorado requiring a debtor to notify a secured creditor if that debtor gave an interest in the same collateral to a second creditor. (T. 331). In fact, he explained that the Colorado UCC holds the creditor responsible for ensuring that the interest is properly attached and perfected since granting a second interest in collateral to a subsequent creditor is a common practice. (T. 331).

B. The Trial, Verdict and Bankruptcy Filing

Hillview's Complaint against Viele alleged breach of contract and civil theft. (T. 360-61). Before Hillview's Complaint was served, Viele filed a Complaint against Hillview alleging mechanic's lien and breach of contract claims. (T. 360). Hillview selected William Christopher, a shareholder at Brown, Clark, as trial counsel. (T. 356). Mr. Christopher prepared for and attended an unsuccessful mediation in September, 1997. (T. 356-57). Consequently, in 1998 Mr. Christopher undertook extensive trial preparation. (T. 358).

Shortly before trial in 1998, the trial judge struck Hillview's claims against Viele due to Viele's allegation that Hillview had provided insufficient discovery

responses. (T. 308, 362, 367). Accordingly, rather than Hillview presenting its \$300,000 to \$400,000 claim for consideration by the jury, Hillview merely defended Viele's breach of contract cause of action. (T. 366). The jury returned a verdict of \$147,000 in favor of Viele, which was consistent with Hillview's and Brown, Clark's original estimation of its worst potential exposure. (T. 361, 543-44). In addition, the jury answered an interrogatory denying prejudgment interest. (T. 367).

The trial court retained jurisdiction over Viele's mechanic's lien, which was based on the same factual issues determined by the jury. (T. 164; 360). On February 17, 1999, the judge entered judgment of \$352,000 which included prejudgment interest and unilaterally added Pioneer as a party to the judgment without notice, motion or argument from Hillview or Pioneer. (T. 363, 368).

After the verdict, Respondent consulted Mr. Mike Markham, a Tampa bankruptcy attorney, who recommended filing Chapter 11 to protect Hillview's assets and Respondent agreed. (T. 547). Respondent had no prior bankruptcy experience and relied upon Mr. Markham's advice. (T. 547). Pioneer initially supported Hillview's bankruptcy filing and Pioneer's lawyer, Mr. Edgar Neel, cooperated with Mr. Markham. (T. 548-49; Resp. Exh. 11). Throughout the bankruptcy proceeding, Respondent intended to honor Hillview's indemnity

agreement with Pioneer. (T. 563-64). Viele opposed the bankruptcy and argued that the March 28, 1997 Agreement between Hillview and Pioneer was not a security agreement and that the certificate of deposit was not collateral for the bond. (T. 368-69). Hillview's bankruptcy petition was ultimately dismissed. (T. 388).

C. Post-Trial Motions

Hillview retained the Colorado firm of Wells, Love & Scoby to pursue post-trial motions. (T. 304). Glen Krahenbuhl, Esquire, of the Wells firm, identified several appellate issues. The first issue was whether the trial judge had improperly disregarded the jury's determination of indebtedness and instead adopted Viele's calculations as to the appropriate lien figure. (T. 306-07). The second issue was whether the judge improperly disregarded the jury's finding that prejudgment interest was not warranted. (T. 307). The third issue was whether the court had improperly struck Hillview's entire claim against Viele for a perceived discovery violation. (T. 308). Mr. Krahenbuhl filed several post-trial motions, including a motion for post-trial relief, a motion for stay of execution on the judgment, a motion to vacate the judgment, and a motion for amendment of the judgment on behalf of Hillview. (T. 311-12). The trial court did not rule on the motions within sixty days, and therefore, pursuant to Colorado law, the motions were deemed

denied and the time period for filing an appeal began to run. (T. 318).

D. Payment by Pioneer Without Notice to Hillview

Mr. Warburton and Mr. Lowdermilk testified that Pioneer would not have authorized payment if Pioneer knew that Hillview had filed a notice of appeal or if Hillview intended to file an appeal and its appellate time period had not yet run. (T. 60, 61, 62, 64, 96). Mr. Warburton explained that if he had personally monitored the litigation, he would have contacted Hillview to determine its intent to appeal or at the least, given Hillview the opportunity to pay the judgment before Pioneer satisfied the judgment. (T. 63-64). Rather than personally monitoring the litigation between Hillview and Viele, Mr. Warburton delegated this duty to Pioneer's attorney, Mr. Neel. (T. 55, 58). Notwithstanding Pioneer's request, Mr. Neel testified in his deposition that he did not monitor the trial, did not know if Pioneer monitored the trial and did not review or discuss Hillview's appellate issues. (TFB Exh. 27, pp. 36, 37).¹ No other representative from Pioneer ever contacted Hillview's counsel, Mr. Krahenbuhl or Mr. Christopher, concerning Hillview's intent to appeal. (T. 59, 99, 320).

Although Pioneer had initially filed a motion for relief from the order naming

¹ In lieu of Mr. Neel's appearance at trial, Complainant introduced Mr. Neel's discovery deposition. (TFB Exh. 27).

Pioneer as a judgment debtor and for a stay of execution, Pioneer's counsel, Mr. Neel informally communicated with Mr. Robert Meer, Viele's counsel concerning Pioneer's payment of the judgment. (T. 139-40, 166, 172, 312). Mr. Meer had previously represented Pioneer on a couple of occasions based on the referral of Mr. Neel's partner. (T. 160; TFB Exh. 20). On March 5, 1999, Mr. Meer faxed Mr. Neel a draft demand for payment and Mr. Neel suggested revisions. (T. 139-41; TFB Exh. 20, 22). On May 7, 1999, Mr. Meer sent the revised demand for payment to Mr. Neel. (T. 141; TFB Exh. 21).

Mr. Neel assumed, without any investigation, that Hillview would not be filing an appeal and recommended payment on the bond based on Mr. Meer's demand letter. (TFB Exh. 27, pp. 24, 25, 27, 31, 246). Mr. Warburton testified that Mr. Neel told him that no appeal had been filed. (T. 66, 70). However, no Pioneer representative inquired into Hillview's intent to pay the judgment or made a request for indemnification. (T. 260, 316-317, 320, 322, 371). Based solely upon Mr. Neel's representations and advice, Mr. Warburton instructed Pioneer to pay the judgment and payment was tendered on May 12, 1999. (T. 42, 47, 59, 60, 61, 70, 174).

Mr. Krahenbuhl was shocked to learn that Pioneer had paid the judgment because he believed Mr. Neel understood that Hillview was adamantly disputing the

propriety of the judgment on multiple grounds and would appeal. (T. 315-16, 321, 326). Mr. Krahenbuhl believed that Pioneer had volunteered payment on the bond, giving Hillview a colorable defense to indemnification. (T. 325-26). Pioneer's representatives and attorney and The Florida Bar's surety expert acknowledged that a surety company is susceptible to the principal defending an indemnification claim by asserting that the company "volunteered" payment if the company failed to conduct adequate investigation prior to paying on a bond. (T. 63, 96, 98, 246; TFB Exh. 27, p. 17).

Respondent's surety expert, Mr. Madagan, opined that Pioneer's conduct fell below the surety industry standards because Pioneer did not monitor the litigation, did not give Hillview the opportunity to satisfy the judgment, did not notify Hillview of the demand prior to Pioneer tendering the funds to Viele and failed to investigate the appropriateness of an appeal which if successful, would be in Pioneer's best interest. (T. 445-47). Mr. Madagan explained that Pioneer's actions left itself vulnerable to Hillview raising the defense of a volunteer payment. (T. 450).

On June 16, 1999, Hillview filed its timely Notice of Appeal with the Colorado Court of Appeals appealing the judgment amount and seeking a new trial. (T. 171, 318; Resp. Exh. 5). Mr. Krahenbuhl's firm ordered the trial transcripts

and Respondent paid \$4,099.50 for transcript costs. (T. 327-28).

E. Writ of Garnishment Proceedings and Settlement

At the time Mr. Meer demanded payment from Pioneer, he had already prepared a Petition for Writ of Garnishment in which Viele sought to garnish Hillview's certificate of deposit held by First Bank of Vail. (T. 137, 164, 175, 187-88; Resp. Exh. 1). Pioneer filed its UCC-1 financing statement on April 29, 1999 and Viele served its Petition on Pioneer on May 5, 1999. (TFB Exh. 24, p. 2). Subsequent to Pioneer's filing and at the advice of Mr. Krahenbuhl, Brown Clark filed a UCC-1 financing statement pertaining to its interest in Hillview's assets.² (T. 370). In response to the Petition, the First Bank of Vail deposited the certificate of deposit proceeds into the Registry of Court. (T. 152, TFB Exh. 24). On August 17, 1999, the court entered an Order for Stay and Establishing a Claim Procedure Regarding Interpleaded Funds. (TFB Exh. 24, p. 2). Pioneer, Brown, Clark and Hillview were named defendants in the interpleader action. (T. 372). Viele again argued that the agreement between Hillview and Pioneer did not create a security interest. (T. 148-49, 152,176).

² Mr. Krahenbuhl represented Brown, Clark's interest in the garnishment proceedings because Hillview was not going to claim entitlement to the certificate of deposit proceeds. (T. 346). Respondent, on behalf of Hillview, signed a waiver of conflict of interest. (Resp. Exh. 6).

On August 19, 1999, Brown, Clark filed a Statement of Claim asserting that Viele was not entitled to the certificate of deposit and requesting the court to “determine the respective priorities and entitlement to the CD proceeds as between Brown, Clark and Pioneer and any other claimants.” (TFB Exh. 23, p. 6). Pioneer, Viele and Brown, Clark raised unique and novel issues of Colorado law pertaining to their respective interests in Hillview’s certificate of deposit during the interpleader proceedings. (T. 100-102, 332). However, in order to avoid costly litigation, the parties agreed to settle. (T. 163; TFB Exh. 24). Pursuant to the agreement, Brown, Clark received \$100,000 in settlement of its claim for \$196,593.22 owed in attorney’s fees and Hillview received none of the proceeds from the certificate of deposit. (T. 346, 348; TFB Exh. 24, p. 3). First Bank received \$2,476.66, Viele received an additional \$95,000 and Pioneer received \$227,254.98 of the certificate of deposit proceeds. (Complaint, para. 4a).

Following the settlement, Viele filed a grievance. (T. 127). While the grievance committee found no probable cause concerning Viele’s allegations, the committee found probable cause regarding Hillview’s security agreement with Brown, Clark. The Florida Bar filed its complaint asserting that Respondent violated Rules 4-8.4(c) and 3-4.3 because he “double pledged” Hillview’s assets. (Complaint). A final hearing was held on September 9-11, 2003 and the Referee

signed her Report of Referee on November 26, 2003, recommending that Respondent be found guilty of both rule violations and be suspended for six months. (RR. 14, 23). Respondent filed his Petition for Review on January 9, 2004.

STANDARD OF REVIEW

The Court is “precluded from reweighing the evidence and substituting its judgment for that of the referee” and should presume that the factual findings are correct and uphold the findings “unless clearly erroneous or lacking in evidentiary support.” Florida Bar v. Wohl, 842 So. 2d 811, 814 (Fla. 2003)(*citations omitted*). The Court’s scope of review in considering discipline is broader and should only uphold the referee’s recommended sanction if it has a “reasonable basis in existing case law.” Id. at 815.

SUMMARY OF THE ARGUMENT

The facts of this cause are undisputed in overwhelming measure. What is disputed is The Florida Bar's and ultimately the Referee's interpretation of the facts and the law which applies to the transactions in question. The Referee notes that Pioneer paid out more money on the bond than it ultimately collected from the collateral and erroneously concludes that the loss is attributable to Respondent. In so doing, the Referee's findings effectively impose duties on Respondent not recognized by substantive or ethical law. Further, the Referee ignores the fact that Pioneer's principals acknowledged their duty to Hillview to properly investigate the claim and to inquire of Hillview's intentions prior to paying Viele. Finally, the Referee, by ignoring Respondent's defenses to Pioneer's indemnification claim, denies Respondent, as a lawyer, equal protection under the law.

The undisputed facts, properly analyzed, establish that Pioneer failed to protect its security interest and failed to properly investigate and handle the claim prior to paying on the bond. If Pioneer had followed industry standards, it would have sustained no loss and Respondent's lawful and appropriate commercial conduct would not be seen as sinister and violative of our ethical rules.

ARGUMENT

I. The Referee's recommendations that Respondent violated Rule 4-8.4(c) and Rule 3-4.3 are clearly erroneous.

The Referee acknowledged that at the time Respondent pledged a junior security interest in Hillview's assets to Brown, Clark, Respondent believed "that the certificate of deposit was large enough to pay Viele after the conclusion of the lawsuit, as well as attorneys' fees and costs to BC & W." (RR. 11-12). As such, the Referee found that Respondent did not intend to benefit Brown, Clark at the expense of Pioneer when he pledged a second security interest. Rather than focusing on Respondent's lack of intent to deceive at the time of the second pledge, the Referee erroneously based intent on the perceived inequitable consequences to Pioneer. The Referee's determination fails to examine Respondent's intent at the time of the second pledge, ignores the common and accepted practice of granting junior security interests and creates a new unfounded duty on lawyers to make disclosures not otherwise recognized or required by law. In this case, it was a disclosure that could not have in any way changed the ultimate outcome, as the bond, once issued, was irrevocable. Each of these points will be addressed separately below.

A. The Referee’s finding that Respondent intended to act dishonestly was clearly erroneous because her conclusion depended on subsequent events rather than Respondent’s intent at the time of the act.

It is well established that “to find that an attorney acted with dishonesty, misrepresentation, deceit or fraud, the Bar must show the necessary element of intent.” Florida Bar v. Lanford, 691 So. 2d 480, 481 (Fla. 1997)(citing Florida Bar v. Neu, 597 So. 2d 266, 268 (Fla. 1992)). Intent is most commonly shown through the circumstances at the time the alleged misconduct occurred. Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994). It is improper to base any finding of intent on subsequent conduct. Id. at 443. Moreover, if intent is sought to be proven through circumstantial evidence, the evidence “must be inconsistent with any reasonable hypothesis of innocence.” Id.

The Referee appears to find two dishonest acts: (1) pledging the second security interest to Brown, Clark, and (2) failing to live up to the Indemnification Agreement with Pioneer years later. (RR. 22). Rather than examining Respondent’s intent at the time he signed the security agreement with Brown, Clark or at the time he decided to defend a claim for indemnification, the Referee improperly focused on Pioneer’s subsequent financial loss without regard to whether Respondent intended to defraud Pioneer.

1. Granting Brown, Clark a security interest was not dishonest conduct.

The Referee held that Respondent did not intend to deceive or cheat Pioneer at the time it granted the junior security interest to Brown, Clark by finding that “at the time of the second pledge, Respondent believed that there were sufficient funds to pay Viele in the event of an adverse judgment as well as attorneys fees owed to Brown, Clark” and by finding that Respondent “thought his obligations were fully satisfied” when he granted the junior secured interest. (RR. 11-12, 18). This finding is supported by the record. Respondent reasonably believed that Hillview’s potential adverse exposure in the Colorado litigation was approximately \$150,000.³ Accordingly, he expected that Hillview would have substantial cash assets remaining from the \$420,000 certificate of deposit after the payment of a judgment to Viele. (T. 403-05, 408, 535-37, 542). Respondent granted his law firm a secured interest in any remaining assets so that it would have priority over Hillview’s other unsecured creditors. (T. 398). Respondent never contemplated that Pioneer’s interests would be compromised because he reasonably believed that Pioneer’s security interest would have priority over any subsequently granted

³ Respondent’s calculation of the potential adverse verdict was based on payments made directly to sub-contractors. (T. 543-44). The jury ratified this calculation by returning a verdict of \$147,000 and denying prejudgment interest. (T. 361, 367). However, the judge unexpectedly unilaterally increased the judgment to \$352,000. (T. 363, 368). Hillview intended to appeal. (T. 307).

secured interest. (T. 405, 541). Further, Brown, Clark did not race to perfect its interest to attempt to gain an advantage over Pioneer. Rather, Brown, Clark filed its UCC-1 two years later, after Pioneer filed its UCC-1 and after Viele filed its Petition for Writ of Garnishment. (TFB Exh. 24, p. 2, Resp. Exh. 1; T. 370). Thus, the record establishes that Respondent did not have a dishonest intent at the time he signed the Brown, Clark security agreement.

The Referee acknowledged that at the time Respondent signed the Brown, Clark security agreement, he believed that Hillview's assets were sufficient to cover any adverse verdict against Hillview and his attorney's fees. However, the Referee found that granting the junior interest was dishonest because "[i]n the end, that turned out not to be the case." (RR. 21). The Referee's analysis is clearly erroneous and contrary to Marable because she based her finding of a dishonest intent on the subsequent consequences to Pioneer rather than on Respondent's lack of dishonest intent at the time he signed the security agreement. The Referee's recommendation that Respondent violated Rule 4-8.4(c) must be rejected because Respondent did not intend to deceive Pioneer.

Further, the record does not support a finding that Hillview deceived Pioneer into drafting a Letter Agreement that did not prohibit subsequent security interests. The record does not support any finding that on March 28, 1997, Respondent

masterminded a plot to deceive an experienced insurance company, with expertise in issuing surety bonds, when Pioneer had exclusive control over the drafting of the agreement, when Pioneer could have imposed any requirements or conditions it felt necessary and when Respondent first reviewed the document shortly before it was signed without revision. (T. 56, 71, 93, 527-28). In addition, Pioneer's failure to attempt to perfect any security interest it created is not attributable to Respondent. Indeed, there is no evidence that Respondent knew Pioneer had not perfected its interest. Since Respondent believed that the second pledge of a security interest to Brown, Clark would not conflict with Hillview's obligations to Viele and Pioneer, he did not possess a dishonest intent.

2. Respondent's decision to fight indemnification to Pioneer is not dishonest conduct.

The Referee erroneously found that Respondent's failure to indemnify Pioneer was dishonest because the Indemnification Agreement contained a clause giving Pioneer the "sole discretion to settle or pay any claim or judgment." (RR. 19). The Referee's finding is clearly erroneous because it fails to consider that good faith defenses, such as "volunteering payment" may prevail over a clause in the Indemnification Agreement.

In this case, Hillview's Colorado attorney, Glen Krahenbuhl, advised

Hillview that it had a potential defense to indemnification because Pioneer volunteered payment. (T. 325-26). Respondent’s decision to oppose indemnification after Pioneer failed to adequately investigate the status of appellate remedies and communicate its intentions to Hillview is not dishonest.⁴ Hillview’s assertion that Pioneer “volunteered” payment, a viable defense to indemnification, is a reasonable hypothesis of innocence refuting dishonest intent.⁵ The Referee erroneously focused on the result of the litigation and failed to consider whether reasonable defenses excused Hillview’s obligations under the Indemnification Agreement.

B. “Double Pledging” is not dishonest conduct.

Although the Referee approved The Florida Bar’s characterization of Respondent’s conduct as “double pledging,” there is no authority proscribing the granting of subsequent secured interests. (RR. 13, 22). Mr. Glen Krahenbuhl, Respondent’s Colorado counsel who was hired to pursue Hillview’s post-trial

⁴ Black’s Law Dictionary defines dishonesty as the “disposition to lie, cheat or defraud; untrustworthiness; lack of integrity.” The decision to pursue legally recognized claims can not be characterized as lying, cheating or defrauding the opposing party.

⁵ (T. 63, 96, 98, 246, 450; TFB Exh. 27, p. 17) See also *infra* at § III.A. for discussion of Hillview’s bona fide defenses.

remedies, was the only witness to address Colorado's treatment of encumbering secured property by a junior secured interest. (T. 331). Mr. Krahenbuhl explained that Colorado common law did not prohibit such a transaction. (T. 331). The Colorado UCC addressing the analysis for determining priority, places the burden on the creditors to attach the collateral and perfect the interest. (T. 331).

Conflicts between secured creditors are frequently the subject of civil litigation because the same collateral is often pledged to separate creditors. See Edward C. Dobbs, "Enforcement of Article 9 Security Interests — Why so Much Deference to the Junior Secured Party?", 28 Loyola of Los Angeles Law Review, 131 (1994). The amount to which a creditor is entitled depends on the priority of the claim. Creditors commonly enter into security agreements with debtors notwithstanding their knowledge of a prior security interest on the same collateral. Id. at 132. These creditors are referred to as a "junior secured party." Id. Oftentimes, these creditors will assume the risk that there will not be sufficient remaining collateral to cover the debt and will agree to the security interest "for whatever its worth." Id. If the senior secured creditor fails to perfect or properly create its interest in the collateral, the junior creditor could potentially prevail over

the senior creditor. Id.⁶

The debtor's offer to pledge his or her encumbered property is not illegal or improper. See White and Summers, Uniform Commercial Code, § 22-3(e)(4th Ed. 1995)(“Nothing in Article 9 . . . shows any intention to limit the power of a debtor to convey a security interest in any rights held by the debtor, however slight.”) Rather, the junior secured party assumes the risk that the collateral may not be sufficient to cover its debt when it agrees to accept the encumbered security interest. Ethical issues only arise when the debtor pledges property that he or she does not own as collateral to cover the debts or extend credit. See In re Byrd, 511 So. 2d 958 (Fla. 1987)(imposing a public reprimand when a judge pledged a certificate of deposit owned by a client as collateral for two personal loans).

In this case, there is no dispute that Hillview purchased and owned the \$420,000 certificate of deposit that was being held by First Bank. (TFB Exh. 7). Brown, Clark was fully aware of the details of the agreements between Hillview, Pioneer and First Bank. (T. 365, 399, 402-03). Brown, Clark further understood that the breach of contract claim filed by Viele against Hillview would not exceed \$150,000 which represented the amount of the outstanding unpaid contracting bills

⁶ A well-known commercial transaction in which this scenario arises is a junior secured interest in real property, commonly referred to as a second mortgage.

after appropriately deducting Hillview's direct payments to the subcontractors. (T. 403-05). Accordingly, if the jury determined that Viele was owed \$150,000 and costs, significant funds would be left from the \$420,000 certificate of deposit after the judgment was satisfied. (T. 406, 408). While some creditors would not accept encumbered collateral as security, Brown, Clark knowingly assumed that risk.

Had Pioneer created and perfected a valid security interest, Pioneer would have had full access to the certificate of deposit. However, Pioneer waited more than two years from the date of its letter to file a financing statement with the Colorado Secretary of State, and after it had already paid money to Viele. (TFB Exh. 24, p. 2). Hillview's counsel believed Pioneer had "volunteered" payment due to inadequate investigation into Hillview's appellate remedies and thus, Respondent litigated his obligation to indemnify Pioneer. (T. 325-26).

Although both The Florida Bar and Respondent's surety experts agreed that standard industry practices require obtaining an irrevocable letter of credit in conjunction with a UCC-1 filing, Pioneer failed to take either action. (T. 244-46, 441, 444). Any losses sustained by Pioneer were caused by its election not to comply with the procedures which were created to protect the primary secured party and by Pioneer's payment on the bond without adequate investigation or notification. Respondent did not act dishonestly merely because Pioneer failed to

act in a commercially reasonable manner.

There is no authority supporting the Referee's finding that "double pledging" collateral is improper. Respondent, through counsel, pursued viable and reasonable legal defenses available to Hillview. While one may believe that the ultimate outcome was not "fair," feelings of inequity do not equate with Rule 4-8.4(c) or Rule 3-4.3 violations. To the contrary, it is a commercial realization that creditors commonly agree to extend credit in consideration of encumbered collateral. Brown, Clark, as the "junior secured party" was fully aware of Hillview's agreements with Pioneer and First Bank and assumed the risk whether there would be insufficient collateral to cover the debt. Pioneer was the initial party which had an ability to file or recover a priority over any subsequent creditors. Hillview took no action to hinder Pioneer's ability to perfect its interest. Further, Hillview had no obligation, nor did the Letter Agreement require Hillview to advise Pioneer of subsequent secured creditors.

Respondent, on behalf of Hillview, merely engaged in legitimate and commonly recognized commercial practices. Respondent complied with his duties and responsibilities as required by the March 28, 1997 Letter Agreement which Pioneer drafted without any contribution or revision by Respondent. Respondent did not violate Colorado law. There is no evidence that Respondent's

actions on behalf of Hillview constituted misconduct.

C. Even if Complainant had proven the necessary element of intent, Respondent did not owe Pioneer a duty and thus, was not obligated to advise Pioneer of any defects in the March 28, 1997 agreement or of the security agreement with Brown, Clark.

The Referee erroneously found that Respondent violated Rule 4-8.4(c) because he did not advise Pioneer that he pledged Hillview's security to Brown, Clark. (RR. 9-10, 18). This finding is premised on a failure to act rather than on an overt act. However, there must be a duty to act before an attorney can be found guilty of Rule 4-8.4(c) for not performing that duty. The Referee's finding is clearly erroneous because Respondent did not have a duty to inform Pioneer of the junior secured interest and thus, did not act dishonestly by not informing Pioneer.

Although the Rules do not specifically define what constitutes "dishonesty, fraud, deceit or misrepresentation," guidance can be found in persuasive authority and case law. The Restatement of the Law (Third Edition) of the Law Governing Lawyers, section 98, titled "Statements to Others" explains a lawyer's obligations as follows:

- A lawyer communicating on behalf of a client with a nonclient may not:
- (1) knowingly make a false statement of material fact or law to the nonclient,
 - (2) make other statements prohibited by law; or
 - (3) fail to make disclosure of information *required by law*.

(*emphasis added*). The Restatement of Law recognizes the distinction between an affirmative misrepresentation and an omission and explains that an omission is only improper if there is a duty to make a disclosure.

Case law addressing criminal fraud statutes is also useful when considering whether an attorney violates Rule 4-8.4(c) by omission. In State v. Mark Marks, P.A., 698 So. 2d 533, 539 (Fla. 1997)(citing State v. Mark Marks, P.A., 654 So. 2d 1184 (Fla. 4th DCA 1995)(quoting Chiarella v. U.S., 445 U.S. 222 (1980)), the Florida Supreme Court stated in pertinent part, the following:

A fraud is committed for the failure to disclose material information only when there is a duty to disclose such; and such duty arises when one party has information that the other party has a right to know because of a fiduciary or other relation of trust or confidence between them.

See also Friedman v. American Guardian Warranty Services, Inc., 837 So. 2d 1165 (Fla. 4th DCA 2003). In Mark Marks, P.A., 698 So. 2d 533, the Court considered whether a criminal statute charging a defendant with the intent to “injure, defraud or deceive” for providing “incomplete” information was void for vagueness when the defendant’s duty to provide complete information was “uncertain.” The court determined that since there was no clear duty to provide information, the defendant could not have committed fraud by failing to disclose. Id. at 539-40.

In contrast to an attorney's duty of candor to a tribunal, which imposes the duty to disclose adverse material authority, there is no similar duty of candor owed to third parties. See Ronald D. Rotunda, Legal Ethics, The Lawyer's Deskbook on Professional Responsibility, § 25-1 (American Bar Association ed. 2000) ("The ethics rules impose on lawyers certain affirmative obligations of candor to a tribunal, e.g., to disclose material adverse legal authority. However, with respect to opposing parties or third parties, the lawyer's duty is, in general, more limited.")

Moreover, while the Rules Regulating The Florida Bar impose a heightened duty of disclosure pertaining to a lawyer's role during the representation of a client, there is no similar duty of disclosure when the lawyer is acting in a non-advocate role. Anthony Alfieri, a professor at the University of Miami School of Law, who is the founder and director of the Center for Ethics and Public Service which has a standing retainer to provide expert testimony and memoranda to The Florida Bar in complex disciplinary cases, addressed an attorney's disclosure obligations to third parties during the final hearing.⁷ (T. 471, 474, 479, 487-92). Professor Alfieri explained that Rule Regulating the Florida Bar 4-4.1 governs disclosure duties and

⁷ While the Referee discounted Professor Alfieri's testimony because he was not an expert in "commercial transactions," his testimony was offered to explain the context, background and application of the Rules Regulating the Florida Bar to these unique factual circumstances. (RR. 14-15, T. 470-498).

noted that The Florida Bar did not charge and could not have supported a Rule 4-4.1 disclosure violation. (T. 488-91). Further, Professor Alfieri testified that neither the American Bar Association nor The Florida Bar have amended Rule 4-4.1 to adopt a higher standard of disclosure in a lawyer's non-advocacy roles. (T. 499-500). Professor Alfieri explained that The Florida Bar circumvented the disclosure standards set out in Rule 4-4.1 by generally charging Respondent with violating Rules 4-8.4(c) and 3-4.3 due to his "failure" to inform Pioneer of its security agreement with Brown, Clark or his "failure" to apprise Pioneer of any defects in the March 28, 1997 Letter Agreement. (T. 489-90). However, it is clearly erroneous to broadly interpret Rules 4-8.4(c) or 3-4.3 to impose disclosure requirements that are not mandated by Rule 4-4.1, the disclosure rule.

In addition, assuming arguendo that Respondent, who is not admitted in Colorado, was familiar with Colorado law, Colorado law did not require Respondent to disclose the existence of any junior secured interest to Pioneer. No duty exists at common law and there is no provision in the Colorado UCC requiring a debtor to notify his creditor when he is granting additional security interests in collateral to third parties. (T. 331). If anything, the UCC authorizes such non-disclosure. Colorado's version of UCC Section 9-205 states, in pertinent part, the following:

A security interest is not invalid or fraudulent against creditors solely because

- (1) The debtor has the right or ability to:
 - (A) Use, commingle or dispose of all or part of the collateral . . . ;
 - (B) Collect, compromise, enforce or otherwise deal with collateral . . .;or
- (2) The secured party fails to require the debtor to account for proceeds or replace collateral.

C.R.S. § 4-9-205. While section 9-205 typically applies to sales of collateralized goods rather than the general intangible at issue (certificate of deposit), the plain language of the statute is facially applicable. Section 9-205 recognizes that a wide array of secured transaction circumstances and agreements are possible and that the debtor does not commit a “fraud” by compromising or even disposing of the collateral. Further, by addressing a creditor’s failure to require the debtor to account for proceeds, section 9-205 acknowledges that the debtor does not have an affirmative duty to disclose any event that could possibly compromise the collateral. Because Colorado law did not require Respondent to disclose the Brown, Clark security agreement to Pioneer, Respondent did not violate Rule 4-8.4(c) or 3-4.3 for failing to make the disclosure.

II. The Referee erroneously found that Hillview’s March 6, 1997 proposal to Pioneer defined Respondent’s duties to Pioneer and erred in finding that Respondent should have known that Pioneer relied on Hillview’s proposal rather than other commercially acceptable practices to protect its

security interest.

The Referee found that Respondent’s decision to grant Brown, Clark a second security interest in Hillview’s certificate of deposit violated Hillview’s March 6, 1997 proposal to Pioneer in which he stated he intended to purchase a certificate of deposit as “full cash collateral to Pioneer General for issuing the proposed bond . . .” and was therefore, dishonest and violated Rule Regulating the Florida Bar 4-8.4(c). (RR. 9-10). Assuming *arguendo* that “full cash collateral” is inconsistent with junior security interests,⁸ the ultimate Letter Agreement drafted by Pioneer never required Hillview to provide “full cash collateral.” (TFB Exh. 7). The Referee’s analysis is partially premised on the erroneous belief that the March 6, 1997 letter imposed a duty on Hillview. However, the March 6, 1997 letter was merely a proposal while the March 28, 1997 letter, which did not restrict Hillview’s ability to further collateralize its assets, was the only binding and executed Agreement between the parties.

Since the March 6, 1997 letter was not a binding contract and was never referenced by the final agreement between Hillview and Pioneer, the proposal did not create any duties or obligations. The stipulated facts of the Colorado litigation

⁸ As discussed more thoroughly above, the granting of subsequent security interests does not compromise “full cash collateral” unless the primary secured party is negligent. *See supra* at § I.B.

settlement agreement only referenced the March 28, 1997 letter, drafted by Pioneer and signed by all the parties, as “the Letter Agreement.” (TFB Exh. 24, p. 1). In order to incorporate the terms of the March 6, 1997 proposal into the March 28, 1997 Letter Agreement, the Referee appears to raise the equitable issue of promissory estoppel four years after settlement and without citation to disciplinary or contract authority. The Referee’s conclusion that Respondent is responsible for Pioneer’s reliance on the March 6, 1997 proposal as its sole means of protecting its security agreement fails to consider that such reliance would be commercially unjustifiable, especially when Pioneer, a sophisticated entity in the business of writing surety bonds, drafted the March 28, 1997 Agreement and did not attempt to perfect any security interest until two years later.

A. Hillview’s March 6, 1997 proposal did not contractually obligate Respondent to perform any act and the March 28, 1997 Letter Agreement did not prohibit Hillview from granting additional security interests in its asset.

The record does not support the Referee’s conclusion that the March 6, 1997 agreement memorialized Hillview and Pioneer’s understanding of the parties’ respective obligations.⁹ “A security agreement is the contract between the parties and must show an actual meeting of the minds of the contracting parties.” Cook v.

⁹ See RR. 5 (finding that Respondent’s March 6, 1997 letter “confirmed the relationship between Hillview and Pioneer”).

Theme Park Ventures, 633 So. 2d 468, 470 (Fla. 5th DCA 1994) (*citations omitted*). “Intentions” cannot constitute a security agreement because there is no “meeting of the minds.” Cook at 470 (citing S.E.L. Maduro (Fla.) v. Strachan Shipping Co., 800 F.2d 1572 (11th Cir. 1986)). In Cook, the court found the debtor’s initial letter outlining his “intentions” to post collateral was a proposal and not a binding contract and determined that a subsequent letter enclosing the loan documents and UCC financing statement was the contract. Id. at 470.

Similarly, Hillview’s March 6, 1997 letter was merely a proposal while the March 28, 1997 letter, executed at the same time as the Indemnity Agreement, was the contract between Hillview and Pioneer. Respondent’s March 6, 1997 letter was written to Pioneer after a single telephone call with Pioneer’s president that lasted less than five minutes. (T. 49, 54). Pioneer never asserted that it had reached an agreement with Hillview during this short conversation. The March 6, 1997 letter did not set forth the final terms of the agreement between Hillview and Pioneer but rather explained Respondent’s “intentions” by prefacing the proposed transaction with “my intent is to . . .” and concluded as follows:

I trust that the foregoing will at least introduce you to this transaction and, to the extent you have any questions or any further thoughts, please, of course, do not hesitate to call on me at any time Any procedure that is ultimately agreed upon will, of course, need to be approved by [the purchaser’s attorney.]

(TFB Exh. 1). Although the Referee describes Respondent's representations as "unequivocal," the context of the letter indicates they were preliminary discussions.

(RR. 6). Because the March 6, 1997 letter only references Respondent's intentions and the closing paragraph's language emphasizes that a final agreement still had to be reached, there is no meeting of the minds and no valid contract.

After March 6, 1997, Respondent and Mr. Lowdermilk, another Pioneer representative, discussed alternative methods of securing the surety bond over several phone calls. (T. 523). Despite Pioneer's understanding that Hillview would continue to own the certificate of deposit, Pioneer never orally prohibited Hillview from granting further security interests in its asset. (T. 43-44, 100).

Pioneer, an experienced insurance company in the business of issuing surety bonds, drafted the final March 28, 1997 agreement signed by all parties. (T. 56, 71, 93). The president of Pioneer explained that the Letter Agreement was initially prepared by First Bank and then faxed to Pioneer for the president's review and revisions. (T. 56, 71, 93). The president modified the agreement before it was finally approved. (T. 56). In addition, Pioneer used forms to create the Indemnity Agreement which was submitted to Respondent with the March 28, 1997 letter. (TFB Exh. 2; T. 34-35). Pioneer provided the documents to Respondent for the first time at the closing on March 28, 1997 and Respondent signed the agreements

without revision. (T. 527).

The March 28, 1997 letter agreement indicated that Hillview “owned” the certificate of deposit and it did not limit Hillview’s ability to further collateralize its asset while it was being held by First Bank. (TFB Exh. 7). Moreover, the March 28, 1997 Agreement did not reference Hillview’s March 6, 1997 proposal. Even the Settlement Agreement, setting forth the pertinent facts in the Colorado litigation, did not reference Hillview’s March 6, 1997 proposal or Pioneer’s purported reliance on the proposal. (TFB Exh. 24, p. 1). Respondent’s grant of a junior security agreement to Brown, Clark did not violate the March 28, 1997 Letter Agreement.

In contrast to the well established rule of interpreting a contract against the drafter,¹⁰ the Referee has improperly construed the Letter Agreement inconsistent with its plain language and in favor of the drafter, supplying provisions and obligations never included in the Letter Agreement. Without explanation or authority, the Referee merged Hillview’s proposal into the Final Agreement and found Respondent acted dishonestly by violating the erroneously incorporated provisions. Failure to adhere to an obligation that was never legally imposed should not be the basis of a disciplinary violation.

¹⁰ Farnsworth, Contracts, §7.11 (citing Restatement (Second) of Contracts § 206).

B . Pioneer did not justifiably rely on Hillview’s proposal as the sole means of protecting Pioneer’s interest and thus, Respondent was not equitably obligated to perform any provision of his March 6, 1997 letter.

The Referee erroneously determined that Hillview was obligated to the terms of its proposal because Pioneer “relied” on Hillview’s March 6, 1997 letter. (RR. 6-7). The Referee appears to base her determination on the equitable issue of promissory estoppel. However, the Referee does not address whether Pioneer’s reliance was “justified,” an essential element of promissory estoppel.¹¹ Pioneer’s reliance on Hillview’s proposal letter as the sole means of protecting its interest in Hillview’s property was not commercially reasonable when Pioneer controlled the terms of the final Letter Agreement between the parties and did not file its UCC-1 financing statement until two years after its security interest in the collateral was supposedly created. ¹² (TFB Exh. 24, p. 2).

Respondent reasonably believed that Pioneer would draft an acceptable agreement and if desired, would perfect its primary security interest in Hillview’s

¹¹ See Farnsworth, Contracts, §4.14 (citing Restatement (Second) of Contracts §164(1) (“upon which the recipient is justified in relying”)).

¹² If Pioneer had little or no experience with security agreements, exclusive reliance on Hillview’s proposal rather than other available methods of protection might be more reasonable. To the contrary, Pioneer, an established insurance company with extensive experience with Colorado security agreements was on equal, if not superior footing, to Respondent, who was not admitted in Colorado. As such, Pioneer’s reliance on Hillview to protect Pioneer’s interest is untenable.

asset in accordance with Colorado law. Based on this reasonable belief, Respondent determined that Pioneer would be fully indemnified because it would have priority over any subsequently created secured interest. Respondent should not be expected to refrain from the otherwise permissible action of granting additional security interests due to the possibility that Pioneer might act in a commercially unreasonable manner.¹³

The unreasonableness of Pioneer's reliance is demonstrated by its failure to follow standard industry standards to protect its security interest. Surety experts hired by The Florida Bar and Respondent agreed that requiring an irrevocable letter of credit with a UCC-1 financing statement were standard industry practices used by insurance companies to ensure that its surety bond was secured by "full cash collateral." (T. 244-46, 440, 444). Had Pioneer simply followed standard industry practices or drafted a provision in the Letter Agreement prohibiting Hillview from entering into other security agreements, it could not be harmed by any subsequent creditor claiming secured status. The justifiable reliance element of promissory estoppel is not met because it was not reasonable for Pioneer to rely on

¹³ Hillview reasonably believed that an adverse judgment would not exhaust its assets and intended Brown, Clark to have a secured interest in the remaining funds. See supra at § I.A.1. Once Pioneer paid the adverse judgment without consulting Hillview, Respondent, on behalf of Hillview raised defenses to indemnification. See infra at § III.A.

Hillview’s “proposed” intentions in lieu of adhering to standard industry practices. Since promissory estoppel cannot be established, there is no extra-contractual, equitable basis to obligate Respondent to the terms of Hillview’s proposal. Moreover, holding Respondent responsible for Pioneer’s commercial failings is strangely paternalistic, especially when there is no showing that Respondent had any knowledge of or prior experience in Colorado security laws. The Referee’s finding that Respondent acted dishonestly by violating the terms in Hillview’s March 6, 1997 proposal is flawed because Respondent was never contractually or equitably obligated to adhere to the proposal. Accordingly, Respondent did not violate Rule Regulating the Florida Bar 4-8.4(c) or 3-4.3.

III. The Referee’s finding that Respondent acted dishonestly by not adhering to Hillview’s Indemnification contract with Pioneer and refusing to consider whether Hillview had bona fide defenses to indemnification, violates the Equal Protection Clause by infringing on an attorney’s right to redress private disputes.

The Referee repeatedly emphasized that any defense to indemnification “matters not” because Respondent promised to indemnify Pioneer and thus, his

failure to do so was dishonest. (RR. 11,12, 19).¹⁴ The Referee has interpreted Rule Regulating the Florida Bar 4-8.4(c) in an exceedingly broad manner requiring an attorney to perform any contractual pledge or promise as interpreted by the adverse party, despite the existence of a good faith defense excusing the performance. This interpretation forces an attorney to choose between refraining from defending oneself in a contractual dispute or being subjected to discipline for raising the same defense available to non-attorneys.

A. The record demonstrates that Respondent had a good faith defense excusing performance under Hillview’s Indemnification Agreement with Pioneer.

Respondent, through Colorado counsel, defended Hillview’s obligation to indemnify Pioneer based on Pioneer’s payment of the judgment without sufficiently investigating Hillview’s intent to appeal. Hillview believed post-trial and appellate issues existed after the Colorado trial judge struck Hillview’s claims against Viele and unilaterally increased the jury’s verdict of \$147,000 in favor of Viele to \$352,000. (T. 306-08). Following the trial, Hillview hired the Colorado law firm of Wells, Love & Scoby to pursue post-trial motions and if necessary, an appeal.

¹⁴ See Report of Referee at 19 (finding that Respondent’s indemnification defenses asserting that Pioneer “volunteered” payment of the judgment or that Pioneer deprived Hillview of the opportunity to pursue a valid appeal “flies in the face of the document Respondent himself signed in order to obtain the mechanic’s lien in the first place.”)

(T. 304).

Pioneer's past and current presidents testified that they would not have authorized payment of the judgment if Hillview had filed a Notice to Appeal or if the appellate time period had not expired. (T. 60-62; 64, 96). Mr. Warburton, Pioneer's president at the relevant time, testified that had he personally monitored the litigation, he would have called Hillview to inquire about its appellate intentions and, at least, would have offered Hillview the option of paying the judgment. (T. 63-64). Instead, Mr. Warburton delegated Pioneer's monitoring duties to its attorney, Mr. Neel, who advised Pioneer to pay the judgment. (T. 55, 58). Mr. Neel failed to advise Pioneer that Hillview had not exhausted its appellate remedies and never notified Hillview of Pioneer's intent to pay the judgment, thereby depriving Hillview of the opportunity to immediately seek an appellate bond. (TFB Exh. 27, pp. 36, 37; T. 66, 70).¹⁵

Pioneer's representatives and attorney, as well as The Florida Bar's surety expert, acknowledged that if a surety company failed to conduct adequate investigation prior to payment of a bond, the company is susceptible to the principal opposing indemnification by raising the defense of "volunteering

¹⁵ At the time Viele was pressuring Pioneer to pay the judgment, it had already drafted its Petition for Writ of Garnishment in preparation to attack Pioneer's interest in Hillview's asset. (T. 137, 164, 187-88; Resp. Exh. 1).

payment.” (T. 63, 96, 98, 246; TFB Exh. 27, p. 17). Mr. Krahenbuhl, Hillview’s Colorado counsel, testified that he was shocked to learn that Pioneer had paid the judgment since he believed Pioneer’s attorney knew Hillview disputed the validity of the judgment and would be pursuing an appeal. (T. 315-316, 321, 326).¹⁶ Mr. Krahenbuhl advised Hillview that Pioneer was susceptible to a claim that they had volunteered payment on the bond and thus, Hillview had a colorable defense to indemnification. (T. 325-26). Accordingly, Respondent, on behalf of Hillview, determined it would litigate its obligation to indemnify Pioneer.

After consideration of the parties’ respective positions and defenses, Pioneer, Viele, Brown, Clark and Hillview entered into a Settlement Agreement resolving their disputes. (TFB Exh. 24). Although Pioneer received \$227,254.98 of the certificate of deposit proceeds, it agreed to accept less than full indemnification after assessing the likelihood of prevailing in litigation. If Pioneer did not settle, and all issues were fully adjudicated, Hillview’s defense may have prevailed and Pioneer may not have been entitled to any indemnification.

Respondent’s decisions to defend indemnification and to support Brown, Clark’s Statement of Claim in the garnishment proceedings constituted the assertion

¹⁶ Hillview timely filed its Notice of Appeal to pursue its appellate remedies. (T. 171, 318; Resp. Exh. 5).

of bona fide claims and defenses and was not dishonest conduct.

B. Punishing attorneys for raising bona fide legal defenses and claims regarding contractual obligations violates the Equal Protection Clause and infringes on the fundamental right to resolve private legal disputes.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits “intentional and arbitrary discrimination” caused by the express language of a statute or by its “improper execution through duly constituted agents.” Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Rule Regulating the Florida Bar 4-8.4(c) promotes the state’s interest in disciplining dishonest conduct by attorneys. However, the Referee’s over-broad interpretation of Rule 4-8.4 is not strictly tailored to the state’s interest in protecting the public or promoting public confidence in attorneys. Indeed, broadly construing Rule 4-8.4(c) to prohibit Respondent from litigating private contractual disputes on behalf of a corporation in the same manner as other non-attorney citizens infringes on his fundamental right to resolve a private dispute in the courts as guaranteed by Article 1, Section 21 of the Florida Constitution.

Article I, Section 21 of the Florida Constitution states, in pertinent part, that “courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.” “‘Openness’ and necessity that access be provided ‘without delay’ clearly indicates that a violation occurs if the statute

obstructs or infringes the right to any significant degree.” Mitchell v. Moore, 786 So. 2d 521, 527 (Fla. 2001). While there is no statute prohibiting attorneys from raising bona fide claims or defenses, the Referee’s analysis and application of Rule 4-8.4(c) holds that attorneys who choose, in good faith, to defend against contractual obligations do so only at significant risk to their livelihood. Forcing attorneys to choose between imminent disciplinary proceedings and the redress of private disputes is a “Hobson’s choice.”¹⁷

Moreover, the Referee’s finding that Respondent acted dishonestly for failing to indemnify Pioneer while refusing to consider whether Respondent had a bona fide defense to indemnification is “arbitrary” and unjustified. Because the “right to access is specifically mentioned in Florida’s constitution . . . it deserves more protection than those rights found only by implication.” Moore at 527 (citing Lloyd v. Farkash, 476 So. 2d 305, 307 (Fla. 1st DCA 1985)). When the state infringes on the right of access to the courts on the basis of class membership (attorney or non-attorney), that infringement must be strictly tailored to address a compelling governmental interest. See Moore at 527-28. There is no compelling

¹⁷ See State v. Spiegel, 710 So. 2d 13, 17 (Fla. 3d. DCA 1998)(court found attorney’s statements in disciplinary proceeding were inadmissible in criminal court when attorney reasonably believed he was compelled to give testimony; to hold otherwise would confront attorney with “Hobson’s choice between self incrimination and disbarment.”)

governmental interest to restrict an attorney's ability to redress private contractual disputes in a court of law.¹⁸ Just as the Equal Protection Clause is violated when a plaintiff's access to sue is limited based on class membership,¹⁹ so too is it violated when a defendant's ability to raise good faith defenses is impaired because he/she is an attorney. The Referee's finding that the Respondent's defenses to his corporation's contractual obligation were irrelevant deprives Respondent of equal protection under the laws by punishing him for litigating the same issues that could be raised by any non-attorney without repercussions. As such, the Referee's interpretations of Rule 4-8.4(c) and Rule 3-4.3 are impermissibly broad and should be rejected by this Court.

¹⁸ This case is distinguishable from DeBock v. State, 512 So. 2d 164 (Fla. 1987) determining, in part, that even if criminal immunity was extended to disciplinary proceedings for some professions, the Equal Protection Clause was not violated by denying extension of immunity to bar proceedings because the state's legitimate interest into protecting the public and preserving public perception was served by investigating attorneys engaged in criminal conduct. In contrast to the application of criminal immunity, the Referee's decision impacts a fundamental right of access to the courts by infringing on a citizen's ability to raise a bona fide defense merely because that citizen is a lawyer. Prohibiting attorneys from asserting contractual defenses is not "strictly tailored" to promote any compelling governmental interest.

¹⁹ See Clark v. Jeter, 486 U.S. 456 (1988); Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982) (finding Pennsylvania, Tennessee and Texas laws restricting an illegitimate child's ability to bring support suit violated Equal Protection Clause when less stringent restrictions were imposed on support suits for legitimate children).

IV. The Referee's recommended sanction does not have an existing basis in case law and the Referee erroneously considered improper aggravating factors and erroneously considered uncharged bad acts.

The Referee does not cite any disciplinary authority in support of her recommendation to impose a six-month suspension. Assuming *arguendo* that Respondent violated Rule 4-8.4(c) or 3-4.3 by granting Brown, Clark a junior secured interest in Hillview's assets, a six-month suspension is excessive. While no disciplinary cases address identical facts, the Court has imposed a public reprimand for more egregious conduct pertaining to the pledge of collateral. See In re Byrd, 511 So. 2d 958 (Fla. 1987). In Byrd, the Judicial Qualifications Commission considered the appropriate discipline for a judge who had pledged a certificate of deposit, that he held in trust for a client, as collateral for two separate personal loans and used interest accrued on the client's certificate of deposit for his own purposes. Even though the judge had a prior judicial qualifications commission inquiry and had used the client's certificate of deposit without permission, the Court imposed a public reprimand. Id.

In this case, the Letter Agreement between Hillview, Pioneer and First Bank specified that Hillview owned the certificate of deposit held by First Bank and that Hillview was entitled to interest accrued on the certificate of deposit. (TFB Exh. 7). In contrast to Byrd, Respondent is not accused of using another's collateral to

secure a loan or misappropriating interest on the collateral. Even if the Court finds that Respondent should not have granted a junior security interest in Hillview's asset, his conduct is substantially less egregious than the conduct described in Byrd that warranted a public reprimand. The Referee's recommendation to impose a six-month suspension does not have a reasonable basis in existing case law and should not be upheld.

In addition, the Referee erroneously considered issues that were improperly characterized as an aggravating factor or were irrelevant to the charged conduct. First, the Referee erroneously considered that "throughout the proceedings, Respondent refused to accept responsibility." (RR. 18). The Respondent's "refusal" to admit to the charged conduct greatly influenced the Referee's factual findings as well as her recommended sanction as she found "even more troubling is the fact that [Respondent] saw nothing wrong with any of this." (RR. 22). However, the Court has repeatedly disapproved of using a responding attorney's denial of misconduct as an aggravating factor. Florida Bar v. Mogil, 763 So. 2d 303, 312 (Fla. 2000). In Mogil, the Court held as follows:

[i]t was improper for the referee to consider in aggravation the fact that [the subject attorney] refused to acknowledge the wrongful nature of his conduct. [The subject attorney's] claim of innocence cannot be used against him.

Id. (quoting Florida Bar v. Corbin, 701 So. 2d 334, 337 n2 (Fla. 1997))(quoting Florida Bar v. Lipman, 497 So. 2d 1165, 1168 (Fla. 1986)). Not only did the Referee in this matter consider Respondent’s protestations of innocence as an aggravating factor, his refusal to admit the misconduct erroneously colored her assessment of his credibility.

Second, the Referee erred in considering uncharged acts in either assessing his credibility or determining the appropriate sanction. The Referee quoted the Colorado trial judge and referred to his statements as influencing her assessment of the case. (RR. 15). The quoted excerpt addressed a dispute between Respondent and Viele’s trial counsel pertaining to the jury instructions. (RR. 15). This dispute was the subject of the original complaint brought by Viele that initiated these proceedings. (T. 127). The grievance committee considered Viele’s allegations and found no probable cause. (T. 127).

During the final hearing, Viele’s trial counsel attempted to testify about these allegations. When the Referee asked Bar counsel to respond to Respondent’s objection to the elicitation of this evidence, Bar counsel stated, “My response, I could certainly ask my witness to restrict his responses narrowly and not to get into directly to allegations that are much broader in scope or contained in the complaint.” (T. 128). Despite The Florida Bar’s acknowledgment that these

allegations were not the proper subject of the disciplinary proceedings, the Referee erroneously considered the trial judge's statements pertaining to the dispute between Respondent and Viele's counsel in making her findings and recommendations.²⁰ Consequently, the Referee's recommendations are tainted by the consideration of allegations of bad acts that were previously considered and rejected by the grievance committee.

CONCLUSION

Respondent respectfully requests this Court to reject the Referee's Findings as clearly erroneous and enter an order dismissing all charges against Respondent.

Respectfully submitted,

SCOTT K. TOZIAN, ESQUIRE
Fla. Bar No. 253510

²⁰ The Colorado trial judge's statements were included in the final order which was admitted to establish the amount and date of the judgment against Hillview. (TFB Exh. 17, T. 132-134).

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CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that the original of the foregoing Respondent's Initial Brief has been furnished by UPS overnight delivery to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1926 and true and correct copies have been furnished by U. S. Mail to Jodi Anderson, Esquire, Assistant Staff Counsel, The Florida Bar, Suite C-49, 5521 W. Spruce Street, Tampa, Florida 33607 and Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 this 11th day of March, 2004.

SCOTT K. TOZIAN, ESQUIRE